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Foreword

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and for the convenience of the professional bar and the general public.* The first five volumes of opinions published covered the years 1977 through 1981; the present volume covers primarily 1982. The opinions contained in Volume 6 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 1982 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 informal opinions to the various federal agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

Continuing the practice begun in Volume 4, Volume 6 includes the formal Attorney General opinions issued during 1982. These opinions will eventually appear in Volume 43 of the Opinions of the Attorney General.

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

Opinions of the Attorney General in This Volume

Opinions of the Office of Legal Counsel in This Volume

OPINIONS

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

May 6, 1982, through November 30, 1982

Constitutionality of Legislation Limiting the Remedial Powers of the Inferior Federal Courts in School Desegregation Litigation

Proposed legislative restriction on the power of the inferior federal courts to order busing remedies in school desegregation litigation cannot be justified as an exercise of congressional power to enforce the Fourteenth Amendment, if such a restriction would prevent a court from fully remedying a constitutional violation.

Proposed legislation can be justified as an exercise of congressional power under Article III, § 1 of the Constitution, which gives Congress very broad power to control the jurisdiction of the inferior federal courts. The bill does not usurp the judicial function by depriving the lower courts of power to hear desegregation cases and to impose remedies which do not involve busing, nor does it instruct the lower courts how to decide issues of fact in pending cases, or require reversal of any outstanding court order.

The bill's provision prohibiting the Department of Justice from using appropriated funds to bring or maintain an action to require busing is constitutional despite the limitations that it would impose on the Executive's discretion, since it does not preclude the Department from fulfilling its statutory obligation to enforce the law through seeking other effective remedies or objecting to inadequate desegregation plans.

Both the limitation on courts and on the Department of Justice should be upheld if challenged under the equal protection component of the Fifth Amendment's Due Process Clause, since neither limitation creates a racial classification nor evidences a discriminatory purpose

May 6, 1982

THE CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

DEAR MR. CHAIRMAN: This responds to your request concerning those portions of S. 951, the Senate-passed version of the Department of Justice appropriation authorization bill for fiscal year 1982, which relate to the mandatory transportation of school children to schools other than those closest to their homes ("busing").* One of these provisions relates to the remedial powers of the inferior courts and the other to the authority of the Department of Justice. This letter discusses the effect of these provisions as well as the policy and constitutional implications of the provisions as construed. The funding provisions of S. 951 will be addressed in a separate letter by the Assistant Attorney General of the Office of Legislative Affairs.

*NOTE: The relevant portions of S. 951, 97th Cong., 2d Sess., are reprinted at 128 Cong. Rec. S1336 (daily ed. Mar. 2, 1982) Ed

It is important to note at the outset that S. 951 does not withdraw jurisdiction from the Supreme Court or limit the jurisdiction of the federal courts to decide a class of cases. The provisions of the bill and its legislative history make clear that the effect of these provisions relate only to one aspect of the remedial power of the inferior federal courts—not unlike the Norris–LaGuardia Act, enacted in 1932. Nor do the provisions limit the power of state courts or school officials to reassign students or require transportation to remedy unconstitutional segregation. Careful examination of these provisions indicates that they are constitutional.

I. Busing Provisions of S. 951

The first provision, § 2 of the bill, entitled the Neighborhood School Act of 1982, recites five congressional findings to the effect that busing is an inadequate, expensive, energy-inefficient, and undesirable remedy. It then states (§ 2(d)) that, pursuant to Congress' power under Article III, § 1 and § 5 of the Fourteenth Amendment, "no court of the United States may order or issue any writ directly or indirectly ordering any student to be assigned or to be transported to a public school other than that which is closest to the student's residence unless" such assignment or transportation is voluntary or "reasonable." The bill declares that such assignment or transportation is not reasonable if

> (i) there are reasonable alternatives available which involve less time in travel, distance, danger, or inconvenience;
>
> (ii) such assignment or transportation requires a student to cross a school district having the same grade level as that of the student;
>
> (iii) such transportation plan or order or part thereof is likely to result in a greater degree of racial imbalance in the public school system than was in existence on the date of the order for such assignment or transportation plan or is likely to have a net harmful effect on the quality of education in the public school district;
>
> (iv) the total actual daily time consumed in travel by schoolbus for any student exceeds thirty minutes unless such transportation is to and from a public school closest to the student's residence with a grade level identical to that of the student; or
>
> (v) the total actual round trip distance traveled by schoolbus for any student exceeds 10 miles unless the actual round trip distance traveled by schoolbus is to and from the public school closest to the student's residence with a grade level identical to that of the student.

Section 2(f) of the bill adds a new subparagraph to § 407(a) of Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a), authorizing suits by the Attorney General to enforce rights guaranteed by the bill if he determines that a student has been required to attend or be transported to a school in violation of the

bill and is otherwise unable to maintain appropriate legal proceedings to obtain relief. The bill is made "retroactive" in that its terms would apply to busing ordered by federal courts even if such order were entered prior to its effective date. Section 16 of the bill supplements these provisions by providing that "[n]otwithstanding any provision of this Act, the Department of Justice shall not be prevented from participating in any proceedings to remove or reduce the requirement of busing in existing court decrees or judgments."

The second provision, § 3(1)(D), limits the power of the Department of Justice to bring actions in which the Department would advocate busing as a remedy:

> No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring or maintain any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest to the student's home, except for a student requiring special education as a result of being mentally or physically handicapped.

II. General Comments

There appear to be ambiguities in the Neighborhood School Act's provisions for suits to be brought by the Attorney General challenging existing decrees. For example, it is unclear what, if any, obligations are placed on the Attorney General with regard to court decrees that offend § 2. Since the bill does not purport to prevent any governmental entities other than federal courts from requiring the transportation of students, the Attorney General's review of a complaint must include the inquiry whether the transportation is the result of federal court action. It is difficult to determine the party against whom the action is to be brought. The assignment violates the Neighborhood School Act only if it is required by court order. Does the Attorney General sue the court? If so, then what relief is appropriate? Does the bill permit an action against a school board even though its actions are not the subject of the bill's prohibition? If a school board is the defendant, then what relief is appropriate? Does the Attorney General ask that the school board be enjoined from complying with the court order? Does he ask for a declaratory judgment of the board's obligations under the order? If the latter is the case and the board wishes to continue its present assignment patterns, what will have been accomplished by the lawsuit? These questions illustrate the problems incident to the provisions that allow for collateral attack on existing decrees.

Serious concern arises also because of the limitation on the Attorney General's discretion contained in § 3(1)(D). This Administration has repeatedly stated its objection to the use of busing to remedy unlawful segregation in public schools. *See* Testimony of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, *Desegregation of Public Schools* (Oct. 16, 1981). The express limitation on the Department's authority is unnecessary and may inhibit

the ability to present and advocate remedies which may be less intrusive and burdensome than those being urged on a court by other litigants. Moreover, because the limitation is imposed only in the Department's one-year authorization, there is no force to the argument that a statutory provision is necessary to ensure that successive Administrations will also carry out congressional intent. Finally, to the extent that Congress does intend to effect a long-term substantive change in the law, the proper vehicle would seem to be permanent substantive legislation, not an authorization bill which must be reviewed annually by Congress and which becomes more difficult to enact and thus less efficient for its necessary purposes when it is encumbered by extraneous matters.

III. Constitutionality

A. Textual Interpretation of the Neighborhood School Act of 1982

The Neighborhood School Act restricts the power of inferior federal courts to issue remedial busing decrees where the transportation requirement would exceed specified limits of reasonableness. That it does not purport to limit the power of state courts or school boards is amply demonstrated by its text and by statements of its supporters. Senator Hatch, in a colloquy with Senator Johnston, stated that "this bill does not, however, restrict in any way the authority of State courts to enforce the Constitution as they wish . . . ." 127 Cong. Rec. S6648 (daily ed. June 22, 1981). On the day that the bill passed the Senate, Senator Johnston echoed these remarks:

> If a school board wants to bus children all over its parish or all over its county, it is not prohibited from doing so by this amendment. Nor indeed would a State court if it undertook to order that busing. The legislation deals only with the power of the Federal courts . . . .

128 Cong. Rec. S1324 (daily ed. March 2, 1982).

The impact of the Neighborhood School Act on the federal courts is also limited. It withdraws, in specified circumstances, a single remedy from the inferior federal courts. The substantial weight of the text and legislative history supports the proposition that the bill limits the remedial power only of the inferior federal courts, not the Supreme Court. There is strong textual support for this conclusion, because the bill recites that it is enacted pursuant to congressional power under Article III, § 1. Section 1 of Article III provides authority for limiting the jurisdiction and the powers of the inferior federal courts, not the Supreme Court. The source of congressional authority relative to the jurisdiction of the Supreme Court is the Exceptions Clause, Art. III, § 2, cl. 2. The conspicuous and apparently intentional omission of that clause as a source of congressional authority to enact this measure strongly indicates that no restriction of the Supreme Court appellate jurisdiction was intended.

Moreover, there do not appear to be any direct statements in the legislative history to the effect that any restriction on the Supreme Court's jurisdiction was intended. To the contrary, there is an explicit colloquy between Senators Hatch and Johnston indicating that no restriction on Supreme Court jurisdiction was intended. In response to a question posed by Senator Mathias to Senator Johnston, Senator Hatch stated:

> There is little controversy, in my opinion . . . that the constitutional power to establish and dismantle *inferior Federal courts* has given Congress complete authority over their jurisdiction. This has been repeatedly recognized by the Supreme Court . . . .
>
> This amendment would be only a slight modification of *lower Federal court* jurisdiction. These *inferior Federal courts* would no longer have the authority to use one remedy among many for a finding of a constitutional violation.
>
> * * * * *
>
> I would hasten to add that *this bill does not, however, restrict in any way . . . the power of the Supreme Court to review State court proceedings and insure full enforcement of constitutional guarantees.*
>
> In short, this is a very, very narrow amendment. It only withdraws a single remedy which Congress finds inappropriate *from the lower Federal courts.*
>
> * * * * *
>
> MR. JOHNSTON. Mr. President, I thank the distinguished Senator from Utah for his exegesis on the legality, the power of Congress under article III to restrict jurisdiction.

127 Cong. Rec. S6648–49 (daily ed. June 22, 1981) (emphasis added).

B. Legal Status of Transportation Remedies

In *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955) (II), the Supreme Court held that federal courts must be guided by equitable principles in the design of judicial remedies for unlawful racial segregation in public school systems. Under those principles, as the Court has more recently explained, "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley (Bradley I)*, 418 U.S. 717, 746 (1974) (I). The Court has indicated that the principle that justifies judicial discretion to impose transportation remedies also implies a limitation on that discretion.

The judicial power to impose such remedies "may be exercised only on the basis of a constitutional violation," *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1, 16 (1971), and "a federal court is required to tailor 'the scope of the remedy' "

which included the transportation of students to schools other than the ones which they had formerly attended, "to fit 'the nature and the extent of the constitutional violation,'" *Dayton* v. *Brinkman*, 433 U.S. 406, 420 (1977), quoting *Bradley I*, at 744. In other words, reassignment of students and concomitant transportation of students to different schools is appropriate only when it is "indeed . . . *remedial*," *Milliken* v. *Bradley (Bradley II)*, 433 U.S. 267, 280 (1977) (emphasis in original), that is, when it is aimed at making available to the victims of unlawful segregation a school system that is free of the taint of such segregation.

The Supreme Court has stated that circumstances might conceivably exist in which the imposition of a desegregation remedy which included the transportation of students to schools other than the ones which they had formerly attended would be unavoidable in order to vindicate constitutional rights. If school authorities have segregated public school students by race, they shoulder a constitutional obligation "to eliminate from the public schools all vestiges of state-imposed segregation," *Swann*, 402 U.S. at 15. The Court has said that if this duty cannot be fulfilled without the mandatory reassignment of students to different schools, with the concomitant requirement of student transportation, this remedy cannot be statutorily eliminated. In *North Carolina* v. *Swann*, 402 U.S. 43 (1971), the Court overturned a North Carolina statute that proscribed the assignment of students to any school on the basis of race, "or for the purpose of creating a racial balance or ratio in the schools," and prohibited "involuntary" busing in violation of the statutory proscription. The Chief Justice, writing for a unanimous Court, concluded:

> [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.
>
> * * * * *
>
> We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As noted in *Swann*, *supra*, at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it.

402 U.S. at 45–46.

Although the Court has indicated that some student transportation might be a necessary incident to a desegregation decree, it has never stated with particularity what those cases might be, nor has it identified the limitations on busing orders in cases where transportation is constitutionally required. In *Swann* v. *Charlotte-Mecklenburg*, *supra*, for example, the Court declined to provide "rigid

guidelines" governing the appropriateness of busing remedies. It stated only that busing was to be limited by factors of time and distance which would "either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30–31. Limits on time and distance would vary with many factors, "but probably with none more than the age of the students." *Id.* at 31.

C. Congressional Power Under § 5 of the Fourteenth Amendment

In light of the Supreme Court's conclusion that student transportation might in some circumstances be a necessary feature of a remedial desegregation decree, it is necessary to consider whether the limitation on the power of the inferior federal courts under the Neighborhood School Act would be justified as an exercise of congressional authority under § 5 of the Fourteenth Amendment. Section D, *infra*, focuses on Congress' power under Article III, § 1, which is broader in this context than § 5.

Section 5 provides that Congress "shall have power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including the Equal Protection Clause, which has been held to guarantee all students a right to be free of intentional racial discrimination or segregation in schooling. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). The question is whether congressional power to enforce that right by appropriate legislation includes authority to limit the power of the lower federal courts to award transportation remedies generally and specifically in those cases in which some transportation is necessary fully to vindicate constitutional rights.

The cases of *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *City of Rome* v. *United States*, 446 U.S. 156 (1980); and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (plurality opinion), firmly establish that the § 5 power is a broad one. Congress may enact statutes to prevent or to remedy situations which, on the basis of legislative facts, Congress determines to be violative of the Constitution. At the same time, these cases rather firmly establish that Congress is without power under § 5 to revise the Court's constitutional judgments if the effect of such revision is to "restrict, abrogate, or dilute" Fourteenth Amendment guarantees as recognized by the Supreme Court.

The limitation on busing remedies contained in the Neighborhood School Act would be authorized under § 5 of the Fourteenth Amendment to the extent that it does not prevent the inferior federal courts from adequately vindicating constitutional rights. The grant of power under § 5 to "enforce" the Fourteenth Amendment carries with it subordinate authority to determine specific methods by which that amendment is to be enforced. As an incident of its enforcement authority, therefore, Congress may instruct the lower federal courts not to order mandatory busing in excess of the § 2(d) limits, so long as the court retains adequate legal or equitable powers to remedy whatever constitutional violation may be found to exist in a given case.

Moreover, federal and state courts would probably pay considerable deference to the congressional factfinding upon which the bill is ultimately based in

determining the scope of constitutional requirements in this area. The Court has stated that, so long as it can "perceive a basis" for the congressional findings, *Katzenbach* v. *Morgan,* 384 U.S. at 653, it will uphold a legislative determination that a situation exists which either directly violates the Constitution or which, unless corrected, will lead to a constitutional violation. Similar deference would be appropriate for findings under this bill, notwithstanding the somewhat limited hearings which were held and the absence of printed reports. It does not appear that any particularized research was presented to the Senate which might have supported or undermined the specific limitations on federal court decrees contained in § 2(d) of S. 951. It is likely, however, that the time and distance limitations contained in § 2(d) of the bill would serve as legitimate benchmarks for federal and state courts in the future in devising appropriate decrees. To this extent, the exercise of congressional power under § 5 would be fully proper and effective.

Nor does it appear that the Neighborhood School Act would be interpreted to "dilute" Fourteenth Amendment rights merely because it denies a certain form of relief in the inferior federal courts or includes certain retroactivity provisions in §§ 2(f) and (g). Congress cannot, under § 5, prohibit a federal district court from granting a litigant all the relief that the Fourteenth Amendment requires. Moreover, the state courts would remain open to persons claiming unconstitutional segregation in education after this bill becomes law, and would be empowered—indeed, required—to provide constitutionally adequate relief.

Under § 5 Congress cannot impose mandatory restrictions on federal courts in a given case where the restriction would prevent them from fully remedying the constitutional violation. Congressional power to enforce the Fourteenth Amendment is not a power to determine the limits of constitutional rights. Although it includes the power to limit the equitable discretion of the lower federal courts to impose remedial measures which are not necessary to correct the constitutional violation, the courts must retain remedial authority sufficient to correct the violation. And although Congress can express its view through factfinding, but subject to the limitations set forth in § 2(d) of the bill, that busing is an ineffective remedial tool and that extensive busing is not necessary to remedy a constitutional violation, it is ultimately the responsibility of the courts to determine, after giving due consideration to the congressional findings contained in this bill, whether in a given case an effective remedy requires the use of mandatory busing in excess of the limitations set forth in § 2(d) of the bill.

In sum, Congress, pursuant to § 5, can: (1) limit the authority of federal district courts to require student transportation where it is not required by the Constitution; and (2) adopt guidelines, based on legislative factfinding, as to when busing is effective to remedy the violation, which guidelines will tend to receive substantial deference from the courts. Section 5 does not, however, authorize Congress to preclude the inferior federal courts from ordering mandatory busing when, in the judgment of the courts, such busing is necessary to remedy a constitutional violation. This authority must be found, if at all, in the

power of Congress under Article III, § 1 to restrict the jurisdiction of the lower federal courts.

D. Congressional Power Under Article III, § 1

Congress' authority to limit the equitable powers of the inferior federal courts has been repeatedly recognized by the Supreme Court. Article III, § 1 of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *See also* U.S. Const. Art. 1, § 8, cl. 9 (giving Congress power to "constitute Tribunals inferior to the supreme Court"). It seems a necessary inference from the express decision of the Framers that the creation of inferior courts was to rest in the discretion of Congress that, once created, the scope of the court's jurisdiction was also discretionary. The view that, generally speaking, Congress has very broad control over the inferior federal court jurisdiction was accepted by the Supreme Court in *Cary* v. *Curtis*, 44 U.S. (3 How.) 236 (1845), and *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850). That view remains firmly established today.

Congress' power over jurisdiction has been further recognized, most notably in cases under the Norris–LaGuardia Act, to include substantial power to limit the remedies available in the inferior federal courts. In *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938), the Court upheld provisions of the Norris–LaGuardia Act which imposed restrictions on federal court jurisdiction to issue restraining orders or injunctions in cases growing out of labor disputes. In two cases under the Emergency Price Control Act of 1942, the Supreme Court recognized the power of Congress to withdraw certain cases from the jurisdiction of the inferior federal courts and to prohibit any court from issuing temporary stays or injunctions. *See Lockerty* v. *Phillips*, 319 U.S. 182 (1943); *Yakus* v. *United States*, 321 U.S. 414 (1944).

The provisions of the Neighborhood School Act appear to be firmly grounded in Congress' Article III, § 1 power, as interpreted in *Lauf*, *Lockerty*, and *Yakus*, to control the inferior federal court jurisdiction. The bill does not represent an attempt by Congress to use its power to limit jurisdiction as a disguise for usurping the exercise of judicial power. The bill does not instruct the inferior federal courts how to decide issues of fact in pending cases. *See United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872).

Nor does the bill usurp the judicial function by depriving the inferior federal courts of their power to issue any remedy at all. The bill does not withdraw the authority of inferior federal courts to hear desegregation cases or to issue busing decrees, so long as they comport with the limitations in § 2(d) of S. 951. This limited effect on the court's remedial power does not convert the judicial power—to hear and decide particular cases and to grant relief—into the essentially legislative function of deciding cases without any power to issue relief affecting individual legal rights or obligations in specific cases. Whatever implicit limita-

tions on Congress' power to control jurisdiction might be contained in the principle of separation of powers, they are not exceeded by this bill, which does not withdraw all effective remedial power from the inferior federal courts.

Neither the text of the bill nor the legislative history appears to support the conclusion that the bill requires an automatic reversal of any outstanding court order that imposed a busing remedy beyond the limits specified in the bill. Such an attempt to exert direct control over a court order would raise constitutional problems associated with legislative revision of judgments. *E.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (on petition for mandamus). The "retroactive" effect is felt instead through a change in the substantive law, in this case the law of remedies, to be applied by courts in determining whether to impose or to revise a busing remedy, coupled with the grant of authority to the Attorney General to seek relief on behalf of a student transported in violation of the Act. Upon the Attorney General's application, the court would itself determine whether the busing remedy was consistent with the Act. The bill, therefore, does no more than require the court to apply the law as it would then exist at the time of its decision in a "pending" case. *See The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

The busing remedy is "pending" and not final to the extent that the court has retained jurisdiction over the case or the order is otherwise subject to modification by the court in the exercise of its equity jurisdiction. *See United States* v. *Swift & Co.*, 286 U.S. 106, 114–15 (1932). Prior to or in the absence of relief by the court from a previously imposed busing order, the parties before the court would be required to continue to perform pursuant to the court's order. *Cf. Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856).

E. Constitutionality of § 3(1)(D)

Section 3(1)(D) of the bill prohibits the Department of Justice from using any appropriated funds to bring or maintain any action to require, directly or indirectly, virtually any busing of school children. The Department's authority to institute litigation under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, against segregated school systems would not be diminished. Nor would the federal courts, under this section, be limited in their power to remedy constitutional violations. The effect of § 3(1)(D) is only to prohibit the Department in the litigation in which it is involved from seeking, directly or indirectly, a busing remedy. If the language and legislative history of the bill, as finally enacted, support this interpretation, it would appear that § 3(1)(D) would be upheld despite the limitations that it would impose on the discretion currently possessed by the Executive Branch.

The limitation would restrict the litigating authority presently conferred upon the Department by Title IV to seek all necessary relief to vindicate the constitutional rights at stake. At least in cases that do not involve the use of federal funds by segregated school systems, the Executive's authority may be restricted to this limited extent. Because the restriction does not entirely preclude enforcement

actions by the United States, § 3(1)(D) does not impermissibly limit the Executive's "inherent" authority to remedy constitutional violations, to the extent recognized in *United States* v. *City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980), or *New York Times Co.* v. *United States*, 403 U.S. 713, 741–47 (1971) (Marshall, J., concurring). And because the restriction applies only to one remedy and does not preclude the Department from seeking other effective remedies or prevent the Executive from objecting to inadequate desegregation plans, § 3(1)(D) does not exceed the congressional power over the enforcement authority that is granted.

Where federal funds are provided, § 3(1)(D) would be constitutional if read to preserve the government's ability to fulfill its Fifth Amendment obligations by initiating antidiscrimination suits, restricting only, and in a very limited fashion, the Department's participation, by seeking a busing order, in the remedial phase of such suits. The Department would be authorized to seek alternative remedies and to comment on the sufficiency of these alternatives. If the alternative remedies to busing are inadequate in a particular case to vindicate the rights at stake, the court would retain authority, subject, of course, to the Neighborhood School Act provisions, to order a transportation remedy. The Department could be asked to comment on the sufficiency of this remedy if ordered by the court.

Moreover, § 3(1)(D) would not appear to disable the Department of Justice from seeking a court order foreclosing the receipt of federal funding by schools in unconstitutionally segregated school systems in those cases, if any, where the court was prevented by the limits contained in the Neighborhood School Act from issuing an adequate remedy and the administrative agency was precluded from terminating federal funds. *See Brown* v. *Califano*, 627 F.2d 1221 (D.C. Cir. 1980).

F. Due Process Clause

Finally, both the limitation on the courts under the Neighborhood School Act and on the Department of Justice under § 3(1)(D) should be upheld if challenged under the equal protection component of the Fifth Amendment's Due Process Clause, *see Bolling* v. *Sharpe*, 347 U.S. 497 (1954), as a deprivation of a judicial remedy from a racially identifiable group. These provisions neither create a racial classification nor evidence a discriminatory purpose. Absent either of these constitutional flaws, the provisions will be upheld if they are rationally related to a legitimate government purpose. *See Harris* v. *McRae*, 448 U.S. 297 (1980).

As the law has developed, the courts will review statutory classifications according to a "strict scrutiny" standard either if they create a racial or other "suspect" classification, *e.g.*, *Hunter* v. *Erickson*, 393 U.S. 385 (1969), or if they reflect an invidious discriminatory purpose. *E.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976); *cf. City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) (plurality opinion). Satisfaction of the strict scrutiny standard requires a classification that is narrowly tailored to achieve a compelling govern-

mental interest. Neither basis for invoking strict scrutiny appears to be applicable here.

First, these provisions, unlike the provision found unconstitutional in *Hunter* v. *Erickson, supra,* do not contain a racial classification. Mandatory busing for the purpose of achieving racial balance is only one of the circumstances in which student transportation is placed off limits to Justice Department suits or district court orders. The proposals prohibit Justice Department suits or court orders for the transportation of students specified distances or away from the schools nearest their homes for any reason. Moreover, a racial classification would not result even if these provisions limited advocacy or ordering of mandatory busing only to achieve racial integration. The issue of what sorts of remedies the Justice Department should advocate or the federal district courts should order simply does not split the citizenry into discrete racial subgroups. *Cf. Personnel Administrator* v. *Feeney,* 442 U.S. 256 (1979).

Second, there appears to be no evidence of purposeful discrimination. Whatever might be the arguable impact on racial minorities, the legislative history to date contains no suggestion of an invidious discriminatory purpose. To the contrary, the sponsors and supporters of these measures endorsed the decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and repeatedly stated their abhorrence of *de jure* segregation in schooling. The proponents rest their support of this legislation on the conclusion that busing has been destructive not only of quality education for all students but also of the goal of desegregation. Even the opponents of the bill did not suggest that any invidious purpose was present.

Accordingly, the bill will not be subject to review under the strict scrutiny standard. Instead, the bill will be reviewed, and upheld, under the principles of equal protection, if it is rationally related to a legitimate governmental purpose. This test is a highly deferential one. It is reasonably clear that the defects in busing noted by the proponents of the bill and discussed above would suffice to satisfy the minimum rationality standard. Moreover, the proponents of these provisions advanced other rationales to support the measure, including that mandatory busing is an excessive burden on the taxpayer; that it wastes scarce petroleum reserves; and that education is a local matter that should be administered on a local level. These reasons appear to be legitimate governmental purposes, and the busing restrictions appear to be rationally related to these purposes.

It should be noted in closing that these conclusions are predicated in substantial part on the legislative history of this bill to date. Subsequent history in the House or thereafter could well affect these views.

Sincerely,
WILLIAM FRENCH SMITH

Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer

Proposed legislation withdrawing jurisdiction from the Supreme Court to consider cases relating to voluntary prayer in public schools and public buildings raises difficult and unsettled constitutional questions under the separation of powers doctrine. While Congress possesses some power under the Exceptions Clause of Article III of the Constitution to regulate the appellate jurisdiction of the Supreme Court, it may not interfere with the core functions of the Supreme Court as an independent and equal branch in our system of government.

The records of the Constitutional Convention, as well as the structure of the system of government adopted by that Convention, establish that the Exceptions Clause was not intended to allow Congress to intrude upon the Supreme Court's core functions. There is no basis in Supreme Court precedent, or in long accepted historical practice, for reaching a contrary conclusion.

Whether a given exception to Supreme Court jurisdiction intrudes upon its core functions depends upon a number of factors, such as whether the exception covers constitutional or nonconstitutional questions, the extent to which the subject is one which by its nature requires uniformity or permits diversity among the different states and different parts of the country, the extent to which Supreme Court review is necessary to ensure the supremacy of federal law, and whether other forums or remedies have been left in place so that the intrusion can properly be characterized as an exception.

May 6, 1982

THE CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

DEAR MR. CHAIRMAN: This letter is written to you as Chairman of the Committee on the Judiciary. It is written in response to a number of earlier inquiries from members of your Committee concerning S. 1742, a proposal which would withdraw jurisdiction from the Supreme Court to consider "any case arising out of any State statute, ordinance, rule, [or] regulation . . . which relates to voluntary prayers in public schools and public buildings." A second provision of the bill would withdraw the jurisdiction of the district courts over any case in which the Supreme Court has been deprived of jurisdiction. This bill raises fundamental and difficult questions regarding the role of the Supreme Court in our constitutional system, as well as the power of Congress to define and circumscribe that role. The issues involved have been the subject of intense scholarly debate, and prominent constitutional scholars have differed as to the extent of congressional power to limit Supreme Court jurisdiction.

This is perhaps to be expected since the question of congressional power over the appellate jurisdiction of the Supreme Court implicates in a basic way the

relations between Congress and the Supreme Court, two co-equal branches of government. Relations between the different branches in our tripartite system are generally governed by the doctrine of separation of powers. Neither the Constitution nor the decisions of the Supreme Court have attempted to define the precise contours of this doctrine. As two astute students of our constitutional system have noted:

> The accommodations among the three branches of government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of *lines* of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory.

Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts, A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1016 (1924) (emphasis in original).

The doctrine of separation of powers touches fundamentally on how the Nation is governed, and, as the Supreme Court noted last Term in a separation of powers case, "it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed." *Dames & Moore* v. *Regan*, 453 U.S. 654, 660 (1981). In this area more than any other we must heed Justice Holmes' wise admonition that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Philippine Islands*, 277 U.S. 189, 209 (1928) (dissenting opinion).

There is no doubt that Congress possesses some power to regulate the appellate jurisdiction of the Supreme Court. The language of the Constitution authorizes Supreme Court appellate jurisdiction over enumerated types of cases "with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. Art. III. The Supreme Court has upheld the congressional exercise of power under this clause, even beyond widely accepted "housekeeping" matters such as time limits on the filing of appeals and minimum jurisdictional amounts in controversy. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

Congress may not, however, consistent with the Constitution, make "exceptions" to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

In determining whether a given exception would intrude upon the core functions of the Supreme Court, it is necessary to consider a number of factors, such as whether the exception covers constitutional or nonconstitutional questions, the extent to which the subject is one which by its nature requires uniformity or permits diversity among the different states and different parts of the country, the extent to which Supreme Court review is necessary to ensure the supremacy of federal law, and whether other forums or remedies have been left in place so that the intrusion can properly be characterized as an exception.

Concluding that Congress may not intrude upon the core functions of the Supreme Court is not to suggest that the Supreme Court and the inferior federal

courts have not occasionally exceeded the properly restrained judicial role envisaged by the Framers of our Constitution. Nor does such a conclusion imply an endorsement of the soundness of some of the judicial decisions which have given rise to various of the legislative proposals now before Congress. The Department of Justice will continue, through its litigating efforts, to urge the courts not to intrude into areas that properly belong to the state legislatures and to Congress. The remedy for judicial overreaching, however, is not to restrict the Supreme Court's jurisdiction over those cases which are central to the core functions of the Court in our system of government. This remedy would in many ways create problems equal to or more severe than those which the measure seeks to rectify.[1]

With respect to other pending legislation, the Department of Justice has concluded that Congress may, within constraints imposed by provisions of the Constitution other than Article III, limit the jurisdiction or remedial authority of the inferior federal courts. See Letter from William French Smith, Attorney General, to Chairman Rodino, House Comm. on the Judiciary, concerning S. 951 (May 6, 1982). The question of congressional power over lower federal courts is quite different from the question of congressional power over Supreme Court jurisdiction, and the two issues should not be confused.

I.

Proponents of congressional constitutional authority to limit the Supreme Court's entire appellate jurisdiction have contended that such authority exists under the Exceptions Clause of Article III of the Constitution. Article III provides, in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under

[1] The Department of Justice, in previous Administrations, has consistently opposed proposals to restrict Supreme Court jurisdiction *See Limitation of Appellate Jurisdiction of the United States Supreme Court· Hearings on S. 2646 Before the Subcomm To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Sen Comm on the Judiciary*, 85th Cong , 2d Sess. 573–74, Pt 2 (1958) (statement of Attorney General Rogers) ("[f]ull and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government"); Memorandum for the Attorney General from Assistant Attorney General Malcolm R Wilkey, OLC (Feb 25, 1958) (bills to limit Supreme Court jurisdiction are constitutional but bad policy); Memorandum for the Deputy Attorney General from Assistant Attorney General Tompkins, Internal Security Div. (Feb 14, 1958) (unconstitutional), Letter to Sen. James O Eastland, Chairman, Senate Comm. on the Judiciary, from Deputy Attorney General Richard Kleindienst (Sept 4, 1969) (not clearly distinguishing constitutional and policy objections), Memorandum for the Attorney General from Assistant Attorney General William H Rehnquist (Sept 16, 1969) (not clearly distinguishing constitutional and policy objections), Letter from Assistant Attorney General Alan Parker to Rep Peter Rodino, Chairman, House Comm on the Judiciary (June 19, 1980) (unconstitutional); *Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearings on S 450 Before the Subcomm on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 11 (1980) (testimony of John M. Harmon, Assistant Attorney General, OLC) (unconstitutional).

> their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*. (Emphasis added.)

The language of the Exceptions Clause, italicized above, does not support the conclusion that Congress possesses plenary authority to remove the Supreme Court's appellate jurisdiction over all cases within that jurisdiction. The concept of an "exception" was understood by the Framers, as it is defined today, as meaning an exclusion from a general rule or law. An "exception" cannot, as a matter of plain language, be read so broadly as to swallow the general rule in terms of which it is defined.

The Constitution, unlike a statute, is not drafted with specific situations in mind. Designed as the fundamental charter of our political system, its most important provisions are phrased in broad and general terms. As eloquently expressed by Justice Holmes in *Missouri* v. *Holland,* 252 U.S. 416, 433 (1920):

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

For example, a literal interpretation of Article III as a whole would seem to mandate that Congress vest the full judicial power of the United States either in the Supreme Court or in an inferior federal court. Under such an interpretation, Congress could make "exceptions" to the Supreme Court's appellate jurisdiction only if it vested the jurisdiction at issue either in an inferior federal court or in the Supreme Court's original jurisdiction. This interpretation, which would require the conclusion that any measure which entirely ousted the federal courts from exercising any portion of the judicial power of the United States and vested that

authority in state courts would be unconstitutional, is rejected by all authorities today.[2]

The Constitution contains a number of other pronouncements which, although seemingly unambiguous and absolute, have necessarily been interpreted as limited in their applicability. *See, e.g., Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934) (Contract Clause); *Everson* v. *Board of Education*, 330 U.S. 1 (1947) (Establishment Clause); *Reynolds* v. *United States*, 98 U.S. 145 (1878) (Free Exercise Clause); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (*per curiam*) (Free Speech Clause). The Supreme Court has also recognized that even when a statute is otherwise within a power granted to Congress by the Constitution, extrinsic limitations on congressional power contained in the Bill of Rights or elsewhere may nevertheless render the statute unconstitutional. *See, e.g., National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (limitations on Commerce Clause); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (limitations on Necessary and Proper Clause).

In light of these principles of constitutional interpretation, the Exceptions Clause may not be analyzed in a vacuum but must be understood in terms of Article III as a whole, as evidenced by the history of its framing and ratification, its place in the system of separation of powers embodied in the structure of the Constitution, and its consistency with external limitations on congressional power implicit in the Constitution and contained in the Bill of Rights. The construction of the Exceptions Clause that is most consistent both with the plain language of the clause and with other evidence of its meaning is that Congress can limit the Supreme Court's appellate jurisdiction only up to the point where it impairs the Court's core functions in the constitutional scheme.

II.

The events at the Constitutional Convention support a construction of the Exceptions Clause that would preclude Congress from interfering with the Supreme Court's core functions. The Framers agreed without dissent on the necessity of a Supreme Court to secure national rights and the uniformity of judgments. The Resolves which were agreed to by the Convention and given to the Committee of Detail provided, simply, that "the jurisdiction [of the Supreme Court] shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony." 2 M. Farrand, *Records of the Federal Convention of 1787*, at 46 (rev. ed. 1937). No mention was made of any congressional power to make exceptions to the Court's jurisdiction. The Committee of Detail, charged with drafting a provision to implement these Resolves, proposed the language of the Exceptions Clause. It seems unlikely that

[2] *Marbury* v *Madison*, 5 U.S. (1 Cranch) 137 (1803), established that Congress has no authority to enlarge the Supreme Court's original jurisdiction by creating "exceptions" to its appellate jurisdiction In *Martin* v *Hunter's Lessee*, 14 U.S (1 Wheat) 304, 330–31 (1816), Justice Story argued that, if Congress creates any inferior federal courts, it must confer on them the full federal jurisdiction. This view, however, has never since been accepted by a majority of the Supreme Court

the Committee of Detail could have deviated so dramatically from the Convention's Resolves as to have given Congress the authority to interfere with the Supreme Court's core functions without considerably more attention to the subject at the Convention.

This interference is strengthened by the events surrounding the adoption of the Judicial Article by the full Convention. In determining the scope of the Court's jurisdiction, the Convention agreed to provisions expressly confirming that the jurisdiction included cases arising under the Constitution and treaties; but it rejected, by a 6 to 2 vote, a resolution providing that, except in the narrow class of cases under the Court's original jurisdiction, "the judicial power shall be exercised in such manner as the Legislature shall direct."[3] The Convention thus rejected a clear statement of plenary congressional power over the Court's appellate jurisdiction. Nevertheless, on the same day—without any recorded debate or explanation—the Framers adopted the Exceptions and Regulations language now contained in Article III. In light of the value placed on the Supreme Court's appellate jurisdiction, as evidenced by the other actions of the Convention, it seems highly unlikely that the Framers would have agreed, without the slightest hint of controversy, to a provision that would authorize Congress to interfere with the Court's core constitutional functions.

There are additional reasons why the lack of controversy surrounding the adoption of the Exceptions Clause supports the inference that no power to intrude on the Court's core functions was intended. First, the historical materials show the great importance which the Framers attached to these functions. They envisaged that the Supreme Court was a necessary part of the constitutional scheme and believed that the Court would review state and federal laws for consistency with the Constitution.[4] These sentiments were echoed by the authors of *The Federalist Papers* (J. Cooke ed. 1961), a work which is justly regarded as an important guide to the meaning of the Constitution.[5] In light of this explicit recognition by the Founding Fathers of the Court's vital role in the constitutional scheme, it seems unlikely that they would have adopted, without controversy, a provision which would effectively authorize Congress to eliminate the Court's core functions.

A second reason for inferring a more limited construction of the Exceptions Clause from the lack of discussion at the Convention concerns the compromise agreed to by the Framers regarding the establishment of inferior federal courts. While the necessity of a Supreme Court was accepted without significant dissent among the Framers, there was vigorous disagreement over whether inferior federal courts should be provided. The Convention first approved a provision calling for mandatory inferior federal courts, then struck this provision by a divided vote, and finally determined to leave to Congress the question whether to

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[3] 2 M. Farrand, Records of the Federal Convention of 1787

[4] *See, e.g.*, 1 M Farrand, *supra*, at 124; 2 M. Farrand, *supra*, at 589

[5] *See, e.g* , The Federalist No. 39, at 256 (J Madison) (J. Cooke ed. 1961) (Supreme Court is "clearly essential to prevent an appeal to the sword and a dissolution of the compact"); *id* No. 80 (A Hamilton), *id*. No 82 (A. Hamilton)

establish inferior federal courts. The Supreme Court was viewed as a necessary part of the constitutional structure and was established by the Constitution itself; Congress was given no control over whether the Court would be created. The inferior federal courts, however, were viewed as an optional part of the government and were authorized but not established by the Constitution. The decision whether to create them was given to Congress. This distinction, and the role explicitly assigned to Congress with respect to the inferior federal courts, implies that the powers of Congress were to be quite different with respect to the Supreme Court and the inferior federal courts.

If the Exceptions Clause authorized Congress to eliminate the Supreme Court's appellate jurisdiction, thus limiting it to the exercise of original jurisdiction, the power of Congress over the Supreme Court would be virtually indistinguishable from its power over inferior federal courts. Just as Congress could decline to create inferior federal courts, it could, in the guise of creating "exceptions" to the Supreme Court's appellate jurisdiction, deny the Supreme Court the vast majority of the judicial powers which the Framers insisted "shall be vested" in the federal judiciary. Congress could not eliminate the Supreme Court, but it could reduce it to a position of virtual impotence with only its limited original jurisdiction remaining. Such an interpretation cannot be squared with the stark difference in treatment which the Framers accorded to the Supreme Court and the inferior federal courts. Given the intensity of the debate regarding inferior federal courts, and the compromise arrived at by the Framers, it seems highly unlikely that the Convention would have adopted without comment a provision which, for most practical purposes, would place the Supreme Court and the inferior federal courts in the same position vis-a-vis Congress.

A third reason to infer a limited construction of the Exceptions Clause from the lack of debate accompanying its adoption is found in the theory of separation of powers which formed the conceptual foundation for the system of government adopted by the Convention. The Framers intended that each of the three branches of government would operate largely independently of the others and would check and balance the other branches. The purpose of this approach was to ensure that governmental power did not become concentrated in the hands of any one individual or group, and thereby to avoid the danger of tyranny which the Framers believed inevitably accompanied unchecked governmental power. Indeed, it is not an exaggeration to say that the single greatest fear of the Founding Fathers was tyranny, and that concentration of power was, in their minds, "the very definition of tyranny."[6]

Essential to the principle of separation of powers was the proposition that no one branch of government should have the power to eliminate the fundamental constitutional role of either of the other branches. As Madison stated in The Federalist No. 51, at 349 (J. Cooke ed. 1961):

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who

[6] The Federalist No. 47, at 324 (J Madison) (J. Cooke ed 1961)

> administer each department, the necessary constitutional means and personal motives, to resist encroachments, of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.

This basic principle of the Constitution—that each branch must be given the necessary means to defend itself against the encroachments of the two other branches—has special relevance in the context of *legislative* attempts to restrict *judicial* authority. The Framers "applaud[ed] the wisdom of those states who have committed the judicial power in the last resort, not to a part of the legislature, but to distinct and independent bodies of men." The Federalist No. 81, at 544 (A. Hamilton) (J. Cooke ed. 1961). They believed that, by the inherent nature of their power, the legislature would tend to be the strongest and the judiciary the weakest of the branches. This insight is reflected in the very structure of the Constitution: the provisions governing the legislature are placed first, in Article I; those establishing and governing the Judicial Branch are in the third position, in Article III. Madison recognized the great inherent power of the Legislative Branch in The Federalist No. 48. Drawing extensively from Jefferson's *Notes on the State of Virginia,* Madison concluded that in a representative republic "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." The Federalist No. 48, at 333 (J. Cooke ed. 1961). *See also* The Federalist No. 51 (J. Madison) (J. Cooke ed. 1961).

It was in no sense a derogation on the concept of governance responsive to popular will that the Founding Fathers desired checks on the power of the legislature they were creating. The Acts of Parliament as well as those of the King formed the litany of grievances which produced the Revolution. The Founding Fathers believed in the voice of the people and their elected representatives and placed substantial power in the Legislature. At the same time, however, they were acutely sensitive to the rights of individuals and minorities. Most of them had first-hand experience with persecution. The idea of a written Constitution was precisely to place a check on the popular will and, in large part, to restrain the most powerful branch. They crafted a representative republic with restraints on the legislature. "An *elective despotism* was not the government we fought for. . . ." The Federalist No. 48, at 335 (J. Madison) (J. Cooke ed. 1961), quoting Jefferson's *Notes on the State of Virginia* (emphasis in original).

The Supreme Court was viewed as a part of this restraint, but, nonetheless, inherently as the least dangerous branch. Hamilton, in a famous passage from The Federalist No. 78, at 522–23 (J. Cooke ed. 1961) eloquently testified to the inherent weakness of the Judicial Branch:

> Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy

> or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

As a consequence of this view, Hamilton believed that it was necessary for the judiciary to remain "truly distinct from both the legislative and the executive. For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" *Id.* at 523, quoting Montesquieu's Spirit of Laws. Thus, he concluded: "The complete independence of the courts of justice is peculiarly essential in a limited constitution." The Federalist No. 78, at 524 (J. Cooke ed. 1961).

It was in recognition of the inherent weakness of the judiciary, particularly as contrasted with the inherent power of the legislature, that the Framers determined to give special protections to the judiciary not enjoyed by officials of the other branches. Federal judges were given lifetime positions during good behavior, and were protected against diminution of salary while in office. The purpose of these provisions was largely to provide the judiciary, as the weakest branch, with the necessary tools for self-protection against the encroachments of the other branches.

The notion that the Exceptions Clause grants Congress plenary authority over the Supreme Court's appellate jurisdiction cannot easily be reconciled with these principles of separation of powers. If Congress had such authority, it could reduce the Supreme Court to a position of impotence in the tripartite constitutional scheme. The Court could be deprived of its ability to protect its core constitutional functions against the power of Congress. The salary and tenure protections so carefully crafted in Article III could be rendered virtually meaningless in light of the power of the Congress simply to eliminate appellate jurisdiction altogether, or in those areas where the Court's decisions displeased the legislature. It is significant that while the Framers did not focus on the Exceptions Clause, they did point to the impeachment power as "a complete security" against risks of "a series of deliberate usurpations on the authority of the legislature." The Federalist No. 81, at 546 (A. Hamilton) (J. Cooke ed. 1961).

In light of these basic considerations, it seems unlikely that the Framers intended the Exceptions Clause to empower Congress to impair the Supreme Court's core functions in the constitutional scheme. Even if some of the Framers could have intended this, it is improbable that the Exceptions Clause could have been approved by the Convention without debate or controversy, or indeed without any explicit statement by anyone associated with the framing or ratifica-

tion of the Constitution that such a deviation from the carefully crafted separation of powers mechanisms provided elsewhere in the Constitution was intended. Nor does it seem likely that the Convention would have developed the Exceptions Clause as a check on the Supreme Court in such a manner that an exercise of power under the Clause to remove Supreme Court appellate jurisdiction would not return authority to Congress, but vest it in the state courts instead. Hamilton regarded even the possibility of multiple courts of final jurisdiction as unacceptable. The Federalist No. 80, at 535 (J. Cooke ed. 1961).

> The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

Thus, unless there is sound and compelling evidence of a contrary interpretation in the decisions of the Supreme Court, or in the long-accepted historical practices regarding congressional control of Supreme Court jurisdiction, it must be concluded that the Exceptions Clause does not authorize Congress to interfere with the Court's core functions in our constitutional system.

III.

An examination of the Supreme Court's cases does not require any different interpretation. The Supreme Court has provided only inconclusive guidance on the meaning of the Exceptions Clause. In *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816), the Court noted "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." In the absence of the Supreme Court, Justice Story observed, "the laws, the treaties, and the constitution of the United States would be different, in different states. . . . The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the constitution. . . . [T]he appellate jurisdiction must continue to be the only adequate remedy for such evils." *Id.* at 348. Similar statements are found in the opinions of Chief Justice Marshall, *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 415 (1821), and Chief Justice Taney, *Ableman* v. *Booth*, 62 U.S. (21 How.) 506, 517–18 (1858).[7] Although these cases do not squarely address the question whether Congress could constitutionally deprive the Court of its core functions, the Court's language seems strong enough to cast considerable doubt, at least by implication, on the power of Congress to eliminate Supreme Court jurisdiction

[7] *Cf.* the famous statement of Justice Holmes:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States

O. Holmes, Collected Legal Papers 295–96 (1920).

over cases in which a final, uniform, and supreme voice is necessary in the guise of creating "exceptions" to that jurisdiction. In the words of Chief Justice Taney, the exercise of such a power would withdraw authority which is "essential . . . to [the] very existence [of the Federal] Government [and] essential to secure the independence and supremacy of [that] Government." *Id.*

The Supreme Court has, in a number of early cases, referred to the power of Congress over its appellate jurisdiction as being quite broad. For example, in *Barry* v. *Mercein*, 46 U.S. (5 How.) 103, 119 (1847), the Court stated that "[b]y the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes." *See also The Francis Wright*, 105 U.S. 381, 386 (1881); *Daniels* v. *Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1865); *Durousseau* v. *United States*, 10 U.S. (6 Cranch) 307, 313–14 (1810); *United States* v. *More*, 7 U.S. (3 Cranch) 159 (1805); *Wiscart* v. *Dauchy*, 3 U.S. (3 Dall.) 321, 327 (1796). However, every one of these statements is *dictum;* the Court has never held that Congress has the power entirely to preclude the Court from exercising its core functions. It may also be doubted whether these broad statements are intended to cover cases in which such an extraordinary congressional power was exercised. They may instead be designed to recognize a broad power which, like the Commerce Clause, is limited by other provisions of the Constitution and by the structure of the document as a whole.

Proponents of the "plenary power" thesis rely most heavily on the only Supreme Court decision which could be characterized as upholding a power of Congress to divest the Court of jurisdiction over a class of constitutional cases: *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). At issue in that case was the constitutionality of an 1868 statute repealing a provision enacted the previous year which had authorized appeals to the Supreme Court from denials of habeas corpus relief by a circuit court. In a brief opinion which did not discuss the scope or implications of the Exceptions Clause, the Court upheld Congress' withdrawal in 1868 of jurisdiction under the 1867 law, stating that "the power to make exceptions to the appellate jurisdiction of this court is given by express words." *Id.* at 514. Despite this broad language, the Court suggested that the withdrawal of jurisdiction provided by the 1867 law did not deprive the Court of jurisdiction over habeas corpus cases that had been conferred by § 14 of the Judiciary Act of 1789 (1 Stat. 81). "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error." 74 U.S. (7 Wall.) at 515.

The Court's *dictum* regarding alternative procedures for Supreme Court review of habeas corpus cases was converted into a holding several months later in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869). The petitioner in that case had invoked the Court's jurisdiction under the Judiciary Act of 1789, ch. 20, 1 Stat. 73. In holding that it had jurisdiction, the Court in *Yerger* made it clear that the 1868 legislation considered in *McCardle* was limited to appeals taken under the 1867 act and upheld the petitioner's right to Supreme Court review under the proper

jurisdictional statute. The Court noted that the 1868 act did "not purport to touch the appellate jurisdiction conferred by the Constitution. . . ." *Id.* at 105. In doing so, the Court observed that any total restriction on the power to hear habeas corpus cases would "seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction. . . ." *Id.* at 103. Thus, within months of the *McCardle* decision, the Court made it clear that *McCardle* did not decide the question of Congress' power to deprive it of all authority to hear constitutional claims in habeas corpus cases. For this reason, while the *Yerger* Court acknowledged that the Court's jurisdiction as given by the Constitution "is . . . subject to exception and regulation by Congress," *id.* at 102, neither *McCardle*, nor *Yerger*, nor any other case, constitutes an authoritative statement that Congress could deprive the Court of its core functions.

IV.

Finally, the historical record regarding the authority actually asserted by Congress to control the Court's appellate jurisdiction supports, on balance, the construction that the Exceptions Clause does not authorize Congress to interfere with the Court's core functions. It is indeed true that Congress did not in the First Judiciary Act explicitly authorize the Supreme Court to exercise the full range of appellate jurisdiction established by Article III. Perhaps the most prominent category of cases in which the Court was not granted statutory jurisdiction was federal criminal cases, which were not explicitly brought within the Court's appellate jurisdiction until 1889. Although Supreme Court review over these cases may have been available in special circumstances, it is probably true that most federal criminal cases were not reviewable by the Supreme Court during this period under the terms of the applicable legislation. The Judiciary Act also failed to grant the Supreme Court appellate jurisdiction over state court decisions striking down state laws as being inconsistent with the federal Constitution, or upholding federal statutes against constitutional attack.

The failure of Congress in the First Judiciary Act to provide the Court with the full appellate jurisdiction authorized under Article III does not undermine the conclusion that Congress cannot interfere with the Supreme Court's core functions, for several reasons. First, while Congress did omit certain specific categories of cases from the appellate jurisdiction provisions of the First Judiciary Act, it is noteworthy that the first Congress, containing among its members many delegates to the Constitutional Convention, recognized the Court's appellate jurisdiction over an extremely broad range of constitutional cases. Most significantly, the Court was given authority under § 25 of the Judiciary Act (1 Stat. 85) to review decisions of state courts striking down federal statutes or upholding state statutes against constitutional attack. That authority was conferred despite the intense controversy which it sparked among the states—controversy which resulted in state resistance to Supreme Court judgments and in attempts in Congress, foreshadowing the current attempts to limit the Court's jurisdiction, to

repeal § 25 of the Judiciary Act. The fact that the Judiciary Act did not explicitly recognize jurisdiction over state court decisions upholding the validity of federal laws or striking down state laws, or over federal criminal cases, does not undercut the position that the Court cannot be divested of its ability to fulfill its essential responsibility under the Constitution. The supremacy of federal law, guaranteed by the Supreme Court, would not be seriously threatened by state court decisions upholding federal laws or striking down state laws on federal constitutional grounds.

Second, the history of Supreme Court appellate review has confirmed the importance of its core functions. To the extent that any inferences can be drawn from the failure of the First Judiciary Act explicitly to recognize the full range of the Supreme Court's appellate jurisdiction over constitutional cases, those inferences are subject to refutation by later events. The Supreme Court now has appellate jurisdiction over all federal cases. Each of the areas of incomplete jurisdiction has long since been fulfilled. The vast majority of constitutional decisions which are on the books today, and which affect our national life in many and important ways, have been rendered by the Court under a statutory regime which included such broad appellate jurisdiction. As Justice Frankfurter said in another context, "the content of the three authorities of government is not to be derived from an abstract analysis. . . . It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 610 (1952) (concurring opinion). The gloss which life has written on the Supreme Court's jurisdiction is one which protects the essential role of the Court in the constitutional plan.

V.

As noted at the outset, Congress has substantial authority over the jurisdiction and power of the inferior federal courts. It also is given the power under Article III to regulate the Supreme Court's appellate jurisdiction in circumstances which do not threaten the core functions of the Court as an independent branch in our system of separation of powers. Congress may, for example, specify procedures for obtaining Supreme Court review and impose other restraints on the Court. But the question of the limits of Congress' authority under the Exceptions Clause is an extraordinarily difficult one. Thoughtful and respected authorities have come to conclusions which differ.

The legislative process itself is often important in assessing not only the meaning but also the constitutionality of congressional enactments. The Court has stated that it must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." *Rostker* v. *Goldberg,* 453 U.S. 57, 64 (1981).

If Congress considers the subject matter of S. 1742 it may wish to do so in light of the principles enunciated above and carefully weigh whether whatever action

is taken would intrude upon the essential functions of the Supreme Court as an independent branch of government in our system of separation of powers. As the Court has stated, "The customary deference accorded the judgments of Congress is certainly appropriate when . . . Congress specifically considered the question of the Act's constitutionality." 453 U.S. at 64.

Ultimately, it is for Congress to determine what laws to enact and for the Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const., Art. III, § 3. It is settled practice that the Department of Justice must and will defend Acts of Congress except in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid. Accordingly, should the Department be called upon to defend the constitutionality of this bill before the courts, it responsibly could and would do so.

It is appropriate to note, however, that even if it were concluded that legislation in this area could be enacted consistent with the Constitution, the Department would have concerns as a policy matter about the withdrawal of a class of cases from the appellate jurisdiction of the Supreme Court. History counsels against depriving that Court of its general appellate jurisdiction over federal questions. Proposals of this kind have been advanced periodically, but have not been adopted since the Civil War. There are sound reasons that explain why Congress has exercised restraint in this area and not tested the limits of constitutional authority under the Exceptions Clause.

The integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions. The ultimate result of depriving the Supreme Court of jurisdiction over a class of cases would be that federal law would vary in its impact among the inferior courts. State courts could reach disparate conclusions on identical questions of federal law, and the Supreme Court would not be able to resolve the inevitable conflicts. There would also exist no guarantee through Supreme Court review that state courts accord appropriate supremacy to federal law when it conflicts with state enactments.

Sincerely,
WILLIAM FRENCH SMITH

Meeting the Uniformed Military Services' Payroll During a Period of Lapsed Appropriations

The Secretary of Defense may meet the August 31, 1982, payroll for the uniformed military services without violating the Antideficiency Act, even though there are insufficient appropriated funds remaining in the payroll account to cover the amounts of social security and federal income tax that will be withheld simultaneously with issuance of the paychecks. This is because the due date for such withheld sums to be paid into the Treasury has been adjusted by the Secretary of the Treasury to September 30, 1982, and there is no legal obligation on the part of any employer to have in hand or to transfer to the Treasury any withheld funds until those payments are actually due.

Funds withheld from an employee's pay are not considered legally transferred to the employee at the time a paycheck is issued, therefore, the prohibition in Article I, § 9, Clause 7, against drawing money from the Treasury in advance of an appropriation is not implicated by the timely issuance of paychecks in this case.

August 25, 1982

THE SECRETARY OF DEFENSE

MY DEAR MR. SECRETARY: By letter of August 23, 1982, to Director Stockman of the Office of Management and Budget, you have stated that you will take steps to meet the August 31, 1982, payroll for the uniformed military services if the Attorney General reaches certain conclusions regarding the legality of meeting the payroll. The purpose of this letter is to advise you that I have examined this matter and have concluded that there are no legal barriers to meeting the payroll in the manner contemplated.

The issues presented arise only if the President vetoes the enrolled bill, presently before him for his approval or disapproval, which makes government-wide supplemental appropriations for fiscal year 1982. If the President vetoes that bill and no comparable legislation is enacted before August 31, 1982, I am informed that unexpended balances in the 10 regular military pay appropriation accounts will be sufficient for military personnel to be paid from those accounts their full take-home pay. Although the payroll, as regards take-home pay, will thereby be met from appropriated funds, certain questions arise because there will be insufficient appropriated funds remaining in the appropriation accounts at issue which could be paid to the Treasury on August 31, 1982, to cover the amounts of FICA and federal income tax, totaling, I am advised, approximately $652,000,000, that will be withheld simultaneously with issuance of the paychecks.

Under existing regulations issued by the Secretary of the Treasury, 26 C.F.R. §§ 31.6302(c)-1 *et seq.* (1981), there is a legal requirement that the $652,000,000 so withheld be transferred to the appropriate accounts at the Treasury by August 31, 1982. The Secretary of the Treasury has, however, determined to adjust that "due date" to September 30, 1982. Once this change is accomplished by a regulation issued by the Secretary, a draft of which has been provided to me, the $652,000,000 will not have to be paid over to the appropriate accounts at Treasury until September 30. In addition, the Chief Counsel of the Internal Revenue Service has informed this Department by letter of August 24, 1982, that there is no requirement imposed under federal statutes or regulations for an employer, otherwise subject to all of the statutory responsibilities imposed by the various provisions of the United States Code governing FICA and federal income tax withholding, to have in hand, or otherwise in escrow at the time paychecks are issued, the amount of funds necessary to cover the employer's responsibilities under those statutes.[1] In other words, there is no legal obligation to have in hand or to transfer to the Treasury any funds which have been, as an accounting matter, "withheld" from an employee's paycheck until such time as, under pertinent Treasury regulations, those payments are actually due at the Treasury.

If there were a legal requirement for you, as Secretary of Defense, to transfer to the appropriate accounts at Treasury any funds obligated for payment of the taxes involved on August 31, then it would be doubtful that the military personnel involved could receive their full take-home pay because of the superior obligation of the Department of Defense, as an employer under the relevant tax laws, *see, e.g.*, Comp. Gen. B-161457 (May 9, 1978), to make timely payment into those tax accounts. However, because the Secretary of the Treasury will adjust that date to September 30, no payment will be due on August 31, 1982. Thus, your Department will be in the position of a private employer, without any obligation under the law to set aside or otherwise escrow funds to cover the legal obligation that has in fact been accruing throughout the particular pay period involved. In short, you have the authority to determine to pay full take-home pay to the uniformed military services even in the absence of appropriated funds sufficient to cover the taxes on that pay.

You have also raised the question whether a transfer of funds has occurred as a matter of law at the time a paycheck is issued irrespective of whether the tax liability involved is due and payable to the Treasury, so as to implicate the prohibition in Article I, § 9, Clause 7 of the Constitution that no funds be "drawn from the Treasury" in the absence of an appropriation. By way of example, your Department has propounded the following hypothetical: a military officer receives gross pay in a specific pay period of $1,000, $200 of which is required by law to be withheld from that gross pay for FICA and income taxes. Because that officer "earned" that $200, is there not in law a transfer to him of that $200, with the Secretary of Defense merely acting as his "agent" for purposes of paying over that money into the Treasury at the appropriate time?

[1] "The United States as an employer is liable for the payment of salaries and employment taxes in the same manner as the private sector employer." Comp Gen B-161457 at 2 (May 9, 1978).

I believe that if the legal obligation to pay into the Treasury that $200 were the employee's, concern over this question might have some merit. However, as is made clear by 26 C.F.R. § 1.31-1(a), an employee in that situation cannot be held liable for the failure of his employer to make the requisite payment. *See generally Slodov* v. *United States*, 436 U.S. 238, 243 & n.4 (1978). Based on that regulation, I conclude that no legal transfer has occurred, because the obligation to make legally required payments to the Treasury never passes to the employee and because the legal obligation on the Department of Defense to make the transfer will not mature until September 30. I believe that this analysis and conclusion effectively dispose of any suggestion that an obligation of funds to be paid over into the FICA and federal income tax withholding accounts at Treasury is equivalent to funds having been "drawn from the Treasury" under Article I, § 9, Clause 7 of the Constitution. *See Reeside* v. *Walker*, 52 U.S. (11 How.) 272 (1851).

The *Reeside* case is particularly instructive on this constitutional issue. In that case, the petitioner had secured a money judgment against the United States as the result of prevailing on a set-off claimed against the United States. The petitioner had subsequently brought a mandamus action asking that the Secretary of the Treasury be ordered to enter on the books of the Treasury a credit to him and that the credit be paid to him. In denying the petitioner's right to that relief, the Court had occasion to distinguish between the entry of a credit to a private person on the books of the Treasury and the disbursement of that credit under Article I, § 9, Clause 7.

As to the former, the Court stated that if "the verdict against the United States [were] to be entered on the books of the Treasury Department, the plaintiff would be as far from having a claim on the Secretary or Treasurer to pay it as now." This was so, declared the Court, because of "the want of any appropriation by Congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress." 52 U.S. (11 How.) at 291. I believe the *Reeside* case establishes the distinction between accounting entries that may acknowledge liability, on the one hand, and the paying out from an account in the Treasury of funds in the absence of appropriations, an act clearly prohibited by Article I, § 9, Clause 7. *See also* 23 Op. Att'y Gen. 586 (1901). Your obligation to make the payments in issue clearly exists, but no transfer of funds to the employee is recognized in the law and none has occurred in fact.

For the same reason, I see no basis to argue that "an expenditure . . . under any appropriation or fund in excess of the amount available therein" has been made under the Antideficiency Act, 31 U.S. § 665(a) (1976). Clearly an obligation has been incurred, but no funds have even been identified, much less transferred, from any account to any other account, to make good that obligation,[2] nor is there

[2] I note that on August 24, 1982, you certified by letter to the Director, Office of Management and Budget, that maintaining all uniformed military personnel on the payroll during this period in which insufficient appropriations will exist to pay their salaries and taxes thereon is consistent with the opinion of the Attorney General of January 16, 1981, regarding the applicability of the Antideficiency Act, 31 U S C § 665(a), to the employment of personal services in excess of that authorized by law during this period.

any legal requirement that any such transfer occur until September 30, 1982.

In conclusion, I believe that the action to be taken by the Secretary of the Treasury to adjust the date on which these funds must be paid over to the appropriate accounts at Treasury from August 31 to September 30, 1982, the absence of any legal compulsion for the Department of Defense as an employer to escrow or set aside funds which will not be due until September 30, and the fact that no employee of the Department of Defense paid pursuant to this transaction can legally become obligated to the United States for payment of the funds withheld all combine to render legal the issuance to those employees of full take-home paychecks on August 31, 1982.

Sincerely,
EDWARD C. SCHMULTS
Acting Attorney General

Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files

It is the policy of the Executive Branch to decline to provide committees of Congress with access to or copies of law enforcement files, or materials in investigative files whose disclosure might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

Congressional assurance of confidentiality cannot overcome concern over the integrity of law enforcement files, not only because of concern over potential public distribution of the documents by Congress, but because of the importance of preventing direct congressional influence on investigations in progress.

It is the constitutional responsibility of the Executive to determine whether and when materials in law enforcement files may be distributed publicly, and this responsibility cannot and will not be delegated to Congress.

The principle of executive privilege will not be invoked to shield documents which contain evidence of criminal or unethical conduct by agency officials, and the documents at issue here have been made available for inspection by congressional staff members to confirm their proper characterization in this regard.

November 30, 1982

THE CHAIRMAN OF THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

DEAR MR. CHAIRMAN: This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as law enforcement files) of the Environmental Protection Agency (EPA). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent branches of our Nation's government, I shall reiterate at some length in this letter the longstanding position of the

Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the heads of all executive departments and agencies on November 4, 1982, "[t]he 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." Memorandum from the President to the Heads of Executive Departments and Agencies (Nov. 4, 1982), re: "Procedures Governing Responses to Congressional Requests for Information," at 1. Nevertheless, it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over 40 years ago:

> It is the position of [the] Department [of Justice], 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 the 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).

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your subcommittee and its staff to examine relative to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations, and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were 40 years ago, I see no reason to depart from the consistent position of previous Presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago,

> the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.

Memorandum from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President (Dec. 19, 1969), re: "Proposed letter from Secretary of the Army Resor to Chairman Rivers re submission of open CID investigative files," at 2.

Other objections to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods, or strategy; concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files are widely disseminated; sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law; and well-founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case. . . ." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).

The policy which I reiterate here was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

> I am not unmindful of your conditional suggestion that your counsel will keep this information "inviolate until such time as the

> committee determines its disposition." I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee.

40 Op. Att'y Gen. at 50.

Deputy Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

> [S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination *to* the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with "leaks." Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents.

Kauper Memorandum at 3.

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982, letter, I am sensitive to Rule XI, Clause 2, § 706c of the Rules of the House of Representatives, which provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and *all Members of the House shall have access thereto*. . . ." In order to avoid the requirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, Clause 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your subcommittee is not equivalent to making the documents "public." But, as is

evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public.[1] To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the house of Congress involved or some appropriate unit thereof may seek judicial review (*see Senate Select Committee* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "'to say what the law is' with respect to the claim of privilege presented in [any particular] case." *United States* v. *Nixon*, 418 U.S. at 705, quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination.[2]

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[1] Your November 8 letter points out that in my opinion of October 13, 1981, to the President, 43 Op Att'y Gen _____, 5 Op. O L C. 27 (1981), a passage from the Court's opinion in *United States* v. *Nixon*, 418 U.S 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. *See* 5 Op. O L C at 29 That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion The reasoning contained therein remains the same As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's executive privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress Thus, for these purposes the result under *United States* v. *Nixon* would be identical even if the Court had itself not used the word "public" in the relevant passage

[2] It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982, to you Under these principles, your criticism of Mr McConnell's statements made in those letters must be rejected Mr McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved I regret that you chose to take his observations personally.

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the members of your subcommittee at the offices of your subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

In closing, I emphasize that we have carefully reexamined the consistent position of the Executive Branch on this subject and we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,
WILLIAM FRENCH SMITH

MEMORANDUM OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

January 4, 1982, through December 30, 1982

Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission

The Native Hawaiians Study Commission (Commission) was established to advise Congress, not the President or agencies in the Executive Branch, and is thus not subject to the Federal Advisory Committee Act (FACA). The Commission could become subject to the FACA if it were utilized to advise the President or agencies

The Commission is not subject to the requirement of the Government in the Sunshine Act (GSA), which applies only to "agencies" a majority of whose members are appointed by the President with the advice and consent of the Senate. The Commission is not an "agency" as that term is defined for purposes of the GSA, since it was created to undertake studies and not to exercise independent authority. Moreover, none of its members is appointed with the advice and consent of the Senate.

January 4, 1982

MEMORANDUM OPINION FOR THE CHAIRMAN,
NATIVE HAWAIIANS STUDY COMMISSION

You have asked this Office to advise you whether the Native Hawaiians Study Commission (Commission) is subject to the requirements of the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770, 5 U.S.C. App. (1976 & Supp. V 1981) (FACA), or the Government in the Sunshine Act, Pub. L. No. 94-409, 5 U.S.C. § 552b (1976) (GSA). We conclude that the Commission is not subject to either Act. Our analysis of the FACA is somewhat extended because the language of the Commission's authorizing act is not entirely clear, although its legislative history demonstrates Congress' intent that the FACA not be applicable. We conclude that the Commission is not subject to the GSA because the Commission is not an administrative "agency" as defined by that and other relevant statutes.

I. Applicability of the Federal Advisory Committee Act

The FACA imposes certain requirements on "advisory committees" to the President or to federal agencies. The definition of an "advisory committee" includes, in relevant part, any "commission" that is "established" by the President, an agency, or Congress "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.[1] The definition does not cover commissions that are established solely to advise Congress. Whether the Native Hawaiians Study Commission was "established" to advise the President or federal agencies or solely to advise Congress must be determined by reference to the Commission's authorizing act—the Native Hawaiians Study Commission Act (NHSCA).[2]

(A) NHSCA Text

The text of the NHSCA does not indicate that Congress established the Commission to obtain "advice or recommendations" for the President or federal agencies. The Commission's relationship with the President, however, is sufficiently ambiguous to require a review of the NHSCA's legislative history.

The NHSCA directs the Commission to "conduct a study of the culture, needs, and concerns of Native Hawaiians." Section 303(a). The Commission is to publish "a draft report of the findings of the study," distribute the draft to "appropriate" federal and state agencies, native Hawaiian organizations, and the interested public, and solicit their written comments. Section 303(c). The Commission is to issue a "final report of the results of this study" and send copies to the President and to two congressional committees. Section 303(d).[3] Finally, and most importantly, the NHSCA also directs the Commission to "make recommendations to the Congress based on its findings and conclusions [from the study]." Section 303(e).

There is no indication whatever, in the text or in the legislative history, that the NHSCA established the Commission to advise federal agencies. The Commission does not make recommendations or submit its final report to any federal agencies. The fact that the Commission sends a draft report to "appropriate" federal agencies for written comments suggests that it has the opposite relationship—that it is required to obtain the agencies' advice, rather than to advise agencies.

Whether the Commission was established to obtain "advice or recommendations" for the President is a closer question because the President does receive a copy of the Commission's final report. While this could imply a relationship for the transmittal of advice between the Commission and the President, it does not by itself make the Commission an advisory body to the President. First, the NHSCA draws a distinction between the Commission's final report, which contains its factual "findings," and its "recommendations," which are made

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[1] The FACA also covers commissions "utilized" by the President or an agency "in the interest of obtaining advice or recommendations." 5 U.S.C. App. § 3. This aspect of the FACA's definition of "advisory committee" is discussed below.

[2] Pub. L. No. 96-565, Title III, 94 Stat. 3321, 3324-27 (1980), 42 U.S.C. § 2991a note (Supp. V 1981). Senator Matsunaga introduced the NHSCA directly on the Senate floor as an amendment to an act "to establish the Kalaupapa National Historical Park in the State of Hawaii, and for other purposes." 126 Cong. Rec. 32397 (1980) (Kalaupapa Act). The House subsequently passed the Kalaupapa Act with the Senate amendment. 126 Cong. Rec. 32613 (1980). Title III of the Kalaupapa Act is separately titled the NHSCA. Because the NHSCA was introduced directly on the House and Senate floors, no committee reports specifically addressed it.

[3] The Committees are the Senate Committee on Energy and Natural Resources and the House Committee on Interior and Insular Affairs.

only to Congress and apparently forwarded separately. Merely sending a copy of the Commission's report to the President would not seem to make the Commission advisory to the President when its recommendations are made only to Congress. Second, even if the final report itself could be characterized as "advice," it is unclear that such advice is really for the President where other factors and the underlying purpose of the study indicate that the Commission was created to formulate policy recommendations to Congress for future legislation. That the President is to receive a copy of the study, perhaps simply as a courtesy or for his general information, does not mean the study was intended to "advise" him. Thus, while the language of the statute itself is far from a clear indication that the Commission was intended solely to advise Congress, it does not support the contention that it was established to advise the President.

Two other provisions in the NHSCA indicate at least indirectly that the Commission was not established to advise the President. The first provision, § 303(b), establishes a modest open meeting "goal" for the Commission. This provision would be redundant if the requirements of the FACA were applicable. Section 303(b) states:

> The Commission shall conduct such hearings as it considers appropriate and shall provide notice of such hearings to the public, including information concerning the date, location, and topic of each hearing. The Commission shall take such other actions as it considers necessary to obtain full public participation in the study undertaken by the Commission.

42 U.S.C. § 2991a note (Supp. V 1981). If Congress had intended the Commission to be covered by the FACA, notice of each meeting would ordinarily have to be published in the Federal Register, the meeting would have to be open to the public, and interested persons would have the right to appear before the Commission or to file statements. *See* 5 U.S.C. App. § 10. Congress' inclusion of the much more modest provisions of § 303(b) in the NHSCA indicates that it did not believe that the Commission would be subject to the FACA.

The second provision, § 307(a), provides:

> Until October 1, 1981, salaries and expenses of the Commission shall be paid from the contingent fund of the Senate upon vouchers approved by the Chairman. To the extent that any payments are made from the contingent fund of the Senate prior to the time appropriation is made, such payments shall be chargeable against the authorization provided herein.

42 U.S.C. § 2991a note (Supp. V 1981). This reveals that Congress considered the Commission sufficiently close to the Legislative Branch to fund its activities up to October 1, 1981, from the contingent fund of the Senate. It also suggests that Congress believed the Commission would not be funded from any appropriations for the Executive Branch, as would normally be available for advisory committees to the Executive Branch.

In summary, the language of the NHSCA does not support the conclusion that Congress established the Commission to obtain advice or recommendations for the President. Moreover, the moderate "open meeting" provision and the manner of funding seem to suggest that the Commission was closely tied to Congress and not intended to be subject to the FACA.[4] These indications are not necessarily conclusive, however, because the President is to receive a copy of the Commission's final report. Because this might indicate the existence of a reporting relationship with the President, we turn to a review of the NHSCA's legislative history.

(B) Legislative History of the NHSCA

Three aspects of the NHSCA's legislative history strongly support the conclusion that Congress did not establish the Commission to advise the President. These include: (i) comments by the sponsors of the NHSCA that the Commission was to advise Congress; (ii) the existence of two predecessor bills seeking to establish an advisory commission to Congress; and (iii) the circumstances in which a Senate committee first added to a predecessor bill the requirement that the President should receive a copy of the Commission's report.

(i) Floor comments of the NHSCA's sponsors

When NHSCA's two sponsors introduced the bill on the House and Senate floors in the 96th Congress, they characterized the Commission as an advisory committee to Congress without ever mentioning that it would have any relationship with the Executive Branch. Senator Matsunaga stated that the NHSCA

> provides for a study of the Native Hawaiians by an unbiased Federal Commission composed primarily of non-Hawaiians, and *it would require the Commission to report its findings to Congress. If, at that time, the Congress determines that further action is necessary, perhaps a settlement act would be introduced as it was in the case of Alaskan Natives.*

126 Cong. Rec. 32399 (1980) (emphasis added). In similar fashion, Representative Phillip Burton noted:

> Mr. Speaker, it is my sincere hope that 2 years from now, the findings and recommendations from this commission, relative to the past and current problems now facing the Native Hawaiian population in the State of Hawaii and elsewhere, will be such that *it will establish a base upon which the Congress can then decide*

[4] The presidential power over the appointment of Commission members under the NHSCA might be said to support a contrary view The President appoints the members of the Commission, designates its chairman and vice chairman, fills all vacancies, and calls the first meeting. Sections 302(b), (c), (d), (e). The fact that the President appoints the members, however, does not bear directly, as an analytical matter, on the question regarding the functions the Commission members are to perform once they are appointed

> *on the best possible approach to assist the Native Hawaiians.* Mr. Speaker, the Native Hawaiians definitely need help, and after holding hearings last year in Hawaii on this legislation, I am convinced more than ever of the need to establish this commission; and I might add that *the Congress does have a responsibility to these people.*

126 Cong. Rec. 32613 (1980) (emphasis added). Thus, the bill's two sponsors described the Commission as a body to advise Congress and never indicated that it would have an advisory relationship with the Executive Branch.[5]

(ii) Predecessor bills

The legislative history further reveals that the two predecessor bills to the NHSCA in the two prior Congresses—S.J. 155, 94th Cong., 2d Sess. (1976) and S.J. Res. 4, 95th Cong., 1st Sess. (1977)—each had sought to establish a commission specifically to advise Congress.

The first bill, S.J. 155, was introduced in the 94th Congress by Senator Inouye to establish an Hawaiian Native Claims Settlement Study Commission.[6] The commission was to conduct a study of "the nature of the wrong committed against . . . Hawaiian Natives" when the United States allegedly caused the expropriation of their ancestors' land in 1893.[7] The proposal for this commission represented an alternative to another bill introduced by (then) Representative Matsunaga to establish a *corporation* to settle Hawaiian claims for the losses.[8] Because of congressional opposition to a claims settlement procedure, Senator Inouye's bill sought to establish a commission which, according to its preamble, "should be convened to advise the Congress on all matters pertaining to such remedy."[9]

In the 95th Congress, Senators Inouye and Matsunaga introduced the second predecessor bill, S.J. Res. 4, which was identical to the draft of S.J. Res. 155 reported out of the Senate Committee on Interior and Insular Affairs in the 94th Congress. Like S.J. 155, the preamble to S.J. Res. 4 stated that the commission was intended specifically to advise Congress. It stated:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That the Congress hereby declares that a wrong has been committed against the Aboriginal Hawaiians which the United States is obligated to endeavor to remedy; . . . *that the Congress wishes to establish a commission of Aboriginal Hawaiian and other citizens to advise it*

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[5] The brief legislative history of the NHSCA does not indicate that the President requested establishment of the Commission. The Executive Branch did not participate in the drafting of the proposed legislation to create it.

[6] S. J. Res. 155, 94th Cong., 2d Sess. (1976).

[7] S. J. Res. 155, *reprinted in* S. Rep. No. 1356, 94th Cong., 2d Sess. 2–3 (1976).

[8] H. R. 1944, 94th Cong., 1st Sess. (1975). Representative Matsunaga had introduced a similar bill in the 93rd Congress, H. R. 15666, 93rd Cong., 2d Sess. (1974).

[9] S. J. Res. 155, *reprinted in* S. Rep. No. 1356, 94th Cong., 2d Sess. 2 (1976).

on all matters pertaining to the best manner in which to provide such remedy.

S.J. Res. 4, 95th Cong., 1st Sess., 123 Cong. Rec. 34541 (1977) (emphasis added). The Senate and House Committee Reports[10] and floor comments on the bill[11] also clearly indicated that the commission was specifically established to advise Congress.[12]

Against this consistent history demonstrating Congress' desire to create a commission to advise it regarding the Native Hawaiians, there was no indication when Congress passed the NHSCA in the 96th Congress that it also intended to make the proposed Commission advisory to the President.[13] When introducing the NHSCA, Senator Matsunaga explained that he had deleted various provisions of its predecessor, S.J. Res. 4, simply to assure that the Commission's study would be objective. His comments did not reflect any intent to create an advisory committee to the President.[14]

(iii) The requirement that the Commission report be sent to the President

Finally, the legislative history of S.J. Res. 4 sheds some light on the background and significance of the requirement that the Commission send its report to

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[10] The Senate Report stated

> *The Proposed Study Commission would submit a report of its findings to the Congress* and recommend remedies to repair the wrong perpetrated against the Aboriginal Hawaiian people.
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> * * *
>
> By enactment of Senate Joint Resolution 4, the Congress would establish a procedure for determining *what, if any, action the Congress can take to finally settle the claims of the Aboriginal Hawaiians. The recommendations submitted to the Congress* by the Aboriginal Hawaiian Claims Settlement Study Commission *cannot substitute for the Congressional determination, but are expected to assist the Congress in making that determination*
>
> * * *
>
> Senate Joint Resolution 4 would establish [a commission] and ask it to conduct the study to *provide the groundwork necessary for Congress to consider what, if any, settlement can be fashioned for the Aboriginal Hawaiian people*

S. Rep No 501, 95th Cong., 1st Sess 5, 8, 9 (1977) (emphasis added). The House Committee Report reflects the same approach *See* H Rep. No. 860, 95th Cong., 2d Sess 1, 2, 5 (1978)

[11] *See* 123 Cong. Rec. 34544 (1977) (remarks of Sen Inouye), 124 Cong. Rec 15052 (1978) (remarks of Rep Roncalio), *id* at 15054 (remarks of Rep Heftel), 124 Cong. Rec. 28496 (1978) (remarks of Rep Johnson), *id* at 28497 (remarks of Rep Burton); *id.* at 28498 (remarks of Rep. Heftel)

[12] S.J. Res. 4 was not enacted While the Senate passed S J Res 4, only a simple majority of the House members voted for its passage when it was twice brought to the floor. *See* 123 Cong Rec 34544 (1977); 124 Cong Rec 28505 (1978) The special rules under which it was brought to the House floor required a two-thirds vote

[13] Senators Matsunaga and Inouye also introduced in the 96th Congress a bill that was identical to the version of S.J Res. 4 which passed the Senate in the 95th Congress *See* S 2131, 96th Cong., 1st Sess , 125 Cong Rec 35956 (1979). No action was taken on the bill after it was referred to Committee. Congressman Akaka also introduced a similar bill, H R 5791, 96th Cong , 1st Sess (1979), which was referred to the House Committee on Interior and Insular Affairs *See Hearings on H.R. 5791 Before the Subcomm. on National Parks and Insular Affairs of the House Comm on Interior and Insular Affairs*, 96th Cong., 1st Sess (1979)

[14] Senator Matsunaga's bill did delete the preamble that had included the sentence stating that the Commission was established to advise Congress But this does not reflect any intent to change the advisory role of the Commission. First, as the Senator explained, he eliminated the preamble because certain House members objected that it "expressed [Congress'] sense that a wrong had been done to Hawaiians." 126 Cong Rec 32399 (1980). He did not say that he intended to alter the Commission's advisory duties. Second, the Senator also amended S J Res 4 to require expressly that the Commission makes its recommendation to Congress. S J Res 4 had not specified to whom the recommendations were to be made, although they were to have been contained in the Report *See* S J Res 4, § 4, *reprinted in* S. Rep. No 501, 95th Cong , 1st Sess 3 (1977) Thus, even though the Senator removed the paragraph specifically identifying the Commission as advisory to Congress, he added the requirement that the Commission should make its recommendations only to Congress. These facts are inconsistent with the conclusion that elimination of the preamble was intended to make the Commission advisory to the President

the President. As originally introduced by Senators Inouye and Matsunaga, S.J. Res. 4 required the Commission to submit its report, including recommendations, to Congress.[15] The Senate Committee on Energy and Natural Resources amended the bill to direct the Commission, among other things, to send a copy of its report to the President.[16] Although the Committee Report did not comment on this change, it clearly indicated that the purpose of the Commission was to advise Congress.[17] The subsequent floor comments appear to confirm this interpretation,[18] and there is no indication that the change was intended to make the Commission advisory to the President.

(C) Conclusion

In light of these clear indications from NHSCA's legislative history that the Commission was created to advise the Congress and not the President or federal agencies, we conclude that it is not subject to the FACA. The Commission members should be aware, however, that the Commission could become subject to the FACA, despite the fact that it was not "established" to advise the President or federal agencies, if it is so "utilized" by the President or an agency. 5 U.S.C. App. § 3. We are currently aware of no information, however, indicating the Commission has been or is being utilized in this capacity.

II. Applicability of the GSA

You have also asked us to determine whether the Commission is subject to the Government in the Sunshine Act (GSA), which requires that certain meetings of agencies that fall within its coverage "be open to public observation." 5 U.S.C. § 552b(b). The GSA applies, absent special exemptions, to

> any agency, as defined in section 552(e) of this title [the Freedom of Information Act's definition], headed by a collegial body composed of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency.

5 U.S.C. § 552b(a)(1). The Commission does not fall within this definition for two reasons.

First, none of its members are appointed to the Commission with the advice and consent of the Senate. The NHSCA only provides that members be appointed by the President.

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[15] S J Res. 4, § 3, *reprinted in Hearings on S J Res 4 and H J Res. 526 Before the Subcomm on Public Lands and Resources of the Senate Comm on Energy and Natural Resources and the Subcomm. on Indian Affairs and Public Lands of the House Comm on Interior and Insular Affairs*, 95th Cong., 1st Sess. 18–21 (1977)

[16] S Rep No 501, 95th Cong., 1st Sess 3 (1977)

[17] *See* note 10, *supra*

[18] *See* note 11, *supra*

Second, the Commission is not an agency as that term has been used under the Freedom of Information Act, 5 U.S.C. § 552(e) (FOIA), whose definition the GSA expressly incorporates. The FOIA defines "agency" as follows:

> For purposes of this section, the term "agency" as defined in section 551(1) of [the Administrative Procedure Act] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(e). The FOIA thus incorporates the Administrative Procedure Act (APA) definition of "agency," with several additions that are not relevant here.

The APA defines "agency," in relevant part, as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." 5 U.S.C. § 551(1). This definition has been judicially construed to require that an Executive Branch entity, to be deemed an "agency," must have "substantial independent authority in the exercise of specific functions," *Soucie* v. *David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), or the "authority in law to make decisions," *Washington Research Project, Inc.* v. *HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Such tests cannot normally be met by a committee that merely gives advice because its chief function is only to make recommendations, not to act upon them or to exercise independent authority. *See Wolfe* v. *Weinberger*, 403 F. Supp. 238, 241 (D.D.C. 1975); *Gates* v. *Schlesinger*, 366 F. Supp. 797, 799 (D.D.C. 1973). As we have already indicated, the legislative history of the Commission indicates that it was created to undertake studies and to make recommendations, not to "exercise independent authority." Thus, in our view, the Commission is not an "agency" as that term is defined by the APA and the FOIA, and adopted by the GSA.[19]

In short, we conclude, based on the language and legislative history of the legislation creating the Commission, that it is neither an "advisory committee" for purposes of the FACA nor an "agency" for purposes of the GSA. It is therefore not subject to the requirements of either statute.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[19] The NHSCA provides that the Commission may "secure directly from any department or agency of the United States information necessary to enable it to carry out this title . . . and may use the United States mails in the same manner and upon the same conditions as other departments and agencies of the United States." Section 302(j) & (k). There is no indication from this oblique reference that Congress intended to create the Commission as an "agency." In any event, the definition of an agency under the GSA is functional, and Congress clearly did not intend to empower the Commission to exercise functions that would bring it within the GSA's definition of an "agency"

The Attorney General's Role as Chief Litigator for the United States

[The following memorandum describes the development and present scope of the Attorney General's role in representing the United States and its agencies in litigation. It discusses the policy reasons for the centralization of litigation authority in the Department of Justice, and analyzes the Attorney General's relationship with client agencies. It also touches on the Attorney General's authority to settle and compromise cases, and on his authority over litigation in international courts. It concludes that, absent clear legislative directives to the contrary, the Attorney General has plenary authority and responsibility over all litigation to which the United States or one of its agencies is a party, and that his discretion is circumscribed only by the President's constitutional duty to "take Care that the Laws be faithfully executed."]

January 4, 1982

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked this Office to outline the role and responsibilities of the Attorney General in representing the United States in litigation in which the United States, or a federal agency or department, is a party. In particular, you asked that we consider the Attorney General's authority and responsibility to make decisions with respect to litigation, even if those decisions may conflict with the views, desires, or legal analyses of other departments or agencies of the United States, including those which may be "clients" in the particular litigation. Litigation involving agencies which have been granted express exclusive authority by Congress to conduct their own litigation is not within the scope of this memorandum.[1] Rather, the focus of this memorandum is litigation involving

[1] Circumstances in which the Attorney General lacks supervisory authority over litigation on behalf of the United States include (1) Litigation in United States courts where the Attorney General has no authority to determine who shall represent the United States, such as the United States Tax Court (26 U S.C. § 7452 specifies that the United States shall be represented by the Chief Counsel for the Internal Revenue Service or his delegate) and the United States Court of Military Appeals (10 U S C § 870 specifies that the United States shall be represented by the Judge Advocate General or his delegate); (2) Litigation involving independent regulatory agencies which have been given the express statutory authority to conduct their own litigation using agency attorneys, *e g.*, the National Labor Relations Board (29 U S C § 154(a)); the Federal Power Commission (16 U.S.C. § 825m(c) power transferred to Federal Energy Regulatory Commission (42 U.S C. § 7172(a)(2)(A) (Supp IV 1980)), the Interstate Commerce Commission (49 U.S.C. § 16(11) (Supp IV 1980)); and (3) Litigation involving Executive Branch agencies which have been granted independent litigating authority by Congress, *e g* , the Secretary of Labor is authorized to appoint attorneys to represent the Secretary or the Benefits Review Board in actions under the Longshoremen's and Harbor Workers' Compensation Act, except in the Supreme Court, under 33 U S.C. § 921a.

There are also circumstances in which certain agencies have assumed, notwithstanding their lack of express statutory authority, full responsibility for their own trial and appellate litigation, so far without objection from the Attorney General. These agencies, such as the Tennessee Valley Authority and the Federal Deposit Insurance Corporation, have not been required to submit to the Attorney General's supervisory authority, apparently for

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those agencies whose litigating authority is clearly subject to the Attorney General's direction, or whose statutory grants of authority are ambiguous or insufficient to remove them from the Attorney General's supervision.

We conclude that, absent clear legislative directives to the contrary, the Attorney General has full plenary authority over all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties. Such authority is rooted historically in our common law and tradition, *see Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458–59 (1868); *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866) and, since 1870, has been given a statutory basis. *See* 5 U.S.C. § 3106, and 28 U.S.C. §§ 516, 519. *See generally United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888). The Attorney General's plenary authority is circumscribed only by the duty imposed on the President under Article II, § 3 of the Constitution to "take Care that the Laws be faithfully executed."

I. Historical Development of the Role of the Attorney General

Plenary power over the legal affairs of the United States was vested in the Attorney General when the Office of the Attorney General of the United States was first created by the Judiciary Act of 1789. Act of September 24, 1789, ch. 20, § 35, 1 Stat. 92.[2]

The Attorney General's statutory authority to conduct litigation to which the United States, its departments, or agencies, is a party was more fully developed by Congress in 1870, in the same legislation that provided for the creation of the Department of Justice. Act of June 22, 1870, ch. 150, 16 Stat. 162. Prior to 1870, however, the Attorney General's authority in litigation matters involving the United States had been recognized by the Supreme Court. In *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866), the Court held that no counsel would be heard for the United States in opposition to the views of the Attorney General. In the *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868), the Court concluded that:

> Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this

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historical reasons, some of which relate to their financial independence as government corporations. *See* Daniel J Meador, Assistant Attorney General, Office for Improvements in the Administration of Justice, Draft Memorandum to the Attorney General and the Assistant Attorneys General Re: Government Relitigation Policies (May 21, 1979), Memorandum to the Attorney General from William D. Ruckelshaus (Mar 5, 1970) The operative statutes in these two cases, 16 U S C § 831c(h), 831x (TVA) and 12 U S C § 1817(g) (FDIC), merely give the agencies the authority to sue and be sued—not to litigate independently of the Department of Justice. Presumably, the Attorney General may reassert his supervisory authority at any time.

[2] Section 35 of the Judiciary Act provided in pertinent part that

> [T]here shall . . be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.

"District attorneys," now known as "United States Attorneys," were to be appointed to conduct litigation in the lower courts of the United States but were not placed under the Attorney General's authority until 1861 Act of Aug. 2, 1861, ch 37, 12 Stat 285. From 1820 until 1861, the "district attorneys" were supervised by the Department of the Treasury. Act of May 15, 1820, ch 107, 3 Stat 592

> court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General.

74 U.S. (7 Wall.) at 458–59.

The 1870 Act established the Department of Justice and designated the Attorney General as its chief legal officer. The Act provided that certain specified "solicitors" performing legal functions within the various agencies "shall be transferred from the Departments with which they are now associated to the Department of Justice, . . . and shall exercise their functions under the supervision and control of the head of the Department of Justice." (§ 3, 16 Stat. 162.)[3] The Act also authorized the Attorney General to designate any officer of the Department of Justice, including himself, to conduct and argue any case in which the government is interested, in any court of the United States, whenever he deems it necessary for the interest of the United States. (§ 5, 16 Stat. 162.) In addition, the Act gave the Attorney General supervisory authority over the conduct and proceedings of the various attorneys for the United States in the respective judicial districts, "and also of all other attorneys and counsel[l]ors employed in any cases or business in which the United States may be concerned." (§ 16, 16 Stat. 164.) And finally, the Act forbade the Secretaries of the Executive Departments to employ other attorneys or outside counsel at government expense, but "shall call upon the Department of Justice . . ., and no counsel or attorney fees shall hereafter be allowed to any person . . ., besides the respective district attorneys . . ., for services in such capacity to the United States, . . . unless hereafter authorized by law, and then only on the certificate of the Attorney-General that such services . . . could not be performed by the Attorney-General, . . . or the officers of the Department of Justice." (§ 17, 16 Stat. 164.) 16 Stat. 162.

The initial motivation for this legislation was the desire to centralize the conduct and supervision of all litigation in which the government was involved, as well as to eliminate the need for highly paid outside counsel when government-trained attorneys could perform the same function. Other objectives of the legislation that were advanced in the congressional debates were to ensure the presentation of uniform positions with respect to the laws of the United States ("a unity of decision, a unity of jurisprudence . . . in the executive law of the United States"),[4] and to provide the Attorney General with authority over lower court proceedings involving the United States, so that litigation would be better handled on appeal, and before the Supreme Court. *See* Cong. Globe, 41st Cong., 2d Sess., Pt. IV, 3035–39, 3065–66 (1870). *See generally* Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 Fordham L. Rev. 1049 (1978); Key, *The Legal Work of the Federal Government*, 25 Va. L. Rev. 165 (1938).

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[3] Prior to the Act, Congress had provided for the existence of "solicitors" in the various departments and agencies, who were responsible for the legal affairs of their respective departments. *See generally* Key, *The Legal Work of the Federal Government*, 25 Va. L. Rev. 165 (1938).

[4] Cong. Globe, 41st Cong., 2d Sess., Pt. IV, 3035, 3036 (1870).

The Supreme Court considered this legislation in *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888) and concluded that the Attorney General was "undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government." *Id.* at 279. Emphasizing the centralizing function of the Department of Justice and the Attorney General, the Court reasoned that the power to control government litigation must lie somewhere—that there must exist some officer with authority to decide when the United States should sue, and to oversee the execution of such a decision—and that the Attorney General was designated such appropriate officer, in the Judiciary Act of 1789, by reference to the historical practice in England.[5] 125 U.S. at 278–80. In 1921, the Court added that the Attorney General's authority to conduct such litigation could be affected only by clear legislative direction to the contrary. *Kern River Co.* v. *United States*, 257 U.S. 147, 155 (1921). *See also* 21 Op. Att'y Gen. 195 (1895). (The Secretary of the Navy was not warranted in employing counsel in a foreign country to institute suit in behalf of the United States, but should have referred the matter to the Department of Justice, "which is charged with the duty of determining when the United States shall sue, for what it shall sue, and that such suits shall be brought in appropriate cases," *id.* at 198.)

Lower courts reached similar conclusions with respect to subsequent re-codifications of the 1870 legislation. The Court of Claims summarized the legislation in the following manner:

> These provisions are too comprehensive and too specific to leave any doubt that Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney-General, all the litigation and all the law business in which the United States are interested, and which previously had been scattered among different public officers, departments, and branches of the Government, and to break up the practice of frequently employing unofficial attorneys in the public service.

Perry v. *United States*, 28 Ct. Cl. 483, 491 (1893). Speaking for the Second Circuit Court of Appeals, Judge Learned Hand emphasized the centralizing function of the Attorney General's role as chief litigator for the United States and the necessity that that role be committed exclusively to the Attorney General:

> The government has provided legal officers, presumably competent, charged with the duty of protecting its rights in its

[5] This reference is to the origin of the office of Attorney General, which was first created in the Judiciary Act of 1789, and derived its function from the role of the Attorney General in England. The Court stated.

> The judiciary act of 1789 . which first created the office of Attorney General, without any very accurate definition of his powers, in using the words that "there shall also be appointed a meet person, learned in the law, to act as Attorney General for the United States," 1 Stat. 93, c. 21, § 35, must have had reference to the similar office with the same designation existing under the English law. And though it has been said that there is no common law of the United States, it is still quite true that when acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law.

125 U.S. at 280

> courts. . . . Congress, having so provided for the prosecution of civil suits, can scarcely be supposed to have contemplated a possible duplication in legal personnel. The cost of this is one consideration, but far more important is the centering of responsibility for the conduct of public litigation. The Attorney General has powers of "general superintendence and direction" over district attorneys (title 5, U.S. Code, § 317 [5 USCA § 317]), and may directly intervene to "conduct and argue any case in any court of the United States" (title 5, U.S. Code, § 309 [5 USCA § 309]). . . . Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. *No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties.*

Sutherland v. *International Insurance Co.*, 43 F.2d 969, 970 (2d Cir. 1930), *cert. denied*, 282 U.S. 890 (1930) (emphasis added).

In 1933, as part of a crusade to consolidate as much of the government's business as necessary to increase operating efficiency, President Roosevelt issued an executive order to supplement the existing legislative mandate of centralized litigation authority. Executive Order No. 6166 (June 10, 1933), which requires all claims by or against the United States to be litigated by, and under the supervision of, the Department of Justice, is still in effect. The order provides in pertinent part:

> *Claims by or against the United States.*
>
> The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.
>
> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Reprinted in 5 U.S.C. § 901 note (1976).

II. Present Statutory Bases of the Attorney General's Authority

These attempts to centralize the litigating function and authority of the federal government in the Department of Justice, with the Attorney General at its helm,

are now codified in 5 U.S.C. § 3106 and 28 U.S.C. §§ 515–516. Section 3106 of Title 5 forbids the employment of outside counsel by executive agencies for litigation involving the United States unless Congress has provided otherwise, requiring instead that the matter be referred to the Department of Justice.[6] Although we have found no case law interpreting this provision, the language of § 3106 appears to limit the prohibition of payment to outside counsel for litigation, and litigation-related matters. However, in view of the centralization and uniformity purposes underlying the 1870 Act and its progeny, we believe that, absent statutory authority to the contrary, the prohibition should be broadly interpreted to preclude payments to non-agency or non-Justice Department attorneys for (legal) advisory functions as well. *See* Scalia, Assistant Attorney General, Office of Legal Counsel, Letter to Hoffman, General Counsel, Department of Defense (Mar. 26, 1975).[7] *See also Boyle* v. *United States*, 309 F.2d 399, 402 (Ct. Cl. 1962) (quoting from a 1957 letter by the Comptroller General: "[I]n the absence of urgent and compelling reasons, a Government agency may not procure from an independent contractor services normally susceptible of being performed by Government employees."). Nevertheless, the Attorney General may employ outside counsel to perform legal duties under his direction. Sections 515 and 543 of Title 28[8] authorize the Attorney General to commission "special attorneys" to assist United States Attorneys, or to "conduct any kind of legal proceeding, civil or criminal, . . . which United States attorneys are authorized by law to conduct . . . ."

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[6] 5 U S C § 3106 provides in pertinent part that.

> [e]xcept as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

[7] Although the Scalia letter was written in response to an inquiry regarding the use of outside counsel by an agency in connection with the investigation or prosecution of administrative claims, the principles expressed therein are broadly applicable

> In prohibiting the use of outside counsel by the several departments, Congress concentrated all the Government's law business in the Department of Justice—not only litigation, but also *advisory functions*. This was thought to be necessary in order to provide for uniform legal interpretations throughout the Executive branch . . . Congress later departed from the principle that *all* legal activities of the Government were to be carried out by the Department of Justice; subsequent legislation, authorizing and funding agency legal staffs, permitted legal matters not involving litigation to be handled in the various agencies. Those changes were taken into account when Congress, in 1966, codified the various provisions of the law going back to the Department of Justice Act of 1870. See, *e.g* , Historical and Revision Notes to 5 U.S.C 3106 and 28 U S C 516. There is, however, no indication of a Congressional intent to relax the prohibition against engagement of outside counsel by agencies other than the Department of Justice. This principle remains in effect with respect to both litigation reserved to the Department of Justice and nonlitigative matters handled within the several agencies.

Letter at 4-5 (footnotes and citations omitted) (emphasis added).

[8] 28 U.S.C. § 515(a), provides in pertinent part that.

> [t]he Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal . . which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought

28 U.S.C. § 543 provides:

> (a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires
>
> (b) Each attorney appointed under this section is subject to removal by the Attorney General.

Sections 515–519 of Title 28 codify the law growing out of the 1870 Act which consolidated the power to conduct litigation involving the United States in the Department of Justice, and granted the Attorney General supervisory authority over such litigation. The principal provisions granting such authority are §§ 516 and 519. Section 516 provides that

> [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.

Section 519 provides that

> [e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

However, as with the previous legislative and executive efforts designed to centralize the litigating functions of the United States, these provisions have been undercut by exceptions authorized by Congress which grant agencies or departments litigating authority independent of the Department of Justice. *See* Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 Fordham L. Rev. 1049 (1978); Memorandum to the Attorney General, from William D. Ruckelshaus (Mar. 5, 1970); Key, *The Legal Work of the Federal Government*, 25 Va. L. Rev. 165 (1938).[9] As of 1978, some 31 Executive Branch and independent agencies were authorized to conduct at least some of their own litigation. Bell, *supra*, at 1057. Although this memorandum does not address those cases in which agencies have been granted independent litigating authority, the lines between the Attorney General's authority and that which has been delegated to the agencies have at times been drawn ambiguously, and in those cases, the Attorney General frequently asserts his historic authority over the litigation proceedings.

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[9] Congress has thus far maintained virtually unimpaired the Attorney General's control over the initiation of criminal proceedings *See, e.g.*, 15 U S C. § 77t(b) (SEC), 16 U S C § 825m(a) (FPC). The preservation of such authority in the Attorney General is, we believe, sound constitutional policy, in view of the Executive's constitutional mandate to take care that the laws be executed faithfully. Such a responsibility carries with it the vindication of public rights through the institution of criminal proceedings against those who violate the laws which the Executive administers As the Executive's chief legal officer, the Attorney General is singularly suited to carry out this responsibility

Similarly, the Attorney General's authority to conduct cases in the Supreme Court has remained undiluted Section 518 of Title 28, which reserves the conduct and argument in the Supreme Court of suits and appeals "in which the United States is interested" to the Attorney General and Solicitor General, does not contemplate existing or future statutory authorizations to the agencies, as do §§ 516 and 519 However, § 518 does permit the Attorney General to "direct otherwise," in particular cases

III. Supervisory Authority in the Context of Jointly Conducted Litigation

A. Policy Considerations

The policy considerations which support the centralization of federal litigating authority in the Department of Justice, under the supervision of the Attorney General, are many. In addition to the "unity of decision, unity of jurisprudence" goals that were articulated in the 1870 congressional debates, the centralization of authority and supervision over federal litigation in the Department of Justice meets several other objectives: (1) the coordination of lower court proceedings, which enhances the ability of government lawyers to select test cases presenting the government's positions in the best possible light; (2) the facilitation of presidential supervision, through the Attorney General, over Executive Branch policies that are implicated in litigation; (3) the allowance for greater objectivity in the filing and handling of cases by attorneys who are not themselves the affected litigants; and (4) the increased effectiveness in the handling of appeals and Supreme Court litigation which results from centralized control over lower court proceedings. *See generally* Memorandum to the Attorney General from William D. Ruckelshaus, Re: Encroachments upon the Authority of the Attorney General to Supervise and Control the Government's Litigation (Mar. 5, 1970). *See also* Harmon, Office of Legal Counsel, Memorandum for the Associate Attorney General (Dec. 11, 1980).

Centralization of federal litigating authority in the Department of Justice, under the supervision of the Attorney General, is vitally necessary to ensure the Attorney General's proper discharge of his duty to oversee the legal affairs of the United States with which Congress has entrusted him. Centralization ensures that the Attorney General is properly informed of the legal involvements of each of the agencies for which he is responsible; supervisory authority permits him to act on that knowledge. In this way, the Attorney General is better able to coordinate the legal involvements of each "client" agency with those of other "client" agencies, as well as with the broader legal interests of the United States overall. Yet, while the "client" agencies may be involved, to varying degrees, in carrying out the litigation responsibilities necessary to assist the Attorney General in representing the agency's particular interests, it is essential that the Attorney General *not* relinquish his supervisory authority over the agency's litigation functions, for the Attorney General alone is obligated to represent the broader interests of the Executive. It is this responsibility to ensure that the interests of the United States as a whole, as articulated by the Executive, are given a paramount position over potentially conflicting interests between subordinate segments of the government of the United States which uniquely justifies the role of the Attorney General as the chief litigator for the United States. Only the Attorney General has the overall perspective to perform this function.

Nevertheless, it must be stressed that in exercising supervisory authority over the conduct of agency litigation, the Attorney General will generally defer to the

policy judgments of the client agency. This deference reflects a recognition of the agency's considerable expertise in the substantive area with which it is primarily concerned. Strictly speaking, "policy" judgments are confined to those substantive areas in which the agency has developed a special expertise and in which the agency is vested by law with the flexibility and discretion to make policy judgments. However, it is increasingly the case that policy concerns are implicated in decisions dealing with litigation strategy, and in such cases, the Attorney General will accommodate the agency's policy judgments to the greatest extent possible without compromising the law, or broader national policy considerations.

It is in the context of these dual representation functions—in which there exists inherent potential for conflict between "clients"—that questions of representation arise. Circumstances frequently develop in which the Attorney General and client agencies disagree as to the proper course of the litigation—including strategy, legal judgments, settlement negotiations, and policy judgments which impact on the litigation. Such circumstances frequently present the question whether the Attorney General should continue to represent the client.

The simple answer is yes. The Attorney General has not only the statutory authority to represent the agencies over whose litigation he exercises supervisory authority, but, indeed, the *duty* to do so, "[e]xcept as otherwise authorized by law." 28 U.S.C. §§ 516, 519. The Attorney General's authority and duty to represent these agencies are described more particularly by the specific legislation which sets forth his and the agencies' respective litigation responsibilities, and occasionally, in "Memoranda of Understanding" entered into by the Attorney General and specific agencies apportioning such responsibilities. Nevertheless, unlike the private attorney, the Attorney General does not have the option of withdrawing altogether from the representation of client agencies, as long as interests of the United States for which he is held responsible are at stake.

However, recognition of the very real difficulties which are posed in the context of litigation jointly conducted by the Attorney General and "client" agencies—particularly in view of the agencies' greater staffing resources, more intimate familiarity with the subject matter of the litigation, greater visibility to the public as a litigant, and more involvement in the day-to-day administration of field offices—tends to suggest that a more practical understanding of the Attorney General's authority and duty to represent client agencies may be needed. Distinguishing policy judgments from legal judgments in litigation matters—the former being primarily the province of the agencies and the latter being reserved to the Attorney General—helps to provide not only a more reasonable and efficient use of government resources, but a workable framework for resolving most disputes that may result in representation crises. Nevertheless, because of his unique responsibilities in representing government-wide interests as well as those of particular "client" agencies, the final judgment concerning the best interests of the United States must be reserved to the Attorney General.

B. Legislative Exceptions to the Attorney General's Authority

Although Congress has over the years responded, in varying degrees, to the multitude of pressures exerted by agencies seeking independent litigating au-

thority, the courts have continued to give greater weight to the strong policy objectives which recommend centralization. As a result, the "otherwise authorized by law" language creating the exception to the Attorney General's authority in 28 U.S.C. §§ 516 and 519 has been narrowly construed to permit litigation by agencies only when statutes explicitly provide for such authority. *See Marshall* v. *Gibson's Products, Inc.*, 584 F.2d 668, 676 n.11 (5th Cir. 1978); *ICC* v. *Southern Railway*, 543 F.2d 534, 535–38 (5th Cir. 1976); *In re Grand Jury Subpoena of Persico*, 522 F.2d 41, 54 (2d Cir. 1975); *FTC* v. *Guignon*, 390 F.2d 323 (8th Cir. 1968); *United States* v. *Tonry*, 433 F. Supp. 620 (E.D. La. 1977).

Although the legislative history of Sections 516 and 519 is relatively sparse—in fact, the "history" is contained almost entirely in the "Historical and Revision Notes" prepared by the revisers of Title 5 in 1966—the courts' strict interpretation of these provisions is supported not only by the historical antecedents of these statutes and the policy considerations discussed above, but also by the Reviser's Notes to the 1966 amendments.[10] The revisers state, with respect to both Sections 516 and 519, that the sections were revised to express the effect of existing law, which does permit agency heads, "*with the approval of Congress*, [to employ] attorneys to advise them in the conduct of their official duties. . . ." 28 U.S.C. § 516 note (emphasis added). The revisers further state that "[t]he words 'Except as otherwise authorized by law,' are added to provide for existing and future exceptions (e.g., section 1037 of title 10)." § 516 note; 28 U.S.C. § 519 note. Thus the revisers have indicated that existing and future grants of litigating authority that are at least as express as the language contained in 10 U.S.C. § 1037 are to be excepted from the Attorney General's broad grant of authority under §§ 516 and 519 of Title 28. Section 1037 of Title 10 permits the Secretaries of the various military departments to "employ [private] counsel" for the "representation" of persons subject to the Uniform Code of Military Justice "before the judicial tribunals and administrative agencies" of foreign nations. While nothing in the legislative history of § 1037 indicates a congressional intent to create an exception to the predecessors of §§ 516 and 519, Congress made clear in 1966 that the operative language, "the Secretary concerned may employ counsel . . . incident to the representation before . . . judicial tribunals" was sufficient to trigger the exception.[11] *See* H.R. Rep. No. 1863, 84th Cong., 2d Sess. (1956); S. Rep. No. 2544, 84th Cong., 2d Sess. (1956). *See generally* Office of Legal Counsel, Memorandum to Peter R. Taft (Aug. 27, 1976).

In order to come within the "as otherwise authorized by law" exception to the Attorney General's authority articulated in 28 U.S.C. §§ 516 and 519, it is necessary that Congress use language authorizing agencies to employ outside

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[10] 28 U S C §§ 515–526 (1976), Pub L. No. 89-554, § 4(c), 80 Stat 613 is the most recent codification of the provisions contained in the 1870 Act creating the Department of Justice Prior to 1966, these provisions were codified in Title 5

[11] 10 U S C § 1037 was adopted in 1956, prior to the 1966 adoption of 28 U S C §§ 516 and 519, and provides in pertinent part:

> (a) Under regulations to be prescribed by him, the Secretary concerned may employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation, of persons subject to the Uniform Code of Military Justice.

counsel (or to use their own attorneys) to represent them in court. *See, e.g.*, 49 U.S.C. § 16(11) (Interstate Commerce Commission); 16 U.S.C. § 825m(c) (Federal Power Commission); 12 U.S.C. § 1464(d)(1) (Federal Home Loan Bank Board); 29 U.S.C. § 154(a) (National Labor Relations Board);[12] 5 U.S.C. § 7105(h) (Supp. IV 1980) (Federal Labor Relations Authority).[13] However, even agencies to which Congress *has* granted independent litigating authority may be prohibited from conducting their own litigation in the Supreme Court. *See, e.g.*, 42 U.S.C. § 2000e-4(b)(2) (Equal Employment Opportunity Commission); 5 U.S.C. § 7105(h) (Supp. IV 1980) (Federal Labor Relations Authority).[14] More ambiguous language, which, for example, authorizes an agency to "sue and be sued,"[15] "bring a civil action," or "invoke the aid of a court," has been considered by some courts to be insufficient to confer independent litigating authority. *See, e.g.*, *ICC* v. *Southern Railway*, 543 F.2d 534 (5th Cir. 1976); *FTC* v. *Guignon*,

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[12] These statutes provide as follows

I C C —49 U.S C § 16(11)

> The Commission *may employ such attorneys as it finds necessary* for proper legal aid and service of the Commission or for proper representation of the public interests in investigations made by it . or *to appear for or represent the Commission in any case in court.*

F P C —16 U S C § 825m(c)—language substantially similar to that provided for I C C

Federal Home Loan Bank Board—12 U.S C. 1464(d)(1)

> The Board shall have power to enforce this section and rules and regulations made hereunder In the enforcement of any provision of this section or rules and regulations made hereunder . *the Board is authorized to act* in its own name and *through its own attorneys* . .

National Labor Relations Board—29 U S.C. § 154(a)

> *Attorneys appointed under this section may*, at the direction of the Board, *appear for and represent the Board in any case in court.*

(Emphases added) Of course, these authorizations must be read within the context of the whole statutory scheme of which they are a part—in some instances these agencies are represented by the Department of Justice.

[13] Language similar to that contained in the statutes cited in n. 12, *supra* was recently held by the District Court for the District of Columbia to confer independent litigating authority on the Federal Labor Relations Authority (FLRA), including the litigation of proceedings under the Freedom of Information Act, 5 U S C. § 552 *See AFGE* v *Gordon*, C A No. 81-1737 (D D C Oct. 23, 1981) The statute construed by the court as granting the FLRA independent litigating authority, 5 U S C § 7105(h) (Supp IV 1980), provides·

> Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, *attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action* brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law

The Appellate Section of the Civil Division has recommended that the Department of Justice not appeal this decision Nevertheless, the Department has maintained vigorously in the past, and will continue to maintain, that broad grants of independent litigating authority, similar to those discussed above, do not encompass cases arising under administrative statutes that apply government-wide This view is supported by the strong policy imperatives of "unity in the executive law of the United States." *infra* at 5, as well as some legislative history *See* H R Conf Rep No 539, 95th Cong , 1st Sess. 72 (1977), reporting on the Department of Energy Organization Act, Pub L No 95-91, 91 Stat 565, which established the Federal Energy Regulatory Commission

[14] 42 U S.C § 2000e-4(b)(2) provides

> Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, *provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.*

5 U S C § 7105(h) (Supp IV 1980) provides:

> *Except as provided in section 518 of title 28, relating to litigation before the Supreme Court*, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law

(Emphases added)

[15] The Office of Legal Counsel views "sue and be sued" language as merely designating the agency as a "jural entity" which may sue or be sued in its own name, and not as removing the agency's representation from the domain of the Department of Justice pursuant to 28 U S C §§ 516 and 519 *See* Meador, Draft Memorandum Re Government Relitigation Policies, *supra*, at 19, n 51, citing an interview with H Miles Foy III, Department of Justice, Office of Legal Counsel

390 F.2d 323 (8th Cir. 1968). *See generally* Harmon, Office of Legal Counsel, Memorandum for the Associate Attorney General (Dec. 11, 1980); Meador, Office for Improvements in the Administration of Justice, Draft Memorandum (May 21, 1979); Office of Legal Counsel, Relationship of Proposed Amendments to the Administrative Procedure Act . . . to the Department of Justice Policy of Opposition to Litigation Power Outside of the Department (Apr. 29, 1974); Memorandum to the Attorney General from William D. Ruckelshaus, *supra; but see SEC* v. *Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935).

Other language which does grant agency attorneys authority to litigate, but provides that such authority shall be exercised under the direction and control of the Attorney General, provides the framework for "Memoranda of Understanding" (MOUs) between the agencies and the Department of Justice, which apportion the litigation responsibilities between the Department and the agencies. *See, e.g.*, 29 U.S.C. § 204(b) (Fair Labor Standards Act); the Age Discrimination Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.[16] These memoranda usually specify both the categories of cases in which agency counsel may appear and the nature of the Attorney General's continuing control and supervision over such cases. We believe that the sharing of litigation responsibilities under MOUs is proper, as long as the Attorney General retains ultimate authority over the litigation. Moveover, the rationale underlying these arrangements is an eminently sensible one. The efficiency and expertise objectives in government litigation are thereby maximized, without sacrificing the Attorney General's statutory role as chief government litigator, and the responsibilities and prerogatives which attach thereto.

Nevertheless, as a practical matter, MOUs do compromise the Attorney General's control, if not authority, over the conduct of agency litigation. Agencies eager to control their own litigation may proceed to negotiate settlement agreements, send out "no action" letters, depose witnesses, and otherwise represent the agency's position to the public without consultation or assistance from the Attorney General, leaving the Attorney General with a *fait accompli* and a potential equitable barrier to his subsequent assertion of control over the litigation.[17] Such occurrences effectively undermine the Attorney General's

[16] 29 U.S.C. § 204(b) permits Department of Labor attorneys to "appear for and represent" the Administrators of the FLSA and ADEA "in any litigation," but subjects all such litigation "to the direction and control of the Attorney General." The Secretary of Labor and the Attorney General have entered into a series of understandings which provide that Department of Labor attorneys will ordinarily handle all appellate litigation pursuant to the Acts, but permit the Attorney General to take part in the conduct of such cases as he deems to be in the best interest of the United States.

[17] We do not mean to suggest that agencies acting beyond the scope of their litigating authority in settling claims *legally* bind the United States, rather, we refer only to the confusion, ill will, and lack of confidence that would accrue to the agency in its public relations should the Attorney General reverse the agency's actions, as well as the practical difficulties inherent in such a reversal. *See Dresser Indus., Inc* v *United States*, 596 F.2d 1231, 1236 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980):

> It is well established that the federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority. . . . As the Supreme Court stated in [*Federal Crop Ins. Corp* v *Merrill*, 332 U.S. 380 (1947)] Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though . . . the agent himself may have been unaware of the limitations upon his authority. 332 U.S. at 384.

ability to perform the dual litigating functions with which he is charged. Recognizing that the efficiency and expertise objectives in government litigation necessitate the sharing of litigation responsibilities in most cases, care should be taken to make explicit in these arrangements the Attorney General's overriding authority in directing the litigation. While the Attorney General may delegate some litigating authority under the MOUs, he may not delegate the ultimate responsibility which is by law vested exclusively in the Attorney General. *See* Harmon, Office of Legal Counsel, Memorandum for the Associate Attorney General (Dec. 11, 1980). Thus, the Attorney General should make clear to the client agency his willingness to support the Assistant Attorney General and line attorneys in the enforcement of his prerogatives under the MOU.[18]

IV. Settlement and Compromise Authority

Included within this broad grant of plenary power over government litigation is the power to compromise and settle litigation over which the Attorney General exercises supervisory authority. This power "to compromise any case over which he has jurisdiction upon such terms as he may deem fit" is "in part inherent in [the Attorney General's] office and in part derived from statutes and decisions." 38 Op. Att'y Gen. 124 (1934). This authority was the subject of President Roosevelt's Executive Order No. 6166, (June 10, 1933), *reprinted in* 5 U.S.C. § 901 note (1976), which provided that ". . . the function of decision whether . . . to compromise . . . appeal . . . [or] abandon prosecution or defense, now exercised by any agency or officer [of the United States], is transferred to the Department of Justice." *See infra* at 7–8. With respect to the power to compromise, Attorney General Cummings observed that

> it is a power, whether attaching to the office or conferred by statute or Executive order, to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice, carrying with it both civil and criminal features, if both exist, and any other matter germane to the case which the Attorney General may find it necessary or proper to consider before he invokes the aid of the courts; nor does it end with the entry of judgment, but embraces execution (*United States* v. *Morris*, 10 Wheat. 246).

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[18] Additional litigating authority, independent of the Attorney General, was granted to certain agencies by the Hobbs Act, 28 U S C §§ 2342, 2348 (1976 & Supp IV 1980). The Hobbs Act grants specified agencies authority to *intervene* in appellate proceedings "of their own motion and as of right," even though the Attorney General "is responsible for and has control of the interests of the Government" in the proceedings Notwithstanding the Attorney General's overall authority, he "may not dispose of or discontinue the proceeding" over the objection of the intervening agency, *and* the agency "may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General "

38 Op. Att'y Gen. 98, 102 (1934).[19] In these opinions, Attorney General Cummings concluded that the Attorney General's authority to settle cases extended even beyond that which would have been available to the agency charged with administering the underlying law.[20]

Executive Order No. 6166, together with Sections 516 and 519 of Title 28 of the U.S. Code (and their predecessor provisions), have been interpreted consistently by the courts to vest the Attorney General with virtually absolute discretion to determine whether to compromise or abandon claims made in litigation on behalf of the United States. *See New York* v. *New Jersey,* 256 U.S. 296, 308 (1921); *United States* v. *Newport News Shipbuilding & Dry Dock Co.*, 571 F.2d 1283 (4th Cir.), *cert. denied,* 439 U.S. 875 (1978); *Smith* v. *United States,* 375 F.2d 243 (5th Cir.), *cert. denied,* 389 U.S. 841 (1967); *Halbach* v. *Markham,* 106 F. Supp. 475, 479–81 (D.N.J. 1952), *aff'd,* 207 F.2d 503 (3d Cir. 1953). In deciding to settle or abandon a claim, or not to prosecute at all, the Attorney General is not restricted to considerations only of litigative probabilities, but rather may make a decision, in his discretion, on the basis of national policies espoused by the Executive. *Smith* v. *United States, supra.* The only limitations placed on the Attorney General's settlement authority are those which pertain to his litigating authority generally—*i.e.*, explicit statements by Congress circumscribing his settlement authority,[21] *see, e.g.*, 8 U.S.C. § 1329 (1976) (prohibiting settlement of suits and proceedings brought under Title II of the Immigration Act without consent of the court in which the suit or proceeding is pending), and the duty imposed on the President by Article II, § 3 of the Constitution to "take Care that the Laws be faithfully executed. . . ." *See generally* Office of Legal Counsel, Memorandum for Sanford Sagalkin (Sept. 4, 1980); Office of Legal Counsel, Memorandum to James W. Moorman (Oct. 30, 1979). To guide the Attorney General in the exercise of his settlement discretion, the 1934 opinions of Attorney General Cummings proposed a "promote the Government's best interest, or . . . prevent flagrant injustice" standard. *See* 38 Op. Att'y Gen. at 102.

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[19] As early as 1831, Attorney General Taney observed that.

> An attorney conducting a suit for a party has, in the absence of that party, a right to discontinue it whenever, in his judgment, the interest of his client requires it to be done If he abuses this power, he is liable to the client whom he injures. .
>
> An attorney of the United States, except in so far as his powers may be restrained by particular acts of Congress, has the same authority and control over the suits which he is conducting The public interest and the principles of justice require that he should have this power . . [S]ince he cannot consult his client (the United States), the sanction of the court is regarded as sufficient evidence that he exercised the power honestly and discretely

2 Op. Att'y Gen 482, 486–87 Attorney General Cummings cited this opinion approvingly. 38 Op Att'y Gen at 99

[20] The opinions found in 38 Op Att'y Gen at 94, 98, 124 discuss the Attorney General's authority to compromise income tax cases in the absence of *bona fide* disputed questions of fact Attorney General Cummings concluded that he did possess the authority to settle such cases, even though the Secretary had no statutory authority to compromise income tax cases in those circumstances

[21] With respect to actions brought under the Federal Tort Claims Act, 28 U.S C §§ 2671–2680 (1976), for example, the Attorney General or his designee now has the authority to arbitrate, compromise, or settle claims brought under the Act after January 17, 1967, 28 U.S.C § 2677 (1976); prior to the 1966 amendments, court approval was required before the Attorney General was permitted to effect a settlement Congress also prescribed a procedure in the 1966 amendments which granted agencies authority to settle claims under $25,000 without prior written approval by the Attorney General of that specific settlement arrangement, as long as the arrangement was made in accordance with general regulations prescribed by the Attorney General 28 U S C. § 2672 (1976)

V. Litigation in International Courts

Similarly, the Attorney General's authority over litigation involving the United States before the International Court of Justice (ICJ) is plenary. Although the Attorney General's supervisory authority has been challenged only once since the 1966 codification of the broad grant of authority contained in 28 U.S.C. §§ 516 and 519, that challenge was resolved by reference to the broad scope of the statutory provisions as well as Department of Justice regulations contained in Title 28 of the Code of Federal Regulations.

In the connection with the litigation between the United States and Iran in 1980, a dispute arose between the Department of State and the Department of Justice concerning the Attorney General's authority to represent the United States before the ICJ. The Legal Adviser expressed the view that the State Department, by virtue of its premier role in United States foreign policy and international relations, had been historically charged with the responsibility for international affairs involving the United States, including legal matters. In response, Attorney General Civiletti cited the unambiguous language of §§ 516 and 519, and noted the absence of both statutory law and formal opinions which would "otherwise authorize" the Department of State to conduct litigation independent of the Attorney General's supervision. Attorney General's letter to the Legal Adviser, Department of State (Apr. 21, 1980).[22] In addition, 28 C.F.R. § 0.46 (1980)[23] makes clear that the Attorney General's litigation authority is not limited to domestic matters, but rather includes litigation "in foreign courts, special proceedings, and similar civil matters not otherwise assigned." *See generally* D. Deener, The United States Attorneys General and International Law (1957).[24]

VI. Conclusion

In short, the Attorney General, as the chief litigation officer for the United States, has broad plenary authority over all litigation in which the United States,

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[22] At President Carter's request, Attorney General Civiletti personally conducted the Iran litigation before the ICJ, assisted by the Legal Adviser to the State Department, whom the Attorney General commissioned as a "Special Assistant," pursuant to 28 U.S.C. § 515

[23] 28 C.F.R. § 0.46 (1980) provides:

> The Assistant Attorney General in charge of the Civil Division shall, in addition to litigation coming within the scope of § 0.45, direct all other civil litigation including claims by or against the United States, its agencies or officers, in domestic or foreign courts, special proceedings, and similar civil matters not otherwise assigned, and shall employ foreign counsel to represent before foreign criminal courts, commissions or administrative agencies officials of the Department of Justice and all other law enforcement officers of the United States who are charged with violations of foreign law as a result of acts which they performed in the course and scope of their Government service

[24] Deener discusses the historical role of the Attorney General in providing legal advice on questions of international law and concludes:

> The Judiciary Act of 1789 did not specifically charge the Attorney General with the duty of giving legal advice on questions of international law. On the other hand, the act did not restrict the "questions of law" that could be referred to the Attorney General to those involving domestic matters only. Actually, almost from the very beginning, the President and the department heads submitted questions involving the law of nations to the chief law officer, and succeeding Presidents and cabinet officers have continued to submit such questions as a matter of established practice. Congress apparently recognized this practical interpretation of the statutes defining the Attorney General's duties. At any rate, Congress has never deemed it necessary to change the statutes in this respect.

Deener, *supra*, at 10–11 (footnotes omitted)

or its federal agencies or departments, are involved. This authority is wideranging, embracing all aspects of litigation, including subpoena enforcement, settlement authority, and prosecutorial discretion. The reservation of these powers to the Attorney General is grounded in our common law tradition, Acts of Congress (principally, 5 U.S.C. § 3106, and 28 U.S.C. §§ 516 and 519), various executive orders, and a long line of Supreme Court precedent. These powers can be eroded only by other Acts of Congress, and the Executive's constitutional command to faithfully execute the laws.

Implicit in this broad grant of authority is the recognition that the Attorney General must serve the interests of the "client" agency as well as the broader interests of the United States as a whole in carrying out his professional duties. The Attorney General is obligated to administer and enforce the Constitution of the United States and the will of Congress as expressed in the public laws, as well as the more "private" legal interests of the "client" agency. It is because of this diversity of functions that situations may arise where the Attorney General is faced with conflicting demands, *e.g.*, where a "client" agency desires to circumvent the law, or dissociate itself from legal or policy judgments to which the Executive subscribes; where a "client" agency attempts to litigate against another agency or department of the federal government; or where a "client" agency desires a legal result that will benefit the narrow area of law administered by the agency, without regard to the broader interests of the United States government as a whole. In such cases, the Attorney General's obligation to represent and advocate the "client" agency's position must yield to a higher obligation to take care that the laws be executed faithfully. In every case, the Attorney General must satisfy himself that this constitutional duty, delegated from the Executive, has not been compromised in any way, and that the legal positions advocated by him do not adversely affect the interests of the United States.

THEODORE B. OLSON
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Office of Legal Counsel

Presidential Authority Over Wilderness Areas Under the Federal Land Policy and Management Act of 1976

Under the Federal Land Policy and Management Act of 1976 (FLPMA), the President is required to forward to the Congress his recommendations with respect to federal lands studied by the Bureau of Land Management for possible designation as wilderness. He has no authority to refuse to make recommendations for areas he believes unsuitable for wilderness designation, or to return such lands to multiple use management without congressional action upon his recommendation. Under the FLPMA, as under the Wilderness Act of 1964, only Congress has authority to determine whether an area should or should not be designated as wilderness.

January 11, 1982

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

We have been asked by the Office of Legislative Affairs for our views concerning whether § 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976), authorizes the President to determine that areas being studied for wilderness designation are not suitable for such designation and to return such areas to general use management without congressional action.

This question has arisen as a result of a proposal by the Department of the Interior urging the President unilaterally to take such action with respect to the Shoshone Pygmy Sage area either in the form of a presidential executive order or a memorandum from the President. An executive order would have to be submitted to the Attorney General for consideration as to both form and legality prior to submission to the President. Exec. Order No. 11030, 3 C.F.R. 610 [1959–1963 Comp.], as amended. Interior has not articulated a legal rationale for suggesting a memorandum rather than an executive order. However, a memorandum contemplating action of this nature certainly implicates the Attorney General's responsibility to provide legal advice to the President, 28 U.S.C. § 509 (1976), on issues relative to the President's constitutional obligation "to take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. Therefore, since your legal advice will be sought with respect to this matter irrespective of the procedure contemplated, these views are submitted directly to you.

We do not believe that the President has the legal authority to take the action being suggested by the Department of the Interior. We believe that he must forward to the Congress his recommendations as to whether land should or should not be designated as wilderness and that he cannot remove land from

consideration for such designation and return it to multiple use management by unilateral action.[1]

I. Background

The FLPMA, 43 U.S.C. §§ 1701–1782 (1976), was an attempt to establish a coherent, comprehensive scheme of federal land management based on multiple use and sustained yield. *Id.*, § 1701(a)(7). In order to effect this goal, the FLPMA required the Secretary of the Interior (Secretary) to prepare and maintain on a continuing basis an inventory of all federal lands. *Id.*, § 1711. Based on lands identified in the inventory, the Bureau of Land Management (BLM) is required to conduct a study of all areas with wilderness characteristics. *Id.*, § 1782.[2] The Secretary must, as the studies are completed, make recommendations to the President as to the suitability or non-suitability of each area for permanent designation as a wilderness. *Id.*, § 1782(a). The President is then required to forward to the Congress "his recommendations with respect to designation as wilderness of each such area. . . ." *Id.*, § 1782(b). The statute explicitly states how the land is to be managed in the interim between the beginning of the study period and the final decision, a period that may last years.

> During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness. . . .

Id., § 1782(c).

II. Dispute Over the FLPMA, § 603, 43 U.S.C. § 1782

In September of this year, an Associate Solicitor Designate of Interior submitted a memorandum (Memorandum) to the Secretary concluding that the President has the discretion to release land he deems unsuitable for wilderness designation to multiple use management without congressional action.[3] Although conceding that § 603 did not give the President this authority explicitly, the Memorandum concluded that the "better conclusion" is that § 603 implicitly granted the President that authority. The Memorandum concluded that the President need forward to Congress only those recommendations that favor wilderness designation of areas under study. It expressed the view that unilateral presidential action to release land under review to multiple use management if the President determined that such land was not suitable for wilderness designation was consistent with congressional intent.

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[1] Multiple use management is defined in 43 U.S.C. § 1702(c) to include "a combination of balanced and diverse resource uses . . . including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."

[2] Wilderness is defined in 16 U.S.C. § 1131(c) (1976)

[3] Memorandum for Secretary Watt from Associate Solicitor Designate Good, Sept. 4, 1981

The Land and Natural Resources Division of the Department of Justice (Lands) disagrees with this analysis.[4] It concludes that the statute requires the President to forward recommendations on all areas that have been studied, whether or not the recommendations favor wilderness designations. Lands believes that Congress has retained for itself the authority to determine whether or not an area should be designated as wilderness.

Your advice may be requested because of your duty to resolve interagency legal disputes, Exec. Order No. 12146, 3 C.F.R. 409 (1980), *reprinted in* 28 U.S.C. § 509 note (Supp. V 1981), your duty to advise the President on the interpretation of the laws, 28 U.S.C. § 509, or to approve Presidential Executive Orders for legality. Exec. Order No. 11030, 3 C.F.R. 610 (1959–1963 Comp.), as amended. After a careful examination of § 603, its legislative history and prior administrative practice, we have concluded that the President must forward recommendations to Congress on all areas of land studied. We believe that the President does not have the authority to return lands to multiple use management without congressional action.

III. Analysis

The central issue is whether Congress intended the President to forward to it recommendations on all areas with wilderness characteristics that had been studied by BLM. The pertinent language of the statute is:

> (a) [T]he Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands . . . having wilderness characteristics . . . and shall from time to time report to the President his recommendation as to the suitability or nonsuitability *of each such area* or island for preservation as wilderness. . . .
>
> (b) The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness *of each such area*. . . . A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.
>
> (c) During the period of review *of such areas* and until Congress has determined otherwise, the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability *of such areas* for preservation as wilderness. . . .

43 U.S.C. § 1782 (emphasis added). The parallel construction of the statute leads us to conclude that Congress was referring, in each subsection, to the same

[4] Memorandum for Attorney General French Smith and Deputy Attorney General Schmults from Assistant Attorney General Dinkins, Dec. 21, 1981

areas of land—those studied by BLM for possible designation as wilderness.[5] For each such area the Secretary must prepare recommendations, the President must prepare recommendations, and the Secretary must, "until Congress has determined otherwise," continue to manage such areas "so as not to impair the suitability of such areas for preservation as wilderness." *Id.*, § 1782(c). There is nothing on the face of the statute which provides the President with any explicit authority to refuse to make recommendations for areas he believes unsuitable for wilderness designation or to release those lands for multiple use management without congressional action. A natural reading of the statute does not supply an inference that the President was given such authority and prior administrative practice is to the contrary.

The language in § 603 regarding transmission of recommendations is virtually identical to that found in the Wilderness Act of 1964. 16 U.S.C. § 1132(c) (1976).[6] The Wilderness Act of 1964 directed the Secretary to review "every roadless area" of 5,000 or more acres in the national park system and the national wildlife refuges and game reserves in order to identify those with wilderness characteristics. *Id.* The statute requires the Secretary to report to the President his recommendations "as to the suitability or nonsuitability of each such area" and the President to report to Congress "his recommendations with respect to designation as wilderness of each such area. . . ." *Id.* In applying this provision, at least three previous Presidents have interpreted it to require them to forward all recommendations to Congress, including those recommending against designation of certain areas as wilderness.[7] Since the FLPMA's wilderness review provisions are directed towards all the lands within the Secretary's custody that are not covered by the Wilderness Act of 1964, the vast "public lands" administered by BLM, it is unlikely that Congress, adopting the same statutory language for the same executive department, intended to change the process.[8] When Congress enacts a new law incorporating language contained in another law on the same subject with full awareness of administrative practice under the prior law, it would require compelling evidence to conclude that Congress intended to alter the process—especially in a direction which would reduce congressional power. *Lorillard* v. *Pons*, 434 U.S. 575, 580–81 (1978); *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395, 408–10 (1975); *Commissioner* v. *Estate of Noel*, 380 U.S. 678, 682 (1965).

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[5] This parallel construction is even more evident in an earlier version of the bill, H.R. 5622, 94th Cong., 1st Sess., 121 Cong Rec 8999 (1975), introduced by Rep. Seiberling. Section 103 of H.R. 5622 was an almost verbatim version of § 603 except that it was written as one long paragraph, rather than three subsections.

[6] "[T]he Secretary of the Interior shall report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendation with respect to the designation as wilderness of each such area or island . . ." 16 U.S.C. § 1132(c).

[7] These actions by Presidents Ford, Nixon, and Johnson are reflected in the following material: Letter of Transmittal from President Ford, Dec 4, 1974, Public Papers of Gerald R Ford, at 709–10, Letter of Transmittal from President Nixon, June 13, 1974, Public Papers of Richard Nixon, at 496; Memorandum to the Congress from President Nixon, Nov 28, 1973, Public Papers of Richard Nixon, at 985; Letter of Transmittal from President Nixon, Apr. 28, 1971, Public Papers of Richard Nixon, at 592; Letter of Transmittal from President Johnson, Jan. 18, 1969, Public Papers of Lyndon B. Johnson, at 1365.

[8] Public lands, 43 U S C. § 1702(e), constitute the vast majority of the lands overseen by Interior.

Taken as a whole, therefore, we believe that § 1782 establishes a scheme whereby the Executive Branch supplies recommendations and data for Congress for a congressional decision as to each area. Until a congressional determination is made, the Secretary is required to manage such land "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c).

This plain reading of § 603 is supported by the available legislative history. Both the House and Senate versions of the FLPMA, H.R. 13777 and S. 507, had wilderness review sections. The Senate's version, S. 507, § 103(d), was very short and ordered reviews to be done in accord with the Wilderness Act of 1964.

> (d) Areas identified pursuant to section 102 as having wilderness characteristics shall be reviewed within fifteen years of enactment of this Act pursuant to the procedures set forth in subsections 3(c) and (d) of the [Wilderness Act of 1964, 16 U.S.C. § 1132(c), (d).]

S. 507, § 103(d), *reprinted in* S. Rep. No. 583, 94th Cong., 1st Sess. 5 (1975). The sectional analysis states:

> Subsection (d) . . . provides that once these areas are identified *the Secretary must study them* to determine whether or not they are suitable for inclusion in the National Wilderness Preservation System *and submit his recommendations to the President, who, in turn, must submit his own recommendations to the Congress.*

Id. at 46 (emphasis added).[9]

The House version, H.R. 13777, § 603, was longer, in large part because it repeated in full the language of the Wilderness Act of 1964. *Compare* 16 U.S.C. § 1132(c) *with* 43 U.S.C. § 1782(a)–(c). When, in preparation for the conference committee, the Senate staff prepared a Committee Print attempting to merge S. 507 and H.R. 13777, it adopted the expanded language of the House's version, § 603,[10] and it was this language that was ultimately adopted by Congress.

The Committee Print highlighted proposed § 603(d) as the one provision of § 603 which differed from the Senate's version.[11] This subsection stated:

> Where the President recommends *pursuant to subsection (b)* of this section that a roadless area or island is not suitable for inclusion in the National Wilderness Preservation System, that recommendation shall take effect [unless vetoed within 120 days by one House.]

Id. at 857.

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[9] The identical analysis was provided on an earlier version of the bill, S. 424. *See* S Rep. No. 873, 93rd Cong., 2d Sess. 38 (1974) (§ 103(e))

[10] *See* Staff of Senate Comm. on Energy and Natural Resources, 95th Cong , 2d Sess., *Legislative History of the Federal Land Policy and Management Act of 1976*, at 747 (Comm. Print 1978).

[11] *Id* at 857 The House version was originally § 311(d) but was renumbered as § 603 by the Senate staffers compiling the Committee Print. *See* n 10 *supra*

This language makes it manifest that the President was expected to make recommendations under § 603(b) for areas he believed unsuitable for wilderness designation as well as for those he believed suitable. The difference was that the House version would have allowed the President's recommendation regarding areas he regarded as unsuitable to become effective absent an affirmative vote by one House.[12] This understanding is reflected in the House Report. "Subsection (d) provides options whereby areas which the President has recommended as being non-suitable as wilderness either can be restored with minimum delay to full multiple-use management or considered further by the Congress for possible inclusion in the National Wilderness Preservation System." H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976) (§ 311(d)). *See also* 122 Cong. Rec. 24701 (1976) (remarks of Sen. Jackson).

In the conference, Rep. Seiberling objected to language in § 603(c) and to all of § 603(d). Transcript of Conference Committee on S. 507, 94th Cong., 2d Sess., at 88–97 (Transcript).

> CONGRESSMAN SEIBERLING: [T]his means, even where you had something that was statutorily made part of the study, or had previously been withdrawn and was covered by the 15-year review period, that some special interests could get the Secretary to knock it out and the period of review would terminate.
>
> So, here again we have an effort to whittle this thing down. . . .
>
> CONGRESSMAN MELCHER: What the gentleman from Ohio is proposing is we delete what words?
>
> CONGRESSMAN SEIBERLING: [D]elete paragraph (d) on page 109.

Transcript at 88–89.

After a vigorous but inconclusive debate on § 603(c), Rep. Seiberling intervened.

> CONGRESSMAN SEIBERLING: Mr. Chairman, we are getting hopelessly bogged down in this. My suggestion is the House Conferees propose we leave Section (c) as it is in the draft bill before us. I will withdraw my objections to it provided we take out (d) which is the bold-face type on page 109 which, in my view, would deprive Congress which would give the Secretary the ability to deprive Congress of the ability to finally decide what to do at the end of the study period.[13]

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[12] This Memorandum does not address the constitutionality of such a one-House veto

[13] As discussed *infra* in more detail, we attach no particular significance to the somewhat garbled structure of this sentence. We believe the context clearly indicates that the Congressman was expressing concern that subsection (d) would give the Executive Branch power to deprive the Congress of the authority to finally decide whether a particular area was to be designated wilderness or not. The Interior Department Memorandum, through the use of an ellipsis, gives this statement the same effect.

He could completely by-pass the study period by simply recommending a certain area be taken out of the study program and that would be the end of it unless Congress vetoed it.

CONGRESSMAN MELCHER: Is there any objection to the proposal by Mr. Seiberling on the House side?

CONGRESSMAN YOUNG: Do I understand the gentleman correctly? All we are doing is deleting (d)?

CONGRESSMAN MELCHER: Deleting (d), leaving the rest of the language.

Transcript at 93–94. Section (d) was deleted, therefore, *id.* at 97, because of the concern articulated by Rep. Seiberling that it placed too much power in the hands of the Executive by diluting Congress' check on the President's recommendations as to *non-suitable* areas. The concern which was expressed is that an area could be declared unsuitable and taken out of eligibility for wilderness treatment merely as a result of an Executive Branch decision and the absence of affirmative action by Congress. The entire debate proceeded on the assumption that the President had the duty to make recommendations as to non-suitable areas under § 603(b) *prior to the deletion of subsection* (d)—and afterwards. The only difference after the deletion of (d) is that those recommendations cannot become law without affirmative congressional action. They remain recommendations.

The same analysis of the statute's requirement seems to have been made by at least one court. *Utah* v. *Andrus*, 486 F. Supp. 995 (D. Utah 1979), involved a charge that BLM's regulation of federal land that had been identified as having wilderness characteristics was injuring a piece of state property that it completely surrounded. In setting out the facts underlying the government's interest, the court described the wilderness study procedure in an explanatory footnote.

> The BLM procedure for carrying out the wilderness review portions of FLPMA is as follows: First, the agency identifies roadless areas of 5000 acres or more which have wilderness characteristics. These areas are then designated Wilderness Study Areas (WSAs), and BLM studies each area to determine the suitability of the area for inclusion in the Wilderness System. At this point in its planning, BLM looks at all the potential uses of an area, including the potential for mineral development. After completion of this phase BLM reports to the President its recommendation as to each area's suitability (*or lack thereof*) for inclusion in the Wilderness System. *The President then makes his recommendations to Congress, which makes the final determination.*

486 F. Supp. at 1001 n.9 (emphasis added) (dictum).

IV. The Associate Solicitor's Memorandum

The Memorandum relies on the statutory language of 43 U.S.C. § 1782 and congressional intent to support its position. We are not convinced by its arguments.

1. The Memorandum points out that whereas the Secretary makes recommendations to the President "as to the suitability or nonsuitability of each such area," 43 U.S.C. § 1782(a), the President makes recommendations to Congress only "with respect to designation as wilderness of each such area." *Id.*, § 1782(b). The difference in language between subsections (a) and (b) is read by the Associate Solicitor to mean that Congress did not intend to require the President to submit recommendations as to unsuitable land—otherwise, Congress "surely would have selected language similar to that contained in subsection (a)." Memorandum at 2.

We believe that the language employed by Congress does not support the construction suggested. First, subsection (b) does not require the President to submit only recommendations favoring designation as wilderness, but rather recommendations "*with respect to* designation as wilderness *of each such area.*" 43 U.S.C. § 1782(b) (emphasis added). Requiring the President to make a recommendation "with respect to" "each such area" seems fully as broad as requiring the Secretary to make a recommendation for each such area as to its suitability or non-suitability. While the language in subsections (a) and (b) is not identical, the words in subsection (b) are certainly broad enough to embrace the process referred to in subsection (a), do not expressly connote a more limited intent, and the terms of (a) are identical to those used in 16 U.S.C. § 1132 which has not been construed in the manner suggested by the Associate Solicitor. In short, we can see no basis for the interpretation reached by the Associate Solicitor.

Second, we do not believe, as Interior does, that "each such area" is ambiguous. Memorandum at 4. We believe that every use of "each such area" in § 1782 has the same meaning. Although the Memorandum argues that "'of each such area' can just as easily" be construed as referring only to the areas the President recommends as "suitable for wilderness," *id.*, we disagree. First, this would require assuming that Congress meant the same phrase to have two different meanings within the space of a few sentences, a most unlikely event. Second, it would require reading "of each *such* area" as referring back to some prior point in the section where "such" areas are identified—but there is no prior reference that would give a narrow meaning to the word "such." The only possible "areas" to which "such" can refer are in § 1782(a) which, the Associate Solicitor concedes, includes all areas being studied.[14]

2. Interior believes that § 1782(c) is also ambiguous. Again, it is unlikely that Congress would intend "such areas" and "such lands," both phrases found in

[14] We would reach this conclusion even if we did not have the example of other statutes which combine both these sentences in the same paragraph. *See supra*, notes 5 & 6

§ 1782(c), to differ so radically in meaning from such subsection to subsection. Interior argues, however, that "the 'such lands' provision more appropriately refers to those lands that have been recommended to Congress for wilderness under section 603(b) . . . [They are lands] which have been determined by the President to be suitable for wilderness purposes." Memorandum at 4, 5. We cannot agree that this interpretation comports with the "broad scheme" of § 1782. *Id.* at 4. If the lands can be returned to multiple use management as soon as the President decides they are unsuitable, it is certainly possible that such use would irreparably impair the suitability of such areas for preservation as wilderness. By the time Congress had learned of the decision and acted to override it, the characteristics sought to be preserved might no longer exist.[15] The interim management provision would be frustrated by irreversible disturbances of the status quo. *See Parker* v. *United States*, 448 F. 2d 793, 797 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

3. Section 1782(b) concludes with the sentence, "A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress." The Memorandum takes the position that this demonstrates that Congress retained control only of areas which are to be designated as wilderness, not of unsuitable areas. "The logical conclusion is that no provision [for unsuitable areas] was necessary since reports on such nonsuitable areas would not be required to be sent to Congress for decision." Memorandum at 3.

The negative inference of this sentence provides, we believe, the strongest support for the interpretation urged by Interior. However, we believe that the Interior interpretation misapprehends Congress' concern. One of the express congressional purposes for the FLPMA was to reassert Congress' control over federal lands, specifically, to insure that

> the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action.

43 U.S.C. § 1701(a)(4).[16] The FLPMA repealed the President's implied authority to make withdrawals, FLPMA, § 704(a) Pub. L. No. 94-579, 90 Stat. 2792 (1976), and carefully limited the Executive's express authority to make withdrawals. *See* 43 U.S.C. § 1714. Even § 603 contains a limit on the Secretary's withdrawal authority. 43 U.S.C. § 1782(c) (mining lands). Section 1782(b) is an expression of Congress' concern that the President not make any effort to protect wilderness lands by unilateral action. It is very weak support for the argument that Congress left in the President's hands the even broader authority to determine the status of areas by failing to make a recommendation.

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[15] The rationale for preserving the character of the land is theoretically stronger, from Congress' standpoint, for areas which the President does not believe to be suitable He would not be likely to need any congressional admonition to avoid impairing the wilderness characteristics for lands which he believed suitable for wilderness designation

[16] Withdrawals, 43 U S.C § 1702(j), are the withholding of Federal land from settlement in order to limit activities and thereby maintain some particular public value, such as wilderness characteristics.

This sentence of subsection (b), on which this argument is predicated, is also found in the Wilderness Act, 16 U.S.C. § 1132, which, as noted earlier, was administered by three Presidents to require reports and recommendations to Congress on suitable and non-suitable areas. This construction, the plain reading of the statute as a whole, the other inferences to be drawn from the language of the statute and the legislative history, considerably outweigh the argument made by Interior. In short, we do not believe that this sentence can be construed in the manner suggested.

4. Interior also finds support for its position in the fact that the Secretary is required to conduct mineral surveys only for areas he considers suitable for inclusion in the wilderness system, 43 U.S.C. § 1782(a). It argues that this indicates that Congress only wanted such information on suitable areas because it would not be involved in decisions about unsuitable areas. A short answer to this is that any inference about the mineral surveys must apply equally to the President. Since it is the Secretary who conducts the surveys based on *his* assessment of what areas are suitable, Interior's logic would compel the conclusion that the President also would only be involved in decisions regarding suitable areas because those areas are the only ones for which the President would receive surveys. Obviously, the statute does not permit such a conclusion. It seems more likely that, in the interests of administrative economy, Congress directed mineral surveys of the areas that will probably end up being designated as wilderness but did not intend this to be a limit on the areas as to which the Secretary or the President should make recommendations.

5. The next rationale offered by Interior is that requiring the President to make recommendations on all areas will place the land into an administrative quasi-permanent limbo that will frustrate FLPMA's purpose. Memorandum at 5–6. This purpose, it is said, is the "expeditious" return of land to management based on multiple use. Memorandum at 6. First, this ignores the categorical directive in § 1782(c) that the land be managed to protect its wilderness characteristics "until Congress has determined otherwise." Second, it assumes that this interim management scheme requires the Secretary to act so narrowly that the land will be of no use for the long period of time that Congress has the area's future under advisement. This ignores both the provisos in § 1782(c) that provide for certain continuing uses of the land and the court interpretations that have upheld various activities in the areas. *See Rocky Mountain Oil & Gas Ass'n* v. *Andrus*, 500 F. Supp. 1338 (D. Wyo. 1980) (mining), *appeal docketed*, No. 81-1040 (10th Cir. Jan. 5, 1981)*; *Utah* v. *Andrus*, 486 F. Supp. 995 (D. Utah 1979) (access roads for timber harvesting). Further, the status of an area recommended for non-inclusion will stay in the status dictated by subsection (c) only as long as Congress wishes. It is difficult to conclude that this somehow is contrary to congressional intent.

*NOTE. In response to the Secretary's appeal in this case, the court of appeals narrowed the district court's construction of the statutory exemption for existing uses of designated lands, holding that "Congress intended to limit existing mining and grazing activities to the level of physical activity being undertaken so as to prevent impairment of wilderness characteristics" 696 F.2d 734, 749 (10th Cir. 1982) citing *Utah* v. *Andrus*, 486 F. Supp. 995 (D. Utah 1979). Ed.

6. Interior argues that the conference committee transcript indicates that Rep. Seiberling was confused and thought that proposed § 603(d) gave the *Secretary*, rather than the President, the power to release unsuitable areas. Memorandum at 9. *See supra*, n. 13. We doubt whether Rep. Seiberling was confused, not only because of his long involvement with FLPMA, *see supra*, n. 5, culminating in his being chosen as a member of the House delegation to the conference, but also because of his arguments, *see* Transcript, *supra*, at 88–97, detailing his objections to proposed § 603(d). The use of the word "Secretary" is not material to the central issue under debate and we simply cannot attach any significance to it. Nor can we agree with Interior's argument that Rep. Seiberling supported the deletion of § 603(d) "even after recognizing that by such deletion the executive branch could release the land without Congressional approval." Memorandum at 9. The Transcript seems to us to mean just the opposite—that Rep. Seiberling supported the deletion of § 603(d) because he did not want the Executive Branch to be able to bypass congressional action on this subject. Transcript, *supra*, at 94. The quoted language simply does not support the significance attached to it by the Associate Solicitor.

Finally, Interior argues that since § 603(b) already gave the President the power to release unsuitable land, the purpose of § 603(d) was to give Congress the authority to override that release. Deletion of § 603(d), therefore, is construed to mean that Congress did not want to exercise this review authority and left release to the President's unfettered discretion. We disagree. Interior's entire argument is based on the premise with which we are unable to agree, that § 603(b) gives the President release authority. For the reasons stated above, we cannot agree with Interior's reasoning.

We conclude that § 603 calls upon the Secretary to conduct a study of certain areas, to make recommendations to the President with respect thereto, and for the President to make recommendations concerning those areas to the Congress. We are unable to find any credible support for the argument that the President need not make recommendations to Congress as to some areas, but may in fact remove the land from further consideration without any congressional submission. The statute's language, its legislative history, administrative practice regarding previous legislation which is virtually identical, and judicial interpretation all lead to the conclusion that there is no implicit authority in the President to unilaterally release lands from further study merely because he believes them to be unsuitable. The President must make recommendations as to all areas studied by the Secretary and he must await Congress' decision as to their ultimate fate.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

The President's Power to Impose a Fee on Imported Oil Pursuant to the Trade Expansion Act of 1962

The President has authority under § 232(b) of the Trade Expansion Act of 1962 to impose a license fee directly on foreign oil in order to restrict its importation in the interest of national security. However, the case law casts doubt on the President's authority to act under § 232(b) when the impact of his action falls only remotely and indirectly on imported articles, as was the case when President Carter sought in 1980 to implement a program designed primarily to restrict domestic consumption of gasoline.

Prior to imposing a license fee on oil imports under § 232(b), the President is required to make certain findings, based on an investigation by the Secretary of Commerce, relating to the effects on the national security of oil imports, and to issue a proclamation.

January 14, 1982

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

You have asked this Office to provide you with a preliminary and summary review concerning the President's authority under § 232(b) of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 (1976 ed. & Supp. IV 1980), to impose a fee on imported oil. Specifically, you have asked whether such authority can be exercised under that section of the Act and, if so, the proper procedures by which it can be invoked. Based upon our preliminary analysis, we are of the view that the President has such authority and may exercise it by presidential proclamation based upon certain findings.

A. The Statute

Section 232(b) of the Act provides that if the Secretary of Commerce[1] finds that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President is authorized to

> take such action, and for such time, as he deems necessary to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not so threaten to impair the national security.

[1] This responsibility was transferred to the Secretary of Commerce from the Secretary of the Treasury pursuant to § 5(a)(1)(B) of Reorganization Plan No. 3 of 1979, 3 C.F.R. 513 (1979 Comp.).

The Secretary, upon his own motion or at the request of the head of any department or agency, is directed by this section to make an "appropriate investigation" in the course of which he must consult with the Secretary of Defense and "other appropriate officers of the United States" to determine the effects on the national security of imports of the subject article. The Secretary is further instructed that "if it is appropriate," he shall give reasonable notice, hold public hearings, and otherwise give interested parties an opportunity to present information and advice relevant to his investigation.

Section 232(c) of the Act provides the President and the Secretary with guidance as to some of the factors to be considered in implementing § 232(b). "[W]ithout excluding other relevant factors," this section directs the Secretary and the President to consider such factors as domestic production of the article necessary for national defense needs, the capacity of domestic industries to meet such requirements, and, generally, the availability of materials and services necessary to meet national security requirements. This section further provides:

> In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

Power under § 232(b) and its predecessors[2] has frequently been exercised in the context of presidential proclamations designed to restrict the importation of petroleum and petroleum products. Thus in 1959 President Eisenhower, having been advised that crude oil products were being imported in such quantities and under such circumstances as to threaten the national security, imposed a system of quotas on the importation of petroleum and petroleum products. Presidential Proclamation No. 3279, 3 C.F.R. 11 (1959–1963 Comp.). Thereafter, Presidents Kennedy, Johnson, and Nixon each amended the quota program by raising the permissible quota levels. *See* proclamations cited at 19 U.S.C. § 1862 note.

B. Authority to Impose Import Fees

The authority of the President to impose a fee on imported oil pursuant to the Act was upheld by the Supreme Court in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976). In that case, the Secretary of the

[2] Section 232(b) was originally enacted by Congress as § 7 of the Trade Agreements Extension Act of 1955, ch 169, 69 Stat. 162, 166, and amended by § 8 of the Trade Agreement Extension Act of 1958, Pub. L. No. 85-686, 72 Stat 673, 678.

Treasury, acting pursuant to § 232(b), had initiated an investigation "to determine the effects on the national security of imports of petroleum and petroleum products." *Id.* at 553. Although § 232(b) directs the Secretary "if it is appropriate [to] hold public hearings or otherwise afford interested parties an opportunity to present information and advice" as part of such an investigation, the Secretary found that such procedures would interfere with "national security interests" and were "inappropriate" in this case. *Id.* at 554. The investigation therefore proceeded without any public hearings or submissions from interested non-governmental parties. *Id.*[3]

On January 14, 1975, ten days after the Secretary initiated his investigation, he reported to President Ford that prior measures under § 232(b) had not solved the problem of the Nation's dependence on foreign oil and concluded

> crude oil . . . and related products . . . are being imported into the United States in such quantities . . . [and] under such circumstances as to threaten to impair the national security.

426 U.S. at 554.

On the basis of these findings, the President issued a proclamation on January 23, 1975, which, *inter alia,* imposed a "supplemental fee" on all imported oil. Presidential Proclamation No. 4341, 3 C.F.R. 431 (1971–1975 Comp.). The fee was initially $1 per barrel for oil entering the United States on or after February 1, 1975, but was scheduled to be raised to $2 per barrel for oil entering after March 1, 1975, and to $3 per barrel for oil entering after April 1, 1975.

Four days after Proclamation No. 4341 was issued it was challenged by eight states, 10 utility companies, and a Congressman in the United States District Court for the District of Columbia, who alleged that the imposition of the fees was beyond the President's constitutional and statutory authority, and that the fees were imposed without the necessary procedural steps having been taken. The district court ruled that § 232(b) was a valid delegation to the President of the power to impose license fees on oil imports, and that the procedures followed by the Secretary in imposing the fees had fully conformed to the requirements of the statute. The Court of Appeals for the District of Columbia Circuit reversed, holding that § 232(b) did not authorize the President to impose a license fee scheme as a method for adjusting imports because, in its view, the Act authorized only the use of "direct" controls, such as quotas, and did not encompass license fees. The Supreme Court, in turn, reversed the court of appeals, holding that § 232(b) authorized the implementation of import fees and stating:

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[3] The Secretary had solicited the views of the Attorney General on this subject. In an opinion dated January 14, 1975, the Attorney General determined that, under the statute and Treasury Regulations, the public notice and comment provisions could be "varied or dispensed with in emergency situations or when, in [the Secretary's] judgment, national security interests require. . . ." Opinion of Attorney General William B Saxbe, 43 Op Att'y Gen No. 3 (Jan. 14, 1975) at 4. This opinion was also based in part on the fact that the Secretary proposed to follow the pattern of regulating oil imports by amending Proclamation No 3279, 3 C F R. 11 (1959–1963 Comp). The findings of that original proclamation had, by that time, "been sanctioned by Congress' failure to object to the President's proceeding on that basis repeatedly during the past 15 years" to counter the threat of oil imports. Because Proclamation No 3279 already had "been amended at least 26 times since its issuance in 1959," *id.* at 3, citing 19 U S C § 1862 note, the Attorney General concluded that no new findings were necessary.

> Taken as a whole then, the legislative history of § 232(b) belies any suggestion that Congress, despite its use of broad language in the statute itself, intended to limit the President's authority to the imposition of quotas and to bar the President from imposing a license fee system like the one challenged here. To the contrary, the provision's original enactment, and its subsequent reenactment in 1958, 1962, and 1974 in the face of repeated expressions from Members of Congress and the Executive Branch as to their broad understanding of its language, all lead to the conclusion that § 232(b) does in fact authorize the actions of the President challenged here. Accordingly, the judgment of the Court of Appeals to the contrary cannot stand.

426 U.S. at 570–71.

Although the Court upheld the President's power under § 232(b) to affect the price of imports, as well as their quantity, its opinion ended on a note of caution, stating as follows:

> A final word is in order. Our holding today is a limited one. As respondents themselves acknowledge, a license fee as much as a quota has its *initial and direct impact on imports*, albeit on their price as opposed to their quantity. Brief for Respondents 26. As a consequence, our conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by § 232(b) in no way compels the further conclusion that *any* action the President might take, as long as it has even a remote impact on imports, is also so authorized.

426 U.S. at 571 (emphasis added).

C. "Indirect" Import Restrictions

In 1980, President Carter sought to use his authority under the Act in conjunction with authority derived from the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751–760a (1976 ed. & Supp. IV 1980), to implement a program designed to decrease domestic consumption of gasoline. Presidential Proclamation No. 4744, 3 C.F.R. 38 (1980 Comp.). Although styled as a "petroleum import adjustment program," the program was intended and designed "to ensure that the burden of the crude oil fee [fell] on gasoline," and not on such products as home heating oil. This was accomplished through imposition of a "gasoline conservation fee" which applied irrespective of whether the gasoline was refined from domestic or imported crude oil.

The decision to impose the fee on gasoline proceeded after the requisite investigation and finding by the Secretary of the Treasury that oil imports were entering the country "in such quantities and under such circumstances as to threaten to impair the national security." 44 Fed. Reg. 18818 (1979).

This Office was consulted about the proposed fee in January 1980. Memoranda memorializing conversations with Department of Energy and Office of Management and Budget officials expressed concerns that the Act, by itself, could not authorize imposition of a system for allocating to domestic producers of gasoline a tax on foreign crude. Although we recognized that the President clearly had power to adjust imports under § 232(b) by establishing quotas or affecting import prices, we also noted that the Supreme Court's language in the *Algonquin* decision had distinguished between import fees, which have an "initial and direct impact" on imports, and actions with only "a remote impact on imports." Based on this decision and on the legislative history of the Act, we questioned that the President's powers under § 232(b) encompassed measures that applied indirectly to the imported article itself. These doubts notwithstanding, this Office eventually approved the final version of Proclamation No. 4744 as to form and legality. As noted, that version relied for the President's authority not only on § 232(b) of the Act but also on provisions of the Emergency Petroleum Allocation Act of 1973.

The Petroleum Import Adjustment Program (PIAP), set in place by Proclamation No. 4744, was challenged in court on the ground that in imposing it the President had exceeded his authority under the Act. *Independent Gasoline Marketers Council, Inc.* v. *Duncan,* 492 F. Supp. 614 (D.D.C. 1980). After an extended discussion of the mechanics of PIAP, the intent behind it and its predictable impact, the district court, focusing on the Supreme Court's warning in *Algonquin* held:

> In *Algonquin,* the Supreme Court indicated that TEA [Trade Expansion Act] does not authorize "any action the President might take, as long as it has even a remote impact on imports." Any possible benefits of the PIAP on levels of oil imports are far too remote and indirect for the TEA alone to support the program. The remoteness of the program's effect on imports is apparent from three factors. First, the quantitative impact of the program on import levels will admittedly be slight. Second, the program imposes broad controls on domestic goods to achieve that slight impact. Third, Congress has thus far denied the President authority to reduce gasoline consumption through a gasoline conservation levy. PIAP is an attempt to circumvent that stumbling block in the guise of an import control measure. TEA alone does not sanction this attempt to exercise authority that has been deliberately withheld from the President by the Congress.

492 F. Supp. at 618 (footnote omitted).[4]

Subsequent to the district court's decision in *Independent Gasoline Marketers Council, Inc.* v. *Duncan, supra,* Congress terminated PIAP by legislation passed

[4] The government also argued that the President's authority could be derived from the Emergency Petroleum Allocation Act, 15 U S C. §§ 751–760a The court rejected this argument on the ground that the President had not complied with procedures required by that Act *Id* at 619

over the President's veto. Pub. L. No. 96-264, § 2, 94 Stat. 439. This foreclosed substantive appellate action in the case.

D. Conclusion

On the basis of the *Algonquin* decision it is clear that the President has authority under § 232(b) to impose a direct fee on imported oil. Both the cautionary language in *Algonquin*, and the district court's decision in the *Independent Gasoline Marketers Council* case indicate, however, that his authority may be limited to the power to impose fees directly on imported articles. 426 U.S. 548, 571; 492 F. Supp. 614, 618–19. The President's authority to act pursuant to that section becomes increasingly suspect as the impact of his action falls less directly on the imported articles and increasingly affects domestic products. This interpretation is also supported by the legislative history of § 232(b).

Based on the *Algonquin* case, we are confident that a $2 per barrel import fee on imported oil could be imposed by the President pursuant to his authority under the Act, provided it applied solely to imported petroleum or petroleum products. This fee could be imposed by a presidential proclamation similar to Proclamation No. 4341 of President Ford, *supra*. The proclamation could also specify which agency would be responsible for its implementation.[5]

The 1975 Opinion of Attorney General Saxbe advising the Secretary of the Treasury with respect to the necessary procedures for imposing an import fee under § 232(b) stated alternatively (a) that the Secretary would be justified in following his own regulations in deciding that an emergency situation existed such that notice and hearings would be "inappropriate"[6] were he to conduct an investigation, and (b) that an investigation and further finding with respect to the impact of oil imports on the national security were unnecessary, at least in the context of a proposed amendment to the series of programs that had been in existence since President Eisenhower issued Proclamation No. 3279 in 1959.

Although we agree that the harmful impact of oil imports on the national security is well established by prior findings under § 232(b), and further action under that section is not likely to be questioned on this basis, we note that the Act does specifically state that the Secretary shall make "an appropriate investigation, in the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense and other appropriate officers of the United States. . . ." This procedure was followed prior to President Ford's

[5] The department assigned to implement the proclamation would be required to consider the possible application of the National Environmental Policy Act, 42 U.S.C. §§ 4321–4361 (Supp. IV 1980) (NEPA) to its actions taken in connection with the import fee program. Based upon our preliminary review, we do not believe that the Secretary, in connection with an investigation and recommendation concerning the necessity for a § 232(b) proclamation, or the President, in connection with his issuance of such a proclamation, would be required by NEPA to file an environmental impact statement.

[6] Regulations issued by the Secretary of Commerce after § 232(b) functions were transferred to him, *see* Note 1, *supra*, contain similar discretion for him to dispense with public participation in the conduct of any § 232 investigation conducted 15 C.F.R. Part 359 (1981 ed.).

imposition of import fees in Proclamation No. 4341 in 1975 and was recounted in the Supreme Court's opinion in *Algonquin* upholding the President's power to impose the fees. Because this approach has survived court challenge and because it would be permissible and not unreasonably difficult or time-consuming to follow the current, applicable Department of Commerce regulations, 15 C.F.R., Part 359 (1981), we recommend that that Department conduct a new, nonpublic investigation to support any proclamation imposing new import fees. Such an investigation, like the one completed in only ten days in 1975, would, we believe, withstand a legal challenge. Based on the results of such an investigation and the report of the Secretary, the President could reasonably make the requisite findings[7] set forth in §§ 232(b) and (c) of the Act and issue a proclamation imposing import fees.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[7] Because of the cautionary note in the *Algonquin* decision and the district court's holding in *Independent Gasoline Marketers Council, Inc. v Duncan*, we would counsel against the President's premising the issuance of a proclamation on a finding that the import fee would provide revenues which could be used for a national security purpose, such as to defray the expense of filling the Strategic Petroleum Reserve This might be misconstrued as the primary purpose for the proclamation, thus subjecting it to challenge on the ground that it was not truly intended by the President "to adjust the *imports* of [petroleum] . so that such *imports* will not threaten to impair the national security . ," as required by § 232(b) (emphasis added) Nevertheless, we recognize that the import fee would generate revenues, and we see no impediment to Congress' authorizing the Executive to apply these additional revenues for such a national security purpose.

Removal of Presidentially Appointed Regents of the Uniformed Services University of the Health Sciences

There is no statutory limitation on the President's power to remove his appointees to the Board of Regents of the Uniformed Services University of the Health Sciences, and any such limitation would in any event be unconstitutional in light of the purely executive functions performed by these individuals.

January 18, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to your inquiry as to whether the President has the power to remove the persons appointed by him to the Uniformed Services University of Health Sciences pursuant to 10 U.S.C. § 2113(a)(1) (1976). It is our conclusion that the President has this power.

The Uniformed Services University of Health Sciences (University), authorized to grant appropriate advanced degrees, has been established by 10 U.S.C. § 2112. The business of the University is conducted by a Board of Regents (Board). 10 U.S.C. § 2113(a). The Board consists of nine persons appointed by the President with the advice and consent of the Senate (10 U.S.C. § 2113(a)(1)), and several ex officio members. 10 U.S.C. § 2113(a)(2)–(4), (d). The members of the Board other than the ex officio members, *i.e.*, the persons appointed to the Board by the President pursuant to § 2113(a)(1), have staggered six-year terms; members appointed to fill a vacancy are appointed for the remainder of the unexpired term. § 2113(b).

We believe the President has the power to remove the presidentially appointed members of the Board for several reasons. First, according to the basic rule of construction announced by James Madison during the first session of the First Congress, "the power of removal result[s] by a natural implication from the power of appointment." 1 Ann. Cong. 496. The courts have consistently upheld the general validity of that rule. *Matter of Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839); *Blake* v. *United States*, 103 U.S. 227, 231 (1880); *Myers* v. *United States*, 272 U.S. 52, 119 (1926).

Second, there is no indication in the statute that Congress intended to limit the President's removal power. The provision that the presidential appointees to the Board shall serve staggered six-year terms is not indicative of a congressional intent that they have the right to serve out their terms. It has been established

since *Parsons* v. *United States*, 167 U.S. 324, 338 (1897), that a provision for a term merely means that the officer cannot serve beyond his term without reappointment which would subject him to the scrutiny of the Senate. In other words, a provision for a term is an act of limitation and not of a grant.

Third, assuming, *arguendo*, that it were possible to find a congressional intent to limit the President's removal power in the premises, such limitation would be clearly unconstitutional in view of the functions vested in the Board. It has been firmly established that the President's power to remove purely executive officers follows the power to appoint and cannot be limited by Congress. *Myers* v. *United States, supra*. Congressional limitations on the power of the President to remove his appointees have been upheld only in the cases of officers performing quasi-judicial or quasi-legislative functions. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); *Wiener* v. *United States*, 357 U.S. 349 (1958). The operation of a University, however, is a purely executive function, and cannot under any circumstances be considered to have a quasi-judicial or quasi-legislative character.

LARRY L. SIMMS
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Applicability of Certain Cross-Cutting Statutes to Block Grants Under the Omnibus Budget Reconciliation Act of 1981

Two block grant programs created by the Omnibus Reconciliation Act of 1981 are subject to four "cross-cutting" statutes barring discrimination on grounds of race, sex, handicap, and age, and activities funded under those programs are subject to all of the regulatory and paperwork requirements imposed by those statutes.

The language and legislative history of the four nondiscrimination laws at issue reveal that they were intended by Congress to be statements of national policy broadly applicable to all programs or activities receiving federal financial assistance. Therefore, in the absence of a clear expression of congressional intent to exempt a particular program from the obligations imposed by the four cross-cutting laws, those laws will be presumed to apply in full force

While the general purpose of the block grant concept is to consolidate and "defederalize" prior categorical aid to state and local governments, and to lighten federal regulatory burdens, there is no suggestion in the legislative history of the two specific block grants at issue here that Congress intended to exempt programs or activities funded by them from the obligation not to discriminate embodied in the four cross-cutting statutes.

January 18, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

I. Introduction

This responds to your request for our opinion concerning the applicability of four "cross-cutting"[1] laws to two specific block grant programs created by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 [the Reconciliation Act]. Although numerous cross-cutting laws are potentially applicable to the several block grants created by the Reconciliation Act, you have inquired specifically about the applicability of four nondiscrimination statutes to two block grants administered by the Departments of Health and Human Services (HHS) and Education, respectively. These four nondiscrimination statutes are:

(1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d;

[1] The use of the term "cross-cutting" refers to the broad applicability of the particular statutes discussed herein to a wide range of programs or activities receiving federal financial assistance. Because our analysis relies heavily on the legislative history of these four statutes and the public policy reflected in them, our conclusions may not necessarily apply to other cross-cutting statutes.

(2) Title IX of the Education Amendments Act of 1975, 20 U.S.C. § 1681;

(3) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and

(4) The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107.

The two relevant block grants are the Social Services Block Grant and the Elementary and Secondary Education Block Grant.

These two block grants were enacted as part of the massive Omnibus Budget Reconciliation Act of 1981, an unusual statute for its length, breadth, and relatively swift enactment. The legislative breadth of the Reconciliation bill was such that some 30 committees in both Houses of Congress had jurisdiction over the bill. The Reconciliation bill adopted by the House, however, was not a product of the committees but rather was an alternative known as the Gramm-Latta amendment. The House considered the entire Reconciliation package in only two days of debate, and its vote occurred on the same day that the then 700-page Gramm-Latta amendment was made available for general distribution.[2]

The House and Senate bills required the "largest and most complicated conference in the history of the Congress." *See* 127 Cong. Rec. H5759 (daily ed. July 31, 1981) (Summary of Reconciliation Conference). In only a two-week period, 184 House conferees and 69 Senate conferees held a series of 58 "miniconferences." The Reconciliation Act that resulted is over 570 pages long, *see* 95 Stat. 357-933, and although it is primarily a "budget" act, it necessarily makes changes in substantive law in the numerous areas it addresses.[3]

The unique and complex nature of the legislation and its unprecedented legislative history are noted because they are relevant to our analysis of the Reconciliation Act and congressional intent with respect to the four cross-cutting statutes. Your memorandum expresses the preliminary view that the four nondiscrimination statutes do not apply to the Social Services and the Elementary and Secondary Education Block Grants. This conclusion is based on several considerations: (1) the fundamental intent of Congress in enacting block grants was to free the states from all federal encumbrances and regulations not specifically imposed by the statutes; (2) as of the date of your memorandum, the block-grant regulations that had been issued by the agencies responsible for administering them were silent on applicability of the four nondiscrimination statutes to the two block grants in question; (3) six of the eight block grants applicable to the Departments of Education and Health and Human Services explicitly incorporate

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[2] As a result of the dimensions of the legislation and its rapid movement through the legislative process, some opponents expressed strong criticism over the process as well as expressing considerable confusion over some aspects of the package *See, e.g.*, 127 Cong. Rec. H3917 (daily ed. June 26, 1981) (remarks of Rep. Foglietta) ("I would not claim to know all that is in this volume of 700 pages, we only received shortly before noon today I have hardly had a chance to read it."), *id.* H3920 (remarks of Rep. Panetta) ("We are dealing here with over 250 programs, and we are dealing with these changes in this amendment with no consideration, no committee hearings, no consultation, no debate, and no opportunity to offer amendments to this kind of broad substitute.") *See also id.* H3924 (remarks of Rep. Frenzel, supporting Gramm-Latta II) ("All of us have been embarrassed by the tardiness of the receipt of the amendment and by the untidiness of the process I would invite each Member here . to raise his or her sights above the indignity of a late, somewhat-flawed, hard-to-follow bill ")

[3] The Reconciliation Act affected some 250 separate statutes. *See* 127 Cong. Rec. S8988 (daily ed. July 31, 1981) (remarks of Sen. Domenici)

nondiscrimination provisions, suggesting that the nondiscrimination requirements should not apply to the two block grants that omit them; (4) Congress itself deleted nondiscrimination provisions from the original Administration proposals; and (5) except for Section 504, nonapplicability of the nondiscrimination provisions, which are largely redundant of constitutional or other statutory protections or are of minimal effect, will reduce the regulatory and paperwork aspects of enforcement of these rights without affecting to any significant extent the substantive obligation not to discriminate.

The following additional views have also been expressed and we have considered them in our analysis:

(1) The Secretary of Health and Human Services "interprets existing laws against discrimination in Federally assisted programs as applying to the social services block grant." *See* Interim Final Rules for the Block Grant Programs, 46 Fed. Reg. 48,585 (October 1, 1981) (to be codified in 45 C.F.R., Parts 16, 74, and 96). While your memorandum indicated that the draft HHS regulations did not purport to settle the issue, and that the regulations were silent on the question except for the above quoted "advisory statement," the Interim Final Rules since issued articulate the view that federal regulations related to discrimination on the basis of race, color, national origin, handicap, or age are applicable to the Social Services Block Grant.[4]

(2) According to your memorandum, the legal staff of the Department of Education has expressed its view that "all cross-cutting statutes are applicable to the block grants." The Department of Education has not published regulations for the block grants.

(3) The Civil Rights Division of the Department of Justice has forwarded to us a memorandum from Stewart Oneglia, Chief of the Coordination and Review Section, to Deputy Assistant Attorney General D'Agostino. This memorandum disagrees with the position taken in your memorandum, and expresses the legal conclusion that the nondiscrimination statutes apply to the two block grants.

[4] The HHS Interim Final Rules for the Block Grant Programs, 46 Fed Reg 48,585 (Oct 1, 1981), provide as follows

> Current regulations in 45 C F.R Parts 80, 81, 84, and 90, which relate to discrimination on the basis of race, color, national origin, handicap, or age, apply by their terms to all recipients of Federal financial assistance and therefore apply to all block grants. In particular, 45 C.F.R 80 4 and 84.5 require certain assurances to accompany applications for assistance In lieu of the assurances required by Parts 80 and 84, the Secretary will accept the assurances required by the Act to be part of the applications for the preventive health and health services, alcohol and drug abuse and mental health services, maternal and child health services, and low-income home energy assistance block grants Those assurances incorporate the nondiscrimination provisions pertinent to the block grants either specifically or as part of a general assurance that the applicant will comply with block grant requirements For the community services, primary care, and social services block grants, the States should furnish the assurances required by 45 C.F.R. 80 4 and 84 5.

(4) You have provided us with a copy of a memorandum to you from Jim Kelly of the Office of Management and Budget regarding "Applicability of Crosscutting Policy Requirements to Block Grants." That memorandum recommends that Title VI, the Age Discrimination Act, and Section 504 should be considered to apply to all block grants, and that Title IX also should be considered to apply to the Education Block.Grant. *See* note 5, *infra*.

For the reasons set forth in more detail below, we conclude that Congress evidenced no clear intent to exempt the programs or activities funded by the two block grants from the obligations imposed by the four nondiscrimination statutes.[5] In the absence of a clear indication of legislative intent to the contrary, we conclude that the block grant programs are subject to the nondiscrimination statutes.

II. The Nondiscrimination Statutes

A. Coverages and Purposes

All four of the relevant nondiscrimination statutes apply generally to programs or activities receiving "federal financial assistance." For example, Title VI, the earliest of these four nondiscrimination statutes, provides in broad terms:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance*.

42 U.S.C. § 2000d (1976) (emphasis added). The other three nondiscrimination statutes contain similar prohibitions with respect to sex (in education programs),[6] age,[7] and handicapped status.[8] The reach of these later three statutes is somewhat narrower than that of Title VI as to the programs or activities covered[9] or the kind of discrimination prohibited.[10]

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[5] Actual application of the nondiscrimination statutes to specific programs or activities may depend on individual circumstances. Since Title IX applies only to education programs, for example, its prohibition of sex discrimination may not apply to programs or activities funded by the Social Services Block Grant This memorandum assesses only whether the nondiscrimination statutes as written and interpreted apply to the two block grants on the same basis as they would to other forms of federal financial assistance

[6] [N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any education program or activity receiving Federal financial assistance* . .

20 U.S C § 1681(a) (1976) (emphasis added)

[7] [N]o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance*

42 U S.C. § 6102 (1976) (emphasis added)

[8] No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance* . .

29 U S.C.A. § 794 (1980 Supp. Pamph) (emphasis added).

[9] Title IX applies only to certain education programs.

[10] The Age Discrimination Act prohibits only "*unreasonable* age discrimination " *See* H R Conf. Rep No 670, 94th Cong., 1st Sess 56 (1975) (emphasis in original). Section 504 applies only to "otherwise qualified" handicapped individuals. 29 U.S C. § 794

(1) Title VI

The Civil Rights Act of 1964 was a comprehensive legislative program aimed at eradicating the "moral outrage of discrimination." *See* 110 Cong. Rec. 1521 (1964) (remarks of Rep. Celler). Title VI, as part of the 1964 Act, sought to achieve that goal by ensuring "once and for all that the financial resources of the Federal Government—the commonwealth of Negro and white alike—will no longer subsidize racial discrimination." *See* 110 Cong. Rec. 7054–55 (remarks of Sen. Pastore).[11] The requirement that federally assisted programs or activities be nondiscriminatory was based on Congress' power to fix the terms by which federal funds are made available, *see* 110 Cong. Rec. 7063 (1964) (remarks of Sen. Pastore), and the constitutional obligation not to discriminate. *See Regents of University of California* v. *Bakke*, 438 U.S. 265, 284 (1978); note 15, *infra*. Title VI also had roots in a "basic fairness" concept: black citizens should not be required to subsidize with their federal tax money programs or activities that discriminated against them. *See* 110 Cong. Rec. 7061 (remarks of Sen. Hart) ("we do not take money from everybody to build something, admission to which is denied to some").

Title VI represented a fundamental statement of national policy intended to apply across-the-board to all programs or activities receiving federal financial assistance. Senator Humphrey, the Senate manager of H.R. 7152, which was to become the Civil Rights Act of 1964, identified in his opening statement on the bill several needs for Title VI. He noted first that Title VI was necessary because some federal statutes actually appeared to contemplate grants to racially segregated institutions. Second, he noted that, although most federal agencies probably already had the authority to make nondiscrimination a condition of receipt of federal funds, "[e]nactment of Title VI will eliminate any conceivable doubts on this score and give express legislative support to the agency's actions. *It will place Congress squarely on record on a basic issue of national policy* on which Congress ought to be on record." Third, Title VI would "insure *uniformity and permanence* to the nondiscrimination policy." 110 Cong. Rec. 6544 (1964) (emphasis added). Finally, Senator Humphrey explained, enactment of Title VI would end the growing practice of having to debate nondiscrimination provisions each time a federal assistance program was before Congress:

> Many of us have argued that the issue of nondiscrimination should be handled in an overall, consistent way for all Federal programs, rather than piecemeal, and that it should be considered separately from the merits of particular programs of aid to education, health, and the like. This bill gives the Congress an opportunity to settle the issue of discrimination once and for all, in a uniform, across-

[11] *See also Cannon* v. *University of Chicago*, 441 U.S. 677, 704 n. 36 (1979), 110 Cong. Rec. 7058 (remarks of Sen. Pastore) ("From birth to death, in sickness and in want, in school, in job training, in distribution of surplus food, in program staffing, in job referral, in school lunch programs, and in higher education, the Negro has consistently been subjected to gross and extensive deprivation. And the Federal Government has paid the bill.").

> the-board manner, and thereby *to avoid having to debate the issue in piecemeal fashion every time any one of these Federal assistance programs is before the Congress.*

Id. (emphasis added).

The need to settle the issue "once and for all" was a repeated theme of the debate surrounding Title VI. Senator Pastore, one of two Title VI "captains" on the Senate floor, referred to past occurrences of "acrimonious debate" on nondiscrimination provisions, which had led to their defeat for fear that "if the provision prevailed, the Senate might become involved in prolonged or protracted debate, or even a filibuster, and the result might be no legislation whatever." 110 Cong. Rec. 7061. Thus, Senator Pastore explained: "It is to avoid such a situation that Title VI would constitute as *permanent* policy of the United States Government the principle that discrimination will not be tolerated. This would eliminate all the confusion and discussion that arise every time a grant bill comes before the Senate." *Id.* (emphasis added). Furthermore, explained Senator Pastore, enactment of Title VI "would also *avoid any basis for argument that the failure of Congress to adopt such nondiscrimination amendments* in connection with the particular program *implied congressional approval* of racial discrimination in that program." 110 Cong. Rec. 7062 (emphasis added).

This same theme was sounded in the House of Representatives by Representative Celler, who was the original sponsor of H.R. 7152 and also chaired the House Judiciary Committee, which had jurisdiction over the Civil Rights Act. Referring to prior attempts to enact nondiscrimination provisions as parts of individual bills, Celler explained: "Title VI enables the Congress to consider the overall issue of racial discrimination separately from the issue of the desirability of particular Federal assistance programs." 110 Cong. Rec. 2468 (1964). Furthermore, enactment of Title VI "would tend to insure that the policy of nondiscrimination would be continued in future years *as a permanent part of our national policy.*" *Id.* (emphasis added).

Thus, it is clear that Title VI was intended to address, "once and for all," racial discrimination in federally funded programs. It represented the desire both to make a statement of fundamental national policy and to avoid repeated debate over that national policy. In fact, Title VI was apparently thought to answer the contention that noninclusion of discrimination prohibitions in particular legislation amounted to endorsement of discriminatory practices. Of course, the Congress that enacted Title VI could not make it permanent in the sense of its being irrevocable. Nevertheless, it is clear that Title VI was intended to be applicable to all programs or activities receiving federal financial assistance, and it should therefore be considered inapplicable only when there is a clear indication that Congress deliberately exempted certain programs or activities from its provisions.

(2) The Other Cross-Cutting Statutes

The legislative histories of the three other nondiscrimination statutes are less illuminating. This is probably attributable to the fact that Congress had already

debated the concept behind this kind of legislation when it enacted Title VI. It is clear that Title IX, Section 504, and the Age Discrimination Act were modeled after Title VI. *See, e.g., Cannon* v. *University of Chicago*, 441 U.S. 677, 694 (1979) (Title IX patterned after Title VI); *NAACP* v. *Medical Center, Inc.*, 657 F.2d 1322, 1331 (3d Cir. 1981) (en banc) (§ 504 and Age Discrimination Act patterned after Title VI); *Brown* v. *Sibley*, 650 F.2d 760, 768 (5th Cir. 1981) ("Congress expressly modeled the discrimination prohibition contained in section 504 after the prohibitory language contained in Title VI and Title IX"). Thus, the fundamental purpose of legislation like Title VI, which had been thoroughly debated when Title VI itself was adopted, was not a particular focus of the debates. Instead, Congress devoted its attention to possible areas of coverage. For example, the Title IX debate focused not so much on the need to have a generally applicable prohibition of sex discrimination in federally funded education programs but instead on which institutions would be subject to its proscriptions—especially whether or to what extent religious, military, and single-sex-undergraduate institutions would be covered.

Nevertheless, it is clear that Title IX was intended to operate like Title VI, although it would apply in all aspects only to certain educational institutions. Thus, Representative Green, the floor manager of H.R. 7248, explained that Title IX (then Title X in the draft bill) was "really the same as the Civil Rights Act [Title VI] in terms of race." *See* 117 Cong. Rec. 39256 (1971). And Senator Bayh, who sponsored the draft language in the Senate bill, S. 659, explained that Title IX was intended to have comprehensive application to the covered institutions, in order to remedy "one of the great failings of the American educational system . . . the continuation of corrosive and unjustified discrimination against women." 118 Cong. Rec. 5803 (1972). Like Title VI, Title IX also reflected the "fairness" notion that American taxpayers should not be required to subsidize, through their taxes, programs, or activities that discriminated against some of them. *See* 117 Cong. Rec. 39257 (remarks of Rep. Green quoting Secretary of HEW quoting President Nixon) ("Neither the President nor the Congress nor the conscience of the Nation can permit money which comes from all the people to be used in a way which discriminates against some of the people."); *id.* at 39252 (remarks of Rep. Mink) ("Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.").

That Section 504 has roots in Title VI and Title IX is also clear. Although Section 504 of the 1973 Rehabilitation Act was enacted with virtually no legislative history, the next year the Senate Labor and Public Welfare Committee included the following statement in the legislative history of the Rehabilitation Act Amendments of 1974:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d–1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). The section therefore

> constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap.

S. Rep. No. 1297, 93d Cong., 2d Sess. 39–40 (1974).[12] Thus, like Title VI and Title IX, Section 504 represents a broad statement of national policy intended to have application across-the-board. As explained in the 1974 Senate Report: "It is intended that Sections 503 and 504 be administered in such a manner that a *consistent, uniform, and effective Federal approach to discrimination against handicapped persons* would result." *Id.* at 40 (emphasis added).

The last of the nondiscrimination provisions under consideration is the Age Discrimination Act of 1975, which was enacted as part of the Older Americans Amendments of 1975, a comprehensive package directed to problems of the elderly. Representative Brademas, the House manager of the Amendments, explained of the House version: "title III . . . will clearly enunciate national policy that discrimination against the elderly based on their age will not be tolerated. . . ." 121 Cong. Rec. 9212 (1975). The Act was intended to have broad coverage and to apply not just to the elderly but to "age discrimination at all age levels, from the youngest to the oldest." *Id.* The broad applicability of the Age Discrimination Act was evidenced by explicit reference to its application to the most unrestricted kind of federal funding—general revenue sharing. *See* 42 U.S.C. § 6101 (1976) ("It is the purpose of this chapter to prohibit unreasonable discrimination on the basis of age in programs or activities receiving Federal financial assistance, *including* programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.).") (emphasis added).

Although the statute was "modeled on Title VI," *see* H.R. Conf. Rep. No. 670, 94th Cong., 1st Sess. 56 (1975), its coverage is less extensive than Title VI in one significant way: it prohibits only "unreasonable" age discrimination. Furthermore, Congress provided for delayed implementation of regulations as well as for preparation of an age-discrimination study, because of concerns that it had too little information about either the extent or the "reasonableness" of age discrimination in federally assisted programs. *See* 121 Cong. Rec. 37735 (1975) (remarks of Senator Eagleton). Nonetheless, as to "unreasonable" age discrimination, the Age Discrimination Act was modeled after Title VI and was intended to be a statement of national policy. *See* 121 Cong. Rec. 9212 (remarks of Rep. Brademas).

(3) General Application of the Four Cross-Cutting Statutes

The legislative histories of all four nondiscrimination statutes thus evidence a congressional intent to implement as national policy their prohibitions against

[12] Although subsequent comments are not a substitute for statements of legislative intent at the time of enactment, *see Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979), this statement has been regularly referred to by the courts, and § 504 is consistently construed as having its roots in Titles VI and IX. *See, e.g., Pushkin* v *Regents of U. of Colo.*, 658 F.2d 1372 (10th Cir. 1981).

discrimination. While the later statutes have less extensive histories, it is clear that Title VI was intended to end the need for a program-by-program debate about the prohibition of racial discrimination. There is ample basis for concluding that Congress was implementing that same intent with the other three statutes by choosing Title VI as the model for those statutes and by enacting essentially the same broadly applicable language. Nothing in the history suggests that Congress intended later Congresses to be required to specify the applicability of these statutes to individual funding legislation—in fact, the evidence is to the contrary.

That the statutes have a broad sweep is also clear from their application not just to federal categorical programs, but to all "Federal financial assistance," "by way of *grant, loan,* or *contract* other than a contract of insurance or guaranty," *see* 20 U.S.C. § 1682; 42 U.S.C. § 2000d–1; 42 U.S.C. § 6103(a)(4) (adding "entitlement" to list) (emphasis added). *See also* 29 U.S.C. § 794a(2) (providing that remedies, procedures and rights set forth in Title VI shall be available under § 794). In fact, the Age Discrimination Act makes clear that the term "Federal financial assistance" includes general revenue sharing, *see* 42 U.S.C. § 6101, a form of federal assistance that is essentially unrestricted as to the purposes for which it may be used.

Thus, the statutes are fundamental pieces of legislation intended to remedy perceived wrongs to those discriminated against on the basis of race, sex, handicapped status, and age. Their language and legislative histories evidence a broad purpose to be given effect through across-the-board application whether or not a particular program specifically incorporates the nondiscrimination statutes.

B. Enforcement Procedures

To achieve the goal of ending discrimination on the bases prohibited by the statutes, Congress has provided for an administrative scheme of enforcement, which favors conciliation over termination of funds and is designed to provide certain safeguards for fund recipients. *See* 110 Cong. Rec. 7066 (1964) (remarks of Sen. Ribicoff). Thus, the statutes direct the issuance of rules or regulations of general applicability and prohibit termination of funds until the recipient is informed of its failure to comply and the administrative agency has determined that voluntary compliance cannot be secured. Termination may occur only after filing a report with Congress and the expiration of a 30-day waiting period after filing such a report. Termination is limited to the particular noncomplying program. *See* 20 U.S.C. § 1682; 42 U.S.C., § 2000d–1; *id.*, § 6104.[13] Each agency that administers federal financial assistance issues clarifying regulations as to the relevant nondiscrimination statutes, setting forth the discriminations prohibited, assurances required, and compliance information. *See, e.g.*, 45 C.F.R., Parts 80, 81, 84, 90 (1980). By Executive Order 12250, the Attorney General is directed to coordinate implementation and enforcement of Title VI, Title IX, Section 504, and any other provision prohibiting discrimination in federally assisted programs.

[13] By express provision, Section 504 is to be administered under the same terms as Title VI.

When Congress has actually specified that the nondiscrimination provisions apply to particular legislation extending financial assistance, it often has also provided for a different or more detailed administrative enforcement mechanism than is provided in the underlying cross-cutting statutes, or has added to the categories of prohibited discriminations. *See, e.g.*, State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C.A. § 6716 (1982); Community Development Block Grant of 1974, 42 U.S.C. § 5309 (1976); Omnibus Crime Control and Safe Streets Act of 1968, as amended, *id.* § 3789d (1982). These differences may account for Congress' making specific reference to the nondiscrimination statutes. Thus, specific reference to the nondiscrimination statutes is not necessarily an indication that Congress believes the statutes to be otherwise inapplicable.[14]

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[14] The State and Local Fiscal Assistance Act provides:

> No 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 of a State government or unit of local government, which government or unit receives funds made available under subchapter I . . . Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 [42 U.S C 6101 et seq.] or with respect to an otherwise qualified handicapped individual as provided in section [504] shall also apply

31 U S.C. § 1242(a)(1) (1976).

The inclusion of a reference to the Age Discrimination Act in this revenue sharing act illustrates that specific reference to a cross-cutting statute does not necessarily reflect a congressional determination that the cross-cutting statute is otherwise inapplicable To the contrary, the Age Discrimination Act itself explicitly provides that "federal financial assistance" includes revenue sharing under the Fiscal Assistance Act and would have been applicable in any event. The Fiscal Assistance Act did establish different enforcement procedures and broader applicability, however As understood by the sponsor of the 1976 nondiscrimination amendment to the Fiscal Assistance Act, the prohibition against age discrimination in the revenue sharing act had independent significance

> This provision is similar to the provisions of the Age Discrimination Act of 1975 That Act prohibits "unreasonable" age discrimination in programs and activities receiving Federal financial assistance, including revenue sharing funds. The Committee intends that its amendment to the Revenue Sharing Act be considered *a separate and independent statutory right* that age discrimination not be practiced by governments receiving revenue sharing funds. It is important that the Committee amendment be interpreted in this manner, rather than be viewed strictly as an endorsement of the Congress' actions in the 1975 Age Discrimination Act Unlike the 1975 Act, the Committee bill would prohibit age discrimination in all activities or programs of revenue sharing recipients, rather than merely those in those programs and activities receiving revenue sharing funds As indicated above, the Committee adopted this approach in its bill because of the serious problem of the fungibility of funds Also, unlike the 1975 Act, the Committee measure establishes more detailed and automatic suspension and termination procedures, and does not delay effectiveness of the provision until January 1, 1979 Because of these significant distinctions, in terms of the broadness of the prohibition and the remedies provided, it is imperative that the Committee bill not be subject to a limited or narrow interpretation based on the 1975 Age Discrimination Act Rather, *the Committee bill and the 1975 legislation are to be viewed as independent yet complementary measures*. Both seek to insure the elimination of unreasonable age discrimination which is federally financed, but they nevertheless establish different approaches to the overall prohibition as well as to the enforcement mechanism The Committee intends that through cooperation agreements (discussed hereinafter) the various Departments responsible for enforcement under the two laws will coordinate, to the greatest extent possible, those enforcement efforts.

H.R Rep. No 1165, 94th Cong., 2d Sess 98 n.4a (1976) (additional views of Rep. Robert F Drinan) (emphasis added).

It also appears that inclusion of a nondiscrimination provision in the Safe Streets Act need not be interpreted to signify a congressional belief that Title VI would otherwise be inapplicable *See* H. Rep. No. 249, 93d Cong., 1st Sess. 7 [1973]·

> For the first time the Act itself contains provisions protecting civil rights and civil liberties. In addition to deleting prohibitions against conditioning a grant on the adoption by an applicant of a quota system or other program to achieve racial balance, the bill *reiterates* the anti-discrimination requirements of title VI of the Civil Rights Act of 1964, but also prohibits discrimination on the basis of sex The bill strengthens the ban on discrimination by *making clear that the fund cut-off provisions of section 509 of the Act and of title VI of the Civil Rights Act of 1964 both apply*, and that appropriate civil actions may be filed by the Administration and that "pattern and practice" suits may be filed by the Attorney General.

(Emphasis added)

C. Summary

The statutory language and legislative histories of the four nondiscrimination statutes reveal that the statutes are congressional statements of fundamental national policy intended to have across-the-board application not just to federal categorical programs but to nearly all forms of federal financial assistance, including grants, loans, and most contracts. While Title VI and Title IX might be said to prohibit discrimination that is also prohibited by the Constitution, it is not clear that they are merely redundant of existing rights.[15] In any event, Section 504 and the Age Discrimination Act prohibit discrimination not otherwise prohibited by the Constitution. Additionally, the four statutes provide for administrative means of enforcement that are designed to provide certain safeguards while also accomplishing the objective of ending discriminatory activities. *See* 110 Cong. Rec. 7066 (1964) (remarks of Sen. Ribicoff).

Thus, the statutes stand as important components of the national body of antidiscrimination law, intended to apply to all programs or activities receiving federal financial assistance without being explicitly referenced in subsequent legislation. They should therefore be considered applicable to all legislation authorizing federal financial assistance—which includes not only grants and loans, but also most contracts—unless Congress evidences a contrary intent.

III. The Block Grants

A. Background

Federal funding has traditionally been in the form of categorical grants, which can be used only for specific programs designated by Congress and as directed by usually detailed federal regulations.[16] Two other forms of federal funding, block grants[17] and general revenue sharing, provide for less restrictive use of federal funds by the states. Block grants generally consolidate several categorical programs into "federal payments to state or local governments for generally

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[15] Language in the *Bakke* case suggests that Title VI may be coextensive with constitutional guarantees. *See Regents of University of California* v. *Bakke*, 438 U.S. 265, 284 (1978) ("[e]xamination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution"). In *Lau* v *Nichols*, 414 U.S. 563 (1974), however, the Supreme Court had applied a "discriminatory-effects" test under Title VI. It has been suggested that *Bakke* overruled *Lau sub silentio*, thus requiring proof of discriminatory intent, *see Washington* v *Davis*, 426 U.S. 229, 239 (1976), but the Court has declined to rule whether Title VI incorporates the constitutional standard. *See Board of Education* v. *Harris*, 444 U.S. 130, 149 (1979). Some courts therefore have applied an "impact-only" analysis to suits brought under the statutes. *See NAACP* v *Medical Center, Inc.*, 657 F.2d at 1331 (3d Cir. 1981) (en banc) (Title VI, § 504, and Age Discrimination Act).

[16] "What truly characterizes a categorical grant is that it is administered by the Federal bureaucracy, and it is *this* aspect of categorical programs that President Reagan finds most objectionable." 127 Cong. Rec. S6821 (daily ed. June 24, 1981) (remarks of Sen. Hatch).

[17] Block grants are not new to the Budget Reconciliation Act. *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §§ 3701–3797; Community Development Block Grant of 1974, 42 U.S.C. §§ 5301–5320. *See generally Block Grants: An Old Republican Idea*, 1981 Cong. Q. 449 (Mar. 14, 1981). In fact, the Social Services Block Grant amends Title XX of the Social Security Act, 42 U.S.C. § 1397, an existing block grant. Although Congress did not explicitly incorporate nondiscrimination provisions in the earlier version of Title XX, it has been assumed that nondiscrimination provisions apply to programs or activities receiving Title XX assistance. *See Brown* v. *Sibley*, 650 F.2d 760, 769 (5th Cir. 1981) (§ 504 inapplicable because no allegation that two programs funded by Title XX were discriminatorily managed).

specified purposes, such as health, education, or law enforcement. The money must be spent on programs in the general area, but state or local officials make the decisions on specifically how the money is used." 1981 Cong. Q. 449 (Mar. 14, 1981). Put another way, "what distinguishes a block grant [from a categorical grant] is that it is directed at a broad purpose, and is administered by the grant recipient." *See* remarks of Sen. Hatch, 127 Cong. Rec. S6822 (daily ed. June 24, 1981). General revenue sharing is considered to be at the opposite end of the scale from categorical grants, because its use is "virtually unrestricted." *See* 1981 Cong. Q. 449. *See also Goolsby* v. *Blumenthal*, 581 F.2d 455, 465 (5th Cir. 1978) (Thornberry, J., dissenting) (revenue sharing is "vastly different" from block grants), *opinion adopted in relevant portion as opinion of the court*, 590 F.2d 1369 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 970 (1979); *Ely* v. *Velde*, 497 F.2d 252, 256 (4th Cir. 1974) ("A block grant is not the same as unencumbered revenue sharing, for the grant comes with strings attached.").

The initiative to replace categorical programs with block grants to the states stems from several significant concerns. First, the block grants concept reflects a fundamental belief that state and local entities are better suited to choosing the proper programs or activities for their citizens than is the federal government.[18] Decentralization of allocational decisionmaking is also intended to result in increased efficiencies.[19] As Senator Hatch explained in Senate debate over the Reconciliation Act:

> The block grants will reduce bureaucratic overhead. They will give the states greater flexibility for efficient management and for the setting of priorities. Scarce dollars must be used for the most pressing needs in the most practical way. The huge and remote Federal bureaucracy is not suited to these purposes. The States are better situated to do the job.

127 Cong. Rec. S6821 (daily ed. June 24, 1981). Increased efficiency through elimination of numerous regulatory requirements is intended to enable the federal government to fund programs at lower levels than would otherwise be necessary and thus to result in substantial savings.

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[18] *See* Letter from Secretary of Education T.H. Bell to Thomas P. O'Neill, Jr (Apr 28, 1981) (transmitting proposed Elementary and Secondary Education Consolidation Act of 1981) ("The proposed legislation would permit States and localities to make the decisions, as they most appropriately can, as to how, when and where educational services should be provided, about priorities among needs, and about what services should be offered "), Letter from HHS Secretary Richard Schweiker to Thomas P. O'Neill (transmitting proposed Social Services Block Grant) ("the proposal will help to restore to the States the major role which should be theirs in assessing and responding to the social services needs of their population. By removing requirements and earmarks giving priority to certain services and certain population groups, the draft bill will greatly increase the ability of State and local governments to concentrate their resources on meeting their most serious social service needs.") *See also* 1981 Cong Q 449 (Mar 14, 1981) (quoting Administration's Mar. 10 budget "The federal government in Washington has no special wisdom in dealing with many of the social and educational issues faced at the state and local level ")

[19] *See, e g.*, Letter from HHS Secretary Richard Schweiker, *supra* note 18 ("by eliminating many Federal administrative requirements, reporting requirements, standards and the like, the draft bill will permit more efficient administration of the States' social services programs, thus freeing resources for the provision of services and producing significant cost savings").

B. The Education and the Social Services Block Grants

The Elementary and Secondary Education Block Grant, known as the "Education Consolidation and Improvement Act of 1981," addresses two areas of education funding: (1) funding for the educational needs of disadvantaged children (Chapter 1) and (2) consolidation of federal programs previously under several other programs "to be used in accordance with the educational needs and priorities of State and local educational agencies as determined by such agencies." (Chapter 2.) In both chapters, Congress has clearly expressed its intent to place supervision, direction, and control in the hands of state and local authorities. *See* §§ 552, 561(a)(6), 95 Stat. at 463, 562. Chapter 1 funding is to be accomplished "in a manner which will eliminate burdensome, unnecessary, and unproductive paperwork," *id.* § 552, and Chapter 2 is designed to "greatly reduce the enormous administrative and paperwork burden imposed on schools at the expense of their ability to educate children." *Id.* § 561(a).

The Social Services Block Grant amends an existing social services block grant, Title XX of the Social Security Act, 42 U.S.C. § 1397. *See* note 17, *supra*. Its purposes are

> consolidating Federal assistance to States for social services into a single grant, increasing State flexibility in using social service grants, and encouraging each State, as far as practicable under the conditions in that State, to furnish services directed at the goals of—
>
> (1) achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency;
>
> (2) achieving or maintaining self-sufficiency, including reduction or prevention of dependency;
>
> (3) preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating or reuniting families;
>
> (4) preventing or reducing inappropriate institutional care by providing for community-based care, home-based care, or other forms of less intensive care; and
>
> (5) securing referral or admission for institutional care when other forms of care are not appropriate, or providing services to individuals in institutions.

See § 2001, 95 Stat. at 867.

Both of these block grants enacted by Congress are somewhat more limited than those initially proposed by the Administration. In the education area, for example, the Administration sought to consolidate 44 existing programs into two block grants. *See* 127 Cong. Rec. S4329 (daily ed. May 4, 1981) (remarks of Sen. Hatch introducing Administration's draft legislation). Proposed Chapter 1 sought to consolidate federal assistance for several programs, including major

federal programs for disadvantaged children (Title I of the Elementary and Secondary Education Act (ESEA)) and handicapped children (Pub. L. 94-142). Chapter 1 as enacted by Congress, however, left Title I of the ESEA intact as to formula and method of distributing funds, and purposes for using those funds, and did not consolidate programs for the handicapped. Chapter 2 consolidated approximately 30 smaller programs into a single block grant. *See* 127 Cong. Rec. H5795–5796 (daily ed. July 31, 1981) (remarks of Rep. Ashbrook explaining Conference resolution).

The Administration's proposed Social Services Block Grant also sought to consolidate and repeal numerous programs: Title XX of the Social Security Act; the child welfare and foster care and adoption assistance programs under parts B and E of Title VI of that Act; the authority in five titles of that Act for provisions of social services in the territories; the Developmental Disabilities Assistance and Bill of Rights Act; the Child Abuse Acts of 1974 and 1978; the Runaway and Homeless Youth Act; the Rehabilitation Act of 1973 (except definition of "handicapped" and nondiscrimination provisions); and certain sections of the Community Services Act of 1974. The Social Services Block Grant eventually adopted by Congress, however, essentially amended Title XX, the existing social services block grant. A separate community services block grant was also enacted. *See* § 671, 95 Stat. at 511.

Although, Congress clearly intended the block grant mechanism to decrease federal involvement in program administration, the Education and Social Services Block Grants are not without federal requirements. Chapter 1 of the Education Block Grant, for example, essentially leaves intact Title 1 of the Elementary and Secondary Education Act, although removing "those detailed requirements and instructions on how to conduct programs which caused most of a staggering 5 million hours of paperwork each year. . . ." *See* 127 Cong. Rec. H5796 (daily ed. July 31, 1981) (remarks of Rep. Ashbrook explaining conference resolution). Funds must be used only for specified purposes and are distributed according to prior formulas and methods. The states may be required to keep records necessary for fiscal audit and program evaluation, and local agencies may receive funds only after the state approves applications expressing intended uses of the funds. The application must contain assurances as to accurate recordkeeping, which must reflect that programs and projects are conducted in attendance areas with high concentrations of low-income children, and that the need for such programs, and their size, shape, and quality have been assessed and evaluated. *See* § 557(b), 95 Stat. at 466. Chapter 2 requires states to utilize an advisory committee representing school children, teachers, parents, local boards, administrators, institutions of higher education, and the state legislature, for advice and annual evaluation, and requires recordkeeping for fiscal accountability, as well as requiring that local agencies file applications with the states and keep necessary records. Maintenance-of-effort provisions are retained in a modified form. Subchapter A funds may be used for basic skills development. Subchapter B funds may be used for educational improvement and support services and subchapter C funds for special projects, with both subchapters providing a list of

specific "authorized activities." The intent to decrease federal involvement is manifested not by a prohibition of federal regulations but rather by the authorization of a relatively narrow range of regulations in matters related to "planning, developing, implementing, and evaluating programs and projects. . . ." *See* § 591, 95 Stat. at 480.

Similarly, under the Social Services Block Grant, the states are required to develop, make public, and submit to the Secretary of HHS a report on intended use of the funds, including information on the types of activities to be funded and the individuals to be served. Every two years, detailed reports regarding expenditures must be submitted by the states and audits must be conducted. Federal requirements as to amounts to be spent on welfare recipients and income levels of recipients are *not* included, however. The states are specifically prohibited from using the funds for seven forms of services, ranging from land purchases to cash payments. *See generally* H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 654, 989–92 (1981).

All block grants enacted by the Reconciliation Act are also subject to the provisions of §§ 1741–45 of that Act. Section 1742 requires each state to report on the proposed use of block grant funds, including: (1) goals and objectives; (2) activities to be supported, areas to be served, and "categories or characteristics" of individuals to be served; and (3) the criteria and method for fund distribution. Pursuant to § 1745, states are required to conduct financial and compliance audits of block grant funds.

C. Theoretical Application of the Nondiscrimination Statutes to Block Grants

The two block grants are not unrestricted grants of federal monies to be used by the states in any manner they choose. While clearly consolidating and "defederalizing" prior programs, the block grants nevertheless specify the purposes for which the funds are to be used (though permitting some selection within the group of permissible purposes) and impose reporting and other requirements designed to ensure the accountability of those receiving the funds. These requirements enable tracing of block grant funds to specific programs and activities. Thus, it appears that the cross-cutting requirements of nondiscrimination can be imposed on specific programs or activities receiving block grant funds. Additionally, fund termination, if necessary, can be accomplished as to those specific programs or activities found to have discriminated.

Even general revenue sharing to state and local governments, which is a form of federal assistance not limited to specific areas or purposes, is subject to the nondiscrimination laws. Revenue sharing is generally considered to entail even less federal involvement than block grant funding. Congress has nevertheless made explicit its intention that the nondiscrimination statutes apply to *all* programs or activities of a recipient government. *See* note 14, *supra*. State or local governments may avoid the nondiscrimination requirements only by demonstrating, "by clear and convincing evidence," that the program or activity alleged to be discriminating is not funded in whole or in part with revenue-sharing funds.

See State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 6716 (1982). That Congress made nondiscrimination requirements explicitly applicable to revenue sharing is not necessarily an indication that they would otherwise be inapplicable. *See* note 14, *supra*. Moreover, it is clear that Congress chose to require more stringent enforcement—and to make its nondiscrimination provision applicable to *all* activities of a recipient government (except where completely unrelated to federal funding)—because of the poor nondiscrimination enforcement record of the revenue sharing program to date. *See* H.R. Rep. No. 1165, cited *supra* note 14, at 13. Thus, even at the opposite end of the scale from traditional categorical funding, when providing federal assistance virtually unrestricted as to purpose or use, Congress has made clear that the national policy against discrimination applies.

The cross-cutting statutes apply by their terms to all programs or activities "receiving Federal financial assistance." Absent evidence of congressional intent to the contrary, there is no indication apparent from the language of the block grants that Congress intended block grant funding to be other than "federal financial assistance" subject to the provisions of the nondiscrimination statutes. In fact, the two relevant block grants specifically use the terms "financial assistance" or "Federal assistance." *See* Elementary and Secondary Education Block Grant, §§ 552, 561; Social Services Block Grant, § 2001. Furthermore, application of the nondiscrimination statutes to the block grants is both consistent with the congressional intent to have the nondiscrimination statutes apply to all federal financial assistance, and consistent with the principle underlying passage of the cross-cutting statutes, that federal taxpayers should not be required to subsidize programs or activities that discriminate against some of them. Thus, absent some indication to the contrary in the language or legislative history of the two relevant block grants, the nondiscrimination statutes should be considered to apply to the block grant programs or activities. We therefore proceed to consider whether Congress has evidenced an intent that the statutes not apply.

IV. The Applicable Legal Standard

The Education and the Social Services Block Grants do not specifically exempt programs or activities funded by them from the obligations not to discriminate embodied in Title VI, Title IX, Section 504, and the Age Discrimination Act. Nevertheless, due to the importance of the question, it is appropriate to consider whether there is any indication, in the statute or its legislative history, to suggest that Congress actually intended such a result. The courts generally require a clear indication of such intent, because Congress is presumed to be aware of the entire body of law, and thus to be aware of prior statutes when it enacts later ones. Presumably Congress would make express its intent to modify or preclude the applicability of a prior statute that would otherwise embrace the subject of the later enactment. *See* 1A, C. Sands, Sutherland Statutory Construction, § 23.10 (3d ed. 1972). Courts are reluctant, therefore, to find that Congress effected a partial "repeal" or "amendment" of a prior statute by implication. *See* note 20, *infra*, and accompanying text.

The classic "repeal by implication" is a total abrogation of a previous statutory provision by enactment of subsequent legislation. *See, e.g., Morton* v. *Mancari*, 417 U.S. 535 (1974) (rejecting contention that Equal Employment Opportunity Act impliedly repealed Indian preference provisions of Indian Reorganization Act); *cf. United States* v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976) ("repeal" urged would not actually abrogate prior statute, but would make it ineffectual in nearly all cases). Other implied changes, such as implied "exemptions," *see Goolsby* v. *Blumenthal*, 581 F.2d 455, 461 (5th Cir. 1978), *rev'd en banc on other grounds*, 590 F.2d 1369 (5th Cir.), *cert. denied*, 444 U.S. 970 (1979), or implied "amendments," *see Ely* v. *Velde*, 451 F.2d 1130, 1134 (4th Cir. 1971), however, are also analyzed according to the rules applicable to repeals by implication.

Two recent Supreme Court cases illustrate the rules of construction to be applied to questions such as the one presented by your memorandum. In *Allen* v. *McCurry*, 449 U.S. 90 (1980), the Court considered whether 28 U.S.C. § 1738 and traditional principles of collateral estoppel apply to suits brought under 42 U.S.C. § 1983. McCurry had unsuccessfully sought to suppress evidence in his state criminal trial. He later brought a federal civil rights action under § 1983 against the police officers who had entered his home and seized evidence. McCurry argued that he should not be bound by the state court's disposition of his federal constitutional claim because he had had no opportunity to litigate that claim in federal court. Thus, he asserted in effect that § 1738, which requires federal courts to give the same effect to state court judgments as the state court would, and traditional principles of collateral estoppel were inapplicable to his claim brought under § 1983. The Supreme Court analyzed this argument as one suggesting that § 1983 impliedly "repealed" or "restricted" both collateral estoppel principles and the statutory forerunner to § 1738. The Court rejected this argument, applying the maxim that repeals by implication are disfavored, even though "one strong motive" behind enactment of § 1983 was "grave congressional concern that the state courts had been deficient in protecting federal rights," *see id.* at 98–99, a motive that provided some support for the "repeal" or "restriction" asserted by McCurry.

Similarly, in *TVA* v. *Hill*, 437 U.S. 153 (1978), the Court was asked to decide whether the Endangered Species Act permitted an injunction against operation of the nearly completed Tellico Dam because of the dam's effect on an endangered species. Congress had continued to appropriate money for the dam notwithstanding the Appropriations Committee's knowledge of the effect of the dam on the habitat of the endangered species. Tennessee Valley Authority (TVA) argued, therefore, that the subsequent appropriations constituted a congressional determination to permit operation of the dam despite the provisions of the Act. The Court, in an opinion by the Chief Justice, framed the issue in terms of "whether continued congressional appropriations for the [Dam] after 1973 constituted an implied repeal of the Endangered Species Act *at least as to the particular dam*." *Id.* at 156 (emphasis added). The Court determined that to find an implied

"repeal" under the circumstances of the case would violate the cardinal rule disfavoring such repeals.

These cases illustrate that it is appropriate to apply the "repeal" or "amendment" by implication analysis to the contention that Congress did not intend these four nondiscrimination statutes to apply to programs or activities funded by the two block grants. Because the cross-cutting nondiscrimination statutes apply by their terms to all programs or activities "receiving Federal financial assistance," they apply to the block grants unless Congress specifically exempted the block grants or, by implication, "amended" the cross-cutting provisions to prevent their otherwise automatic applicability. *See also, e.g., Watt* v. *Alaska*, 451 U.S. 259 (1981) (contention that Wildlife Refuge Revenue Sharing Act, rather than earlier enacted Mineral Leasing Act, controls distribution of mineral revenues from wildlife refuges) (dissent contended that disfavor of repeals by implication should have force only when "general statute, wholly occupying a field, eviscerates an earlier and more specific enactment of limited coverage . . . without an indication of congressional intent to do so," *id.* at 280); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976) (contention that when bank is sued under Securities Exchange Act it is subject to venue provisions of that Act, rather than to general venue provisions of previously enacted National Bank Act); *United States* v. *Borden Co.*, 308 U.S. 188 (1939) (contention that Agriculture Marketing Agreement Act removed agricultural marketing from purview of Sherman Antitrust Act).

The Fourth Circuit has applied this standard under analogous circumstances. *Ely* v. *Velde*, 451 F.2d 1130 (4th Cir. 1971), required the Fourth Circuit to determine the implied applicability of two other "cross-cutting" laws—the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA)—to a law enforcement block grant—the Omnibus Crime Control and Safe Streets Act of 1968. Because the Safe Streets Act generally prohibited federal interference in the spending of grants except as expressly authorized, the Law Enforcement Assistance Administration (LEAA) argued that it could not apply the requirements of NHPA and NEPA. *Id.* at 1133. The court rejected the argument that the block grant and the cross-cutting laws were irreconcilable, however, applying the "strong presumption against one statute repealing or amending another by implication," *see id.* at 1134, to examine the purposes and policies of the allegedly conflicting statutes and give effect to all three. *But cf. Goolsby* v. *Blumenthal*, 581 F.2d 455, 464 (5th Cir. 1978) (Thornberry, J., dissenting) (Revenue-Sharing and Uniform Relocation Assistance Acts irreconcilable; only acts specifically mentioned in Revenue-Sharing Act applicable) (distinguishing block grants from revenue sharing because revenue sharing provides for automatic distribution and because of difficulty in determining how revenue-sharing money is spent), *opinion adopted in relevant portion as opinion of court*, 590 F.2d 1369 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 970 (1979).

These and other cases establish (1) that Congress' intention to exempt the block grants from the nondiscrimination statutes should be assessed in the context of whether Congress intended the block grants to act as an implied partial

"repeal" of, or "amendment" to, the earlier statutes; and (2) such "repeals" or "amendments" by implication are not favored. *See Morton* v. *Mancari*, 417 U.S. at 549. In short, where possible, the earlier and later statutes will be read as consistent with each other, *see Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) and, absent a clear indication to the contrary, courts will presume that the later statute was enacted against the background of the earlier one, and was intended to be affected by it. This analysis applies both to the total abrogation of a statute, *see id.*, and to partial repeals or amendments affecting only a "tiny fraction" of cases brought under either the earlier or later statute, *see Radzanower* v. *Touche Ross & Co.*, 426 U.S. at 156.

> The presumption against implied repeals is classically founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation, and, therefore, if a repeal of the prior law is intended, expressly to designate the offending provisions rather than to leave the repeal to arise by necessary implication from the later enactment. Still more basic, however, is the assumption that existing statutory and common law, as well as ancient law, is representative of popular will. As traditional and customary rules, the presumption is against their alteration or repeal. The presumption has been said to have special application to important public statutes of long standing.[20]

1A, C. Sands, Sutherland Statutory Construction § 23.10 (4th ed. 1972) (footnotes omitted).

The presumption against implied repeals or amendments is given effect through a requirement that the legislature's intention to repeal must be "clear and manifest." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). "In practical terms, this 'cardinal rule' means that '[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'" *TVA* v. *Hill*, 437 U.S. at 190 (quoting *Morton* v. *Mancari*, 417 U.S. at 550). The Supreme Court has explained: "We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981). Thus, we must examine whether Congress intended the cross-cutting statutes to be inapplicable to the Education and the Social Services Block Grants by first attempting to ascertain if Congress made a "clear and manifest" expression of such intention, especially whether it made an affirmative expression of

[20] The presumption against implied repeals and amendments, strongest when applied to longstanding important public statutes, has force when more minor statutes are involved *Compare Radzanower*, 426 U S at 154, with *id* at 158, 164–65 (Stevens, J , dissenting) (arguing that the rule against implied repeals should apply only to well-established and clearly defined old rules reflecting important national policy, but not to minor laws of whose existence and meaning Congress might have been unaware). The nondiscrimination statutes, while not all of longstanding, clearly articulate important national policy Moreover, they are not the kind of statutes of which Congress is likely to have been unaware Thus, the presumption against their implied repeal or amendment would seem to be particularly strong

such intent. If it did not do so, we must then examine whether the Education and the Social Services Block Grants and the four cross-cutting nondiscrimination statutes are irreconcilable. In the absence of either a clear expression of intent or irreconcilability between the two sets of statutes, the plain language of the nondiscrimination statutes, which would otherwise require them to apply to these two block grants, will prevail.

V. Application of the Legal Standard

There are three possible indicators of congressional intent not to apply the nondiscrimination statutes to the Education and Social Services Block Grants: (A) the absence of any specific reference to the obligation not to discriminate; (B) Congress' failure to refer to the nondiscrimination provisions in these two block grants, while specifically referring to them in six other block grants; and (C) Congress' apparent deletion of nondiscrimination provisions from the Administration's proposed block grant legislation. Because we conclude that none of these provides a clear indication of congressional intent, we also examine (D) whether Congress' purposes in enacting these two block grants may be said to conflict with the nondiscrimination statutes, so as to require that the nondiscrimination statutes be inapplicable to these block grants.

A. Absence of Specific Reference to the Nondiscrimination Statutes

It is clear from their legislative histories that the nondiscrimination statutes were intended to apply to federal financial assistance without Congress having to consider their applicability every time it authorized such assistance. Furthermore, the block grants at issue authorize the grant of "Federal assistance" or "financial assistance," and the relevant federal agencies have generally applicable regulations for enforcing the nondiscrimination statutes, which can be applied to the block grants without issuance of new regulations. *See, e.g.*, note 4, *supra*. Thus, there is no facially apparent reason why the nondiscrimination statutes should be considered inapplicable to the Education and the Social Services Block Grants merely because Congress made no specific reference in those block grants to the obligation not to discriminate. Since a central purpose of the nondiscrimination statutes was in fact to avoid the need for such specific application, we conclude that the mere absence of nondiscrimination provisions, without more, does not suggest that the four nondiscrimination statutes should be considered inapplicable.

B. The "Expressio Unius" Doctrine

As an alternative indication of congressional intent not to apply the nondiscrimination provisions, we have also considered the fact that not all the block grants are merely silent as to application of the nondiscrimination statutes. Six other HHS and Education block grants contain specific nondiscrimination provisions. Four—(1) Preventive Health and Health Services, (2) Alcohol and Drug

Abuse and Mental Health Services, (3) Primary Care, and (4) Maternal and Child Health Services—specify in relevant part that, for purposes of applying Title VI, Title IX, Section 504, and the Age Discrimination Act, "programs and activities funded in whole or in part with funds made available under this title are considered to be *programs and activities receiving Federal financial assistance*." *See* Reconciliation Act, §§ 901 (1908(a)(1); 1918(a)(1); 1930(a)(1)), 2192(a) (508(a)(1)) (emphasis added). These four block grants do not stop there, however, but also prohibit discrimination on the ground of sex or religion, and provide for a 60-day compliance period before resorting to enforcement under, *inter alia*, the cross-cutting statutes. Two other block grants—Community Services, § 671, and Low-Income Home Energy Assistance, § 2601—prohibit discrimination or exclusion from benefits on the basis of race, color, national origin, or sex, and further direct that "[a]ny prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualified handicapped individual as provided in section 504" shall apply. *See id.*, §§ 677, 2606. These two block grants also set forth procedures by which compliance with their nondiscrimination provisions may be secured, including the 60-day compliance period before resorting to remedies under Title VI, Section 504, and the Age Discrimination Act, "as may be applicable."

Applying the maxim *expressio unius est exclusio alterius*, it could be argued that because Congress specified in some block grants that the nondiscrimination laws would apply, its failure to do so in others should be viewed as an intentional exclusion. *See* 2A, C. Sands, Sutherland Statutory Construction § 47.23 (4th ed. 1973). This reading of an implied exclusion deserves particular attention, because the maxim is considered to have special force if a statute provides for something in one section but omits it in another. *See id.*

There are, however, several reasons that might explain why Congress failed to include nondiscrimination provisions in the Education and the Social Services Block Grants. First, as discussed in subsection C below, Congress may simply have decided that existing laws against discrimination should apply without change. It appears that there is some support for this explanation in the language of the nondiscrimination provisions originally proposed, both of which can be interpreted as assuming that existing law would apply, but attempting to add to or change it in some manner. Furthermore, the nondiscrimination provisions in the other six block grants are not merely repetitive of existing law but have independent significance: (1) all six prohibit discrimination on the basis of sex, although Title IX applies only to education programs; (2) four also prohibit discrimination on the basis of religion; and (3) all require that the chief executive officer of a state be given 60 days to secure compliance before the Secretary either refers the matter to the Attorney General or exercises the powers granted by Title VI, Section 504, or the Age Discrimination Act, "as may be applicable," or takes "such other action as may be provided by law." Because Congress was providing for new substantive obligations and remedies regarding nondiscrimination in the other six block grants, it would have been logical for Congress to have recited all of the nondiscrimination provisions applicable to those block grants, perhaps to

avoid a future contention that only discrimination on the basis of sex or religion had been prohibited. By failing to include similar provisions in the Education and the Social Services Block Grants, however, Congress may simply have intended that only existing nondiscrimination provisions, with their regular enforcement mechanisms—which apply to all programs or activities receiving federal financial assistance—should apply.[21]

Second, there is also a reason why Congress might have believed it to be unnecessary to mention the nondiscrimination statutes in the Education and the Social Services Block Grants, but necessary to mention them in the other six grants. The four cross-cutting statutes apply by their terms to programs or activities receiving "Federal financial assistance." Both the Education and the Social Services Block Grants specify that they are providing "federal" or "financial" assistance. The Elementary and Secondary Education Block Grant states in the Declaration of Policy in Chapter I, § 552, "[t]he Congress declares it to be the policy of the United States to continue to provide *financial assistance* to State and local educational agencies . . .," and in the Statement of Purpose in Chapter II, § 561, "[i]t is the further purpose and intent of Congress to *financially assist* state and local educational agencies . . . ." (Emphasis added.) The Social Services Block Grant begins its statement of purpose with the following language: "For the purposes of consolidating *Federal assistance* to States . . . ." § 2001 (emphasis added). In contrast, the four block grants that contain explicit statements that "[f]or the purpose of applying the prohibitions against discrimination" under the four cross-cutting statutes, programs funded by them "are considered to be programs or activities receiving Federal financial assistance," do not otherwise specifically refer to federal financial assistance. It is possible therefore that Congress simply wished to make clear that, in addition to its prohibition of sexual and religious discrimination, those four block grants were "federal financial assistance" for purposes of the four cross-cutting statutes. Similarly, the other two block grants containing nondiscrimination provisions have no explicit reference to the fact that they authorize "federal financial assistance." Thus, the language of these block grants suggests another reason why Congress might have differentiated between the Education and the Social Services Block Grants on the one hand and the six other block grants on the other.

The *expressio unius* maxim is not to be regarded as conclusive, especially when other factors suggest a different result. *See Morris* v. *Gressette*, 432 U.S. 491, 506 n.22 (1977) (express preclusion of judicial review in one section is relevant, but not decisive, as to reviewability in other sections).[22] Here, in addition to the existence of other explanations for the differences that initially appear to call for application of the maxim, there are other factors at play. The block grants are not merely separate sections of a comprehensive statute, but are

[21] This is also consistent with the fact that the existing Title XX Social Services Block Grant makes no specific reference to the nondiscrimination provisions.

[22] *See also, e.g., Wachovia Bank & Trust Co.* v *National Student Mktg Corp.*, 650 F.2d 342, 354–55 (D.C. Cir. 1980) ("The ancient maxim 'expressio unius est exclusio alterius' is a dangerous road map with which to explore legislative intent."), *cert. denied*, 452 U.S 954 (1981), 2A, Sutherland, *supra*, § 47 25 ("The maxim . . . requires great caution in its application, and in all cases is applicable only under certain conditions.").

in reality separate statutes relating to different substantive areas, pieced together for purposes of budget reconciliation. This suggests that application of the maxim, which assumes that Congress considered all possibilities together, has less force than it might in addressing a narrower statute. *Cf. United States* v. *Exxon Corp.*, 628 F.2d 70, 75 (D.C. Cir.) *(per curiam)* (rejecting application of maxim because, *inter alia*, two titles at issue differ in structure and direction), *cert. denied*, 446 U.S. 964 (1980). Particularly in light of the length of the Reconciliation Act, the speed with which it was enacted, and the pressing circumstances that surrounded its enactment, as discussed earlier, it is uncertain that the maxim should be given as much weight as it might normally have. The presumption against finding a repeal or amendment by implication also tends to dilute the force of the maxim. *See United States* v. *Exxon Corp.*, 628 F.2d at 75 (declining to read combination of legislative history and *expressio unius* theories as proof of repeal or amendment by implication).

In attempting to assess congressional intent, the *expressio unius* maxim may serve as a guide to that intent, but it is inconclusive. Other factors, including the reasons for the differences, the nature of the legislation, and the legislative history,[23] must also be considered in the effort to discern congressional intent. When all the factors are considered, we cannot conclude that the absence of nondiscrimination provisions in the Education and the Social Services Block Grants represents a congressional determination that Title VI, Title IX, Section 504, and the Age Discrimination Act not apply. Instead, Congress may merely have determined that existing law against discrimination should apply to these two block grants. Moreover, to the extent the *expressio unius* maxim might be said to provide some support for a finding that Congress intended nonap-

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[23] It is not just the statute that is silent on inclusion or exclusion of the provisions Committee hearings, floor debates, and the House, Senate, and conference reports, which often discuss in some detail the differing versions and congressional intent, are virtually silent on this significant issue In our review of hundreds of pages of testimony, debate, and reports, we found only oblique references to nondiscrimination under the two relevent block grants

Dr. James P. Scamman, Superintendent of Schools in South Bend, Indiana, said:

> To put it bluntly, if you are going to make a local decision model work, you are going to have to rescind 94, 142, 504, and at least unemployment compensation not to kick in until the fall term begins when people aren't assured of a job in the spring.

Hearings Before the Task Force on Human Resources and Block Grants of the Committee on the Budget, House of Representatives, 97th Cong., 1st Sess , Part I, 232 (1981). Another comment came from Representative Biaggi in floor debate, as he explained his opposition to block grants in general, apparently even those specifically containing nondiscrimination provisions:

> Let me illustrate a genuine fear that I have about these block grants. Age discrimination is an insidious problem in this Nation and one of the areas where it is practiced the most are in federally funded programs. When the Civil Rights Commission identified 10 major Federal programs where age discrimination was rampant, Congress responded with the enactment of the age discrimination amendments. What recourse will we have if age discrimination is practiced in the administration of these grants on the State level?

127 Cong. Rec H3911 (daily ed. June 26, 1981) Neither the comments of a committee witness nor the concerns of a single Representative amount to an expression of congressional intent to support the inference to be drawn from application of the *expressio unius* maxim This is especially true here where one reference ("94, 142, 504") is, at the least, obscure, and where the other represents concern apparently unrelated to specific incorporation of the nondiscrimination provisions

There were, of course, some other references in the legislative history to the nondiscrimination provisions originally proposed by the Administration These references were minimal, however, and we do not believe that they support the theory that the laws prohibiting discrimination were meant to be inapplicable. *See* discussion in subsection C, *infra*.

plicability, we cannot say that it is either "clear and manifest" or that it is the affirmative expression of intent required for finding a "repeal" or "amendment" by implication.

C. Apparent Deletion of the Nondiscrimination Provisions

There is an additional factor to consider in assessing the absence of nondiscrimination provisions in these two block grants: Congress' apparent deletion of nondiscrimination provisions from the block grants as originally proposed by the Administration. Based on our analysis of the legislative history of the block grants, however, we are unable to conclude that Congress ever intentionally "deleted" the nondiscrimination provisions from the Administration's proposals so as to make them inapplicable.

(1) Education Block Grant

The nondiscrimination provision of the Administration's proposed Education Block Grant provided:

> Sec. 307(a). Whenever the Secretary determines that there has been a failure to comply with title VI of the Civil Rights Act of 1974, the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, or title IX of the Education Amendments of 1972 in any program or activity receiving Federal financial assistance under this Act, he shall notify the chief executive officer of the State and afford him an opportunity to secure compliance. If within a reasonable period of time, not to exceed sixty days, the chief executive officer does not secure compliance, the Secretary shall take such action as may be provided by law. The time afforded the chief executive officer under this subsection shall not reduce the time otherwise available to the Secretary to secure compliance.
>
> (b) When a matter is referred to the Attorney General pursuant to subsection (a) of this section, or whenever he has reason to believe that there has occurred a pattern or practice in violation of the civil rights provisions referred to in subsection (a) in any program or activity receiving Federal financial assistance under this Act, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate including injunctive relief.

Proposed Elementary and Secondary Education Consolidation Act of 1981, S. 1103 § 307a (127 Cong. Rec. S4332) (daily ed. May 4, 1981). The provision thus appears merely to have provided a method of enforcing the laws; it appears to have assumed their applicability to the Block Grant. The summary provided by Senator Hatch when he introduced the bill stated: "Basic nondiscrimination provisions are *preserved without change* from current law. However, in case of

violations, as determined by the Secretary, the *Governor has an additional 60 days to secure compliance before further action by the Department.*" *Id.*, S4336 (emphasis added). Thus, the omission of this provision, absent explanation, is equally consistent either with the possibility that Congress intended the nondiscrimination provisions not to apply or that it assumed they did, based on the indication that basic law was being "preserved without change," and merely decided that the regular enforcement procedures would apply.

Furthermore, because the Education Block Grant eventually enacted was not the one proposed by the Administration, it would be an overstatement to refer to the lack of such a provision in that bill as the result of a "deletion." The Education Block Grant proposed by the Administration was more sweeping than the bill eventually enacted. There was extensive resistance to including some of the programs the Administration proposed to include and the final product was termed a more modest effort. *See, e.g.*, 127 Cong. Rec. S6821 (daily ed. June 24, 1981) (remarks of Senator Hatch, Chairman of Comm. on Labor and Human Resources) ("Our proposals are more modest than President Reagan's. Our block grants do not compel the Nation to arrive at the new federalism on October 1. But they most definitely set us along President Reagan's road."). In the House, Representative Ashbrook, the ranking minority member of the Education and Labor Committee, tried to make clear that "Gramm-Latta II," the amendment to the Committee reconciliation package approved by the House, was not authored by the Administration:

> And let me put to rest—at least for our committee—all this loose talk about the proposals in the Latta amendment having been written by OMB or the White House. That just is not true. We did cooperate with them and accommodate their concerns where possible. But the substance of our major proposals, and the figures we use, were fashioned by our staff acting on our instructions. In most areas there are very great differences from administration proposals. This is particularly true with respect to education program consolidation, child nutrition, impact aid, and the social services block grant.

Id., H3526–27 (daily ed. June 25, 1981). *See also id.*, S6821 (daily ed. June 24, 1981) (remarks of Sen. Hatch) ("Some have suggested that the President has suffered a political defeat because we in the Senate have turned from his original block grant proposals. They are wrong, and they miss the point. The essential question is not whether we support these proposals, but whether we support the President's ends. Obviously, we do.").

The legislative history of the Education Block Grant is at best ambiguous with respect to whether Congress "deleted" references to the nondiscrimination provisions or merely enacted a bill that, without explanation, contained none. The Education Block Grant, which received extensive attention on the House and Senate floors, was explained and debated in detail, without reference to the possibility that Congress had made nondiscrimination provisions inapplicable.

Given the tone of the discussion—an attempt to assuage concerns that not enough federal control remained in the block grants—it is difficult to infer a clear intent to make the federal nondiscrimination provisions inapplicable. We are reluctant to attach much significance to congressional omission of any reference to the nondiscrimination provisions when they would normally have been applicable without any such reference, especially in the absence of any reference to such omission.

(2) Social Services Block Grant

Because the Social Services Block Grant received less attention in floor debate, it is even more difficult to determine whether Congress could be said intentionally to have deleted the nondiscrimination provisions. It is clear that the Administration's proposed block grant, which contained a nondiscrimination provision, was not finally enacted by Congress. However, even the proposed House Social Services Block Grant contained a nondiscrimination provision, including enforcement procedures differing from those provided in the four nondiscrimination statutes. The Senate version and the ultimate conference version of the Social Services Block Grant, however, made no reference to nondiscrimination. Although the absence of a provision in one of several versions might be said to suggest an intentional deletion, this does not seem to have been the case. First, the section-by-section analysis of the Administration's proposed Social Services Block Grant, inserted into the Record by its sponsor, Representative Ashbrook, is instructive:

> Section 10 of the draft bill, modeled on a section of [the] Housing and Community Development Act of 1974, prohibits discrimination on the ground of race, color, national origin, *or sex* in any program of activity funded under the Act, and also *expressly recognizes the application* of section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against qualified handicapped persons, and the anti-discrimination provisions of the Age Discrimination Act of 1975. Whenever the Secretary determines that there has been a failure to comply with these nondiscrimination provisions, the Secretary must notify the Governor of the State. The Governor is given up to 60 days to secure compliance. If the Governor does not secure timely compliance, the Secretary may refer the matter to the Attorney General and recommend the commencement of a civil action to secure compliance. *Alternatively, the Attorney General may institute proceedings under current statutes, such as title VI of the Civil Rights Act of 1964, that now apply to discrimination.*

127 Cong. Rec. E2194 (daily ed. May 6, 1981) (emphasis added). As understood by its sponsor, the nondiscrimination provision did not "make" Section 504 and the Age Discrimination Act applicable, but rather "recognized" their ap-

plicability. The provision added sex discrimination as a general prohibition. Finally, Representative Ashbrook appeared to recognize that "current statutes, such as title VI," provided an *alternative* method of proceeding. *Id.* Thus, it is conceivable that "deletion" of the provision was merely intended to leave current nondiscrimination law as the only method of proceeding.

It is unclear whether Congress even thought in terms of "deletion." As explained in the summary of the reconciliation conference: "the House receded from its Social Services block grant and conferees agreed to a Title XX block grant and a community services block grant. Child welfare services and Foster Care and Adoption Assistance were retained as categorical programs." 127 Cong. Rec. H5759 (daily ed. July 31, 1981). The conference report referred to the rejected House Social Services Block Grant as a "new freestanding" block grant repealing Title XX social services and training, the Child Abuse Prevention, Adoption Reform, and Runaway and Homeless Youth Acts, and seven titles of the Community Services Act. *See* H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 989 (1981). The conference agreement, however, was to a more modest block grant, amending Title XX to form a new block grant, which "generally follows the Senate amendment," although not incorporating child welfare, foster care, and adoption assistance programs. *See id.* at 991. In the conference report's rather detailed comparisons of the House and Senate versions, there is no reference to the absence of a nondiscrimination provision. Nor was there floor debate over inclusion or deletion of such a provision. Thus, like the Education Block Grant, it is unclear whether Congress intentionally deleted the nondiscrimination provision or merely enacted a different block grant that contained no such provision. Because of the enactment of a substantially different block grant from the one that contained a nondiscrimination provision, and in light of the absence of any reference to a "deletion" of the nondiscrimination provisions, and the presence of another plausible interpretation of any "deletion," it is at best uncertain whether Congress intentionally "deleted" the nondiscrimination provisions to make them inapplicable. It is as appropriate to conclude merely that Congress enacted a block grant silent as to their applicability. Therefore, the absence of the provisions from the final version, under these circumstances, provides no more than highly equivocal support for finding an implied "repeal" or "amendment," when much clearer support is required. *See Allen* v. *McCurry*, 449 U.S. 90, 99 (1980).

(3) Conclusion Regarding Intentional Deletion of Nondiscrimination Provisions

We conclude, therefore, that Congress' intention to make the nondiscrimination statutes inapplicable is at best ambiguous insofar as the finding of such an intention relies on the apparent "deletion" of nondiscrimination provisions from prior versions of these two block grants. There is no indication that Congress gave any thought to such a "deletion," and the absence of nondiscrimination provisions is as consistent with a congressional determination to leave existing

law intact as it is with an intention to exempt the block grants from the four cross-cutting statutes.

D. Conflict Between the Block Grants and the Nondiscrimination Statutes

Because there is no clear indication of congressional intent to make the nondiscrimination statutes inapplicable to programs or activities funded by the Education and the Social Services Block Grants, they should be considered to be inapplicable only if there is an irreconcilable conflict between the block grants and the nondiscrimination statutes. Your memorandum suggests an important ground upon which the block grants and the nondiscrimination statutes may be in conflict: Congress' intent in enacting block grants to free the states of "federal encumbrances and regulations other than those specifically imposed by the Act." To apply the nondiscrimination provisions, it is suggested, would be directly contrary to the intent.

We have found no meaningful evidence, however, that the nondiscrimination statutes are the kinds of federal "interference" with which Congress or the Administration was concerned. To reduce bureaucratic overhead and permit the states to set their own program priorities, the Education Block Grant expressed the intent in Chapter 1 that the *design and implementation of the programs* authorized under that Chapter be "mainly that of local educational agencies, school superintendents and principals, and classroom teachers and supporting personnel, because they have the most direct contact with students and are most directly responsible to parents." § 561(b) (emphasis added). In Chapter 2, Congress directed that the Secretary issue no regulations in most matters "relating to the details of *planning, developing, implementing, and evaluating programs and projects* by state and local educational agencies." § 591(b) (emphasis added). The Social Services Block Grant is intended to "increase State flexibility" in furnishing social services directed at five goals. § 2352 (§ 2001). Congress' focus therefore appears to have been on reducing "those detailed requirements and instructions on *how to conduct programs*," *see* 127 Cong. Rec. H5796 (daily ed. July 31, 1981) (remarks of Rep. Ashbrook) (emphasis added), which force the states to spend great amounts of time and energy on federally imposed program details. As Senator Hatch, a strong proponent of block grants, said, the objection to categorical programs is the involvement of the federal bureaucracy in their administration. *See* note 16, *supra*. Block grants are intended to effect a significant reduction in this involvement.

The nondiscrimination statutes clearly impose regulatory burdens on fund recipients and decrease the "flexibility" of those recipients to the extent they would choose to use federal funds in a manner otherwise prohibited by the cross-cutting statutes; that is, by expending the money in ways that discriminate on the basis of race, sex, age, or handicap. We believe, however, that this apparent conflict does not actually make the cross-cutting statutes and the two block grants irreconcilable, particularly when every attempt must be made to read the two sets of statutes in a way that permits each to be effective. *See, e.g., Morton* v.

Mancari, 417 U.S. at 551. In applying NHPA and NEPA to a block grant, the Fourth Circuit stated, "in the absence of unmistakable language to the contrary, we should hesitate to read the congressional solution to one problem—protection of local police autonomy—so broadly as unnecessarily to undercut solutions adopted by Congress to preserve and protect other societal values, such as the natural and cultural environment. It is not to be assumed lightly that Congress intended to cancel out two highly important statutes without a word to that effect." *Ely* v. *Velde*, 451 F.2d 1130, 1136 (4th Cir. 1971).[24] The same analysis can be applied to this case. The congressional solution to the problem of excess federal involvement in matters of program choice and administration need not be read so broadly as to encompass in the concept of "program administration" the freedom to discriminate on otherwise prohibited grounds or to operate programs free from existing regulations regarding the nondiscrimination statutes. We believe, instead, that it is more likely that the lessened federal involvement anticipated by Congress was to be achieved by allowing state and local authorities to choose how best to use their allocations in programs or activities best suited to the needs of their citizens.[25]

There are several indications that this interpretation is consistent with congressional intent. Clearly, the Administration believed that its block grants were capable of coexisting with nondiscrimination provisions, because the Administration's own proposals assumed applicability of the nondiscrimination statutes. There is no indication in the legislative history that Congress itself initiated any effort to eliminate or cut back on the operation of the nondiscrimination statutes with respect to block grants. In fact, the two block grants enacted are described in the legislative debates as "more modest" in terms of centralizing, consolidating, and decreasing federal involvement than those proposed by the Administration. In the numerous attempts to explain the advantages of block grants as minimizing federal interference and maximizing state flexibility, the nondiscrimination provisions were simply not at issue. Moreover, all the block grants share these goals of increased efficiency, decreased regulation, and increased local autonomy, including the six containing nondiscrimination provisions. It thus does not appear that application of the nondiscrimination provisions is inherently inconsistent with the block grant concept. It is difficult to conclude,

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[24] *Ely* v *Velde* relied on the fact that the Safe Streets Act had as a dominant concern not merely the "simple desire to give the states more latitude in the spending of federal money," but also "to guard against any tendency towards federalization of local police and law enforcement agencies " Application of NHPA and NEPA did not threaten federalization of local police efforts *See* 451 F 2d at 1136 Although the question before the court in *Ely* is not identical to the question before us, we think it is similar to the extent that the block grants not only reflect concern about who decides how to spend federal money but also reflect concern that the federal government not be involved in the details of *program administration*, which are more appropriately left to local decisionmakers.

[25] This appears to be consistent with the President's understanding of the value of block grants. *See* Interview with the President, 17 Weekly Comp Pres Doc. 1326–27 (Dec 7, 1981):

> Now, having been a Governor, I can tell you what the categorical grants do. They come to you with Federal money, but with enormous amounts of *redtape and regulation prescribing exactly what the priorities are and how this money must be spent* Well, no one in Washington can set rules of that kind that will fit New York City and some small town in the urban area or a city in the South that doesn't have the same problems or the West So, it makes these programs needlessly extravagant.

(Emphasis added)

therefore, that Congress viewed the nondiscrimination statutes as inconsistent with its purpose in enacting block grants.

The policy disfavoring "repeals" or "amendments" by implication is particularly applicable when the allegedly repealed provision is a longstanding, important component of a government program. *See Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). The cross-cutting statutes clearly represent important federal nondiscrimination policies of broad applicability. It is difficult, if not impossible, to believe that Congress would choose to alter such fundamental policies without any discussion, and in the context of debates over the block grants, which focused on different concerns unrelated to the policies embodied in the nondiscrimination laws. Because the policies inherent in the nondiscrimination statutes and the block grants may be reconciled without apparent serious damage to either, as indicated by the fact that other block grants and the Administration's own proposals specifically adopted nondiscrimination provisions—in fact, added to the categories of prohibited discrimination—the nondiscrimination statutes should be considered to apply to the block grants. *See, e.g., Morton* v. *Mancari*, 417 U.S. 535; *Ely* v. *Velde*, 451 F.2d 1130.[26]

VI. Conclusion

The circumstances surrounding enactment of the two block grants, as well as the purposes for which they were enacted, do not reveal a congressional intention to make the nondiscrimination statutes inapplicable to the Education and the Social Services Block Grants. The nondiscrimination statutes were intended to be statements of national policy applicable to all programs or activities receiving federal financial assistance, freeing Congress from the need to give subsequent consideration to their applicability on a program-by-program basis. Block grant funding falls within the literal terms of those statutes, and the nondiscrimination statutes should therefore be applied to these two block grants unless Congress actually intended otherwise, or unless the block grants and the nondiscrimination statutes cannot be reconciled so as to give effect to all. That Congress failed to include nondiscrimination provisions in the two block grants does not support a finding of an intention to make Title VI, Title IX, Section 504, and the Age Discrimination Act inapplicable: The nondiscrimination statutes do not require specific reference in funding legislation; Congress may have included nondiscrimination provisions in other block grants to effect changes in existing discrimination law; and Congress' failure to include nondiscrimination provisions in the two block grants can be interpreted as an expression of intent to have

[26] We believe that this conclusion is not inconsistent with *Pennhurst State School & Hospital* v *Halderman*, 451 U.S. 1 (1981), in which the Court stated that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Id.* at 24. In the four cross-cutting nondiscrimination statutes themselves, Congress had clearly expressed its intent that they apply generally to all programs or activities receiving federal financial assistance. *See* 110 Cong. Rec. 7063 (1964) (remarks of Sen. Pastore) (Title VI fixes the conditions under which federal money is distributed: "No one is required to accept Federal assistance or Federal funds. If anyone does so voluntarily, he must take it on the conditions on which it is offered.").

existing law apply. Finally, the block grants and the nondiscrimination statutes are not so irreconcilable that both cannot be given effect.

In light of the fundamental expression of congressional intent underlying the nondiscrimination statutes, it should be presumed that Congress would have debated or made specific its intent to change their applicability. As long as it did not do so, and in light of the several possible reasons for its failure to include independent nondiscrimination provisions, we conclude that the nondiscrimination provisions of Title VI, Title IX, Section 504, and the Age Discrimination Act apply to the Education and the Social Services Block Grants.

THEODORE B. OLSON
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Review of Agency Schedule C Appointments by the Executive Office of the President

The Executive Office of the President may involve itself in reviewing an agency's proposed Schedule C appointments, notwithstanding the President's general delegation of his authority in this area to the Office of Personnel Management, by virtue of the President's continuing responsibility for supervising the performance of Executive Branch officials.

The Executive Office's power to review Schedule C appointments may be limited in the case of the independent agencies, or when the organic act of an agency specifically precludes review by the Executive Office.

January 27, 1982

MEMORANDUM OPINION FOR THE ASSISTANT COUNSEL TO THE PRESIDENT

This responds to your request for a review of the present method by which the Office of Personnel Management (OPM) authorizes those positions of a confidential or policy-determining character known as "Schedule C" positions. 5 C.F.R. § 213.3301–.3399 (1981). You have asked whether it is proper for the Executive Office of the President (Executive Office) to involve itself in the review of Schedule C nominees. We believe that this practice is permissible, if the procedure is clarified as outlined below.

I. Background

The President is charged with general oversight of the civil service. 5 U.S.C. §§ 3301, 3302 (1976).[1] The President may delegate to the Director of OPM general authority for personnel management, 5 U.S.C. § 1104(a)(1) (Supp. III 1979), and he has done so. Exec. Order No. 9830, 3 C.F.R. (1943–1948 Comp.) 606; Exec. Order No. 9973, 3 C.F.R. (1943–1948 Comp.) 710. This general delegation, however, does not remove the President from active involvement in personnel matters. He continues to exercise his authority in this area by, for example, issuing orders concerning who may be admitted to the civil service

[1] *See generally Mow Sun Wong* v *Campbell*, 626 F.2d 739 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (exclusion of aliens from civil service). This "clear statutory authority" can be exercised even when OPM has made a contrary determination

system, *see supra* n.1, and which positions will be placed in the excepted service.

Federal civil service positions are classified into several groups. The President prescribes rules, 5 U.S.C. § 3302, which cover the "excepted service"—those civil service positions which are in neither the competitive service nor the Senior Executive Service. *Id.* § 2103(a); 5 C.F.R. § 213.101 (1981). Schedule C positions, a subcategory of the excepted service, 5 C.F.R. § 213.102 (1981), are "positions of a confidential or policy-determining character," such as Special Assistants and confidential secretaries. *Id.* § 213.3301. There are no merit qualifications imposed on Schedule C positions, as there would be if they were in the competitive service, and there is virtually no protection from removal.

Under President Carter, OPM had delegated to each agency the authority to establish those Schedule C positions it required. These delegations were rescinded on July 31, 1981. Federal Personnel Management (FPM) Bulletin No. 213–45, July 31, 1981, at 3.[2] Implementing regulations were issued in December. 46 Fed. Reg. 58271 (1981) (*to be codified in* 5 C.F.R. § 213.3301b).[3]

At present, an agency that wishes to establish a Schedule C position first submits the name of its nominee to the Executive Office for clearance. After it receives Executive Office clearance or while the name is still under review, the agency applies to OPM for permission to establish the position. This application for permission must contain a description of the job to enable OPM to determine whether the proposed position is of a confidential or policy-determining character. The name of the nominee must also accompany the application to OPM. This information is placed on an OPM computer for recordkeeping purposes and can apparently be reviewed from a terminal in the Executive Office. If the Executive Office, after calling up the names on its terminal, does not approve of an applicant, it informs OPM that it cannot support the application for the Schedule C position.

II. Analysis

Under the current framework of statutes, regulations, and executive orders, OPM's responsibility in this area is relatively straightforward. It must determine whether the agency's description of a proposed Schedule C position meets the criteria of a confidential or policy-determining job, and thus, whether a job may be placed in the excepted service. That is, OPM "decides whether the duties of any particular position are such that the excepting authority is applicable to the position." FPM Basic Inst. 262, ch. 213, subch. 3, § 3–1(c)(1981). Satisfaction of these criteria may fulfill OPM's institutional needs, but it does not mean that the Executive Branch's inquiry is at an end. There is an additional, and legiti-

[2] "Effective immediately, all delegations to agencies to establish Schedule C positions are suspended Any position currently excepted by OPM under Schedule C at GS-15 and below, or any position established under prior delegation agreements, is revoked immediately upon the position becoming vacant." *See also* 5 C.F.R. § 6.7 (1981)

[3] Prior to the revocation of authority, the agency had up to 120 days to fill a vacant Schedule C position before it reverted to OPM. 5 C.F.R. § 213.3301b(a),(b) (1981)

mate, interest in ensuring that persons placed in Schedule C positions are appropriate individuals to hold confidential or policymaking positions.

Schedule C positions serve as a complement to the President's authority over his own appointees. The expressly confidential or policymaking nature of these jobs indicates their sensitive nature. 5 C.F.R. § 213.3301 (1981).[4] These positions have always been used as a way to provide trustworthy aides to policymakers and they were, in fact, conceived for that very reason. Exec. Order No. 10440, 3 C.F.R. (1949–1953 Comp.) 932.[5] The Executive Office has a proper role in the filling of these positions, and has always involved itself, although the extent of each Administration's supervisory role has varied.

In order to ensure that the Executive Office review is properly conducted, certain procedures should be clarified.

First, we believe that the President should, if he has not already done so, instruct the heads of all Executive Branch agencies that he wishes them to consult with him or the Executive Office about Schedule C nominees, preferably before an application is submitted to OPM. This directive is necessary in order to establish that it is he who wishes to assert authority over the Schedule C positions. Normally the judgment of a Schedule C nominee's fitness rests entirely with the appointing officer, *see infra*, and the Executive Office cannot, on its own, involve itself with this decision. The President—not his subordinates—should therefore expressly direct the heads of all Executive Branch agencies to consult with the Executive Office before they submit an application to OPM for a Schedule C position.

Second, the directive should be clear in stating that the President is requiring that the executive agencies *consult* with him prior to making a Schedule C appointment. In most cases, the appointment power is vested in the head of the agency or one of his subordinates, not with the President.[6] The heads of the agencies are vested with the authority to appoint individuals even if the President disapproves, although the President has ample authority to punish disobedient agency heads through dismissal from their own jobs.

Third, if the President wants to restrain OPM from acting on agency requests for Schedule C positions before the Executive Office has an opportunity to consult with the agencies regarding the nominee, we believe that he should modify Exec. Order No. 10440, *supra*. Under the Order, OPM determines whether a position is of a confidential or policymaking character. The Order does not say that authorization is dependent upon review by the Executive Office. In order to require OPM not to take final action on an application prior to the

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[4] *See Leonard* v *Douglas*, 321 F.2d 749, 751–53 (D C Cir. 1963) (removal of Schedule C for incompatibility with his new superior)

[5] Creation of Schedule C positions "was a long overdue step toward a more precise identification of policymaking posts unsuitable for inclusion in the permanent service." Van Riper, *History of the U S. Civil Service* 495–96 (1958) *See also* Cooke, *Biography of an Ideal* 102 (1958); Mosher, *Democracy and the Public Service* 166 (1968). ("It may well be that the political executives are *the* crucial element in the maintenance of democratic control over a public service which is increasingly professional and 'careerized.' They are, or can be, the true nexus between politics and administration.")

[6] *See National Treasury Employees Union* v. *Reagan*, 663 F 2d 239 (D.C Cir. 1981) (Appointments can only be revoked by the appointing official, which in almost all cases would not be the President.)

Executive Office review process, there should be a modification of the present Order. 44 U.S.C. § 1505 (1976). The new order would tell OPM not to authorize a new position until the Executive Office notifies OPM that it has consulted with the agency involved. Once this consultation had occurred, OPM would authorize the slot if it met OPM's criteria.

Finally, we understand that the Executive Office has access to the computer on which OPM stores its data. If OPM's files are retrieved by reference to the individual applicant's name, it is impermissible for OPM to disclose that record to any other agency. 5 U.S.C. § 552a(b) (1976).[7] This may be overcome by obtaining the prior written consent of the nominee, *id.*, such as is now provided on Standard Form 171. In addition, OPM could alert the Executive Office that it has received an application for a certain position—without giving the name of the nominee. This will alert the Executive Office if it has not yet been told by the nominating agency.

A caveat to our advice concerning the exercise of authority by the Executive Office relates to the independent regulatory agencies. The President's authority to persuade the heads of Executive Branch agencies to comply with his request is bottomed on his ability to enforce compliance by virtue of his removal power over recalcitrant Executive Branch officials. He does not have that power to the same extent over members of many of the "independent" agencies. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). If he does not have the authority to have the name submitted to him for review, he does not have the authority to prevent OPM from authorizing the positions pending consultations or to insist that the appointing authority select a particular individual.[8] He can, however, request the agency to consult with the Executive Office.

There are situations where the organic act of an agency specifically precludes review by the Executive Office. The organic act establishing the Consumer Product Safety Commission, for example, has such a provision.

> The appointment of any officer (other than a Commissioner) or employee of the Commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

15 U.S.C. § 2053(g)(4). We would advise OPM to review the underlying statutes of each agency requesting a Schedule C position in order to ensure that such provisions are not overlooked.[9]

III. Conclusion

Some confusion seems to have arisen in this problem because of what some may perceive as OPM's "subservience" to the White House. We see no legal

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[7] Note that 5 U.S.C. § 552a(c) (1976) requires that a record be kept of disclosures that are made

[8] The appointment power in these agencies sometimes rests with the chairman, a position that is designated by the President. This authority could be useful in obtaining compliance with his request.

[9] We have reviewed the organic acts of all the independent agencies listed in the United States Government Manual and this is the only such provision that we have located. There may be others, however, that our search has not uncovered.

problem, however, with Executive Office review of nominees' names under the circumstances described above.

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Office of Legal Counsel

Acting Officers

An officer designated by a department head pursuant to a statute to perform the duties of a presidential appointee has the same authority as the officer for whom he acts, and may serve for an indefinite period notwithstanding the 30-day limitation of the Vacancy Act, though while acting he is entitled only to the salary of his regular position. There are, however, a number of practical and political reasons why the designation of acting officers should not be used as a substitute for appointment by and with the advice and consent of the Senate

Potential infirmities in the authority of the acting officer in any particular situation will be cured by the *de facto* officer rule.

January 27, 1982

MEMORANDUM OPINION FOR THE
DEPUTY COUNSEL TO THE PRESIDENT

This responds to the request by the Office of Presidential Personnel for a discussion of certain issues relating to the designation of the Deputy Commissioner of Immigration (Deputy Commissioner) to perform the duties of and act as Commissioner of Immigration and Naturalization (Commissioner).

I.

The designation would be based on 28 U.S.C. §§ 509, 510 and on § 103 of the Immigration and Nationality Act (Act) (8 U.S.C. § 1103). According to 28 U.S.C. § 510 the Attorney General may authorize the performance by any officer, employee, or agency of the Department of Justice of any function of the Attorney General. 28 U.S.C. § 509 vests in the Attorney General, with certain exceptions not here relevant, all functions of the Department of Justice, including those of the Immigration and Naturalization Service. The Attorney General thus has the authority under 28 U.S.C. § 510 to direct the Deputy Commissioner to perform the duties of and to act as the Commissioner. Similarly § 103(a) of the Act authorizes the Attorney General to delegate to any employee of the Immigration and Naturalization Service (Service) or to any officer or employee of the Department of Justice any of the duties and powers imposed upon the Attorney General in the Act. He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by the Act or any regulations issued thereunder upon

any other employee of the Service. Section 103(b) of the Act charges the Commissioner with any and all responsibilities and authority in the administration of the Service of the Act which are conferred upon the Attorney General or which may be delegated to him or prescribed by the Attorney General. The Attorney General thus has the authority to delegate to the Deputy Commissioner, or require and authorize the Deputy Commissioner to perform or exercise, any or all the powers conferred or imposed upon the Commissioner.

The principal problems relating to the designation of acting officers, discussed below, are the legal authority of the acting officer, the duration of the designation, and the compensation to which the acting officer is entitled.

1. *Authority of Acting Officers.* An acting officer is vested with the full authority of the officer for whom he acts. *Keyser* v. *Hitz*, 133 U.S. 138, 145–46 (1890). *Ryan* v. *United States*, 136 U.S. 68, 81 (1890); *United States* v. *Lucido*, 373 F.Supp. 1142, 1145 (E.D. Mich. 1974); 20 Op. Att'y Gen. 483 (1892); 23 Op. Att'y Gen. 473, 474–76 (1901).

2. *Duration of Designation (Relation to the Vacancy Act).* The Vacancy Act, 5 U.S.C. §§ 3345–3349, provides that where an officer of a bureau, who is not appointed by the department head, dies, resigns, or is sick or absent, his first assistant shall perform the duties of the office (5 U.S.C. § 3346), unless the President directs a department head or another officer of an executive department appointed by the President by and with the advice and consent of the Senate to perform the duties of the office. (5 U.S.C. § 3347.) Vacancies caused by death or resignation, however, may be filled *under these provisions* for not more than 30 days. (5 U.S.C. § 3348.) It has been the position of the Department of Justice for many years that, if vacancies are filled pursuant to 28 U.S.C. § 510 (the same would be true of § 103 of the Act), they are not filled pursuant to the provisions of the Vacancy Act, and that the 30-day limitation of 5 U.S.C. § 3348 consequently is inapplicable. This position was upheld by the courts in the analogous situations where the Deputy Attorney General or Solicitor General became Acting Attorney General pursuant to 28 U.S.C. § 508. *United States* v. *Lucido*, 373 F.Supp. at 1147–51; *United States* v. *Halmo*, 386 F.Supp. 593, 595 (E.D. Wis. 1974).

The Comptroller General takes the position that the 30-day limitation of 5 U.S.C. § 3348 must be read into all statutes authorizing the temporary filling of vacancies, because otherwise the President could circumvent the power of the Senate to advise and consent to appointments. The Department of Justice has never agreed with the Comptroller General's position in this regard. As explained below, however, the Department recognizes that the existence of this controversy makes temporary designations undesirable, especially where certain functions can be exercised only by specific officers.

3. *Compensation of Acting Officers.* Under 5 U.S.C. § 5535(b)(2) the Acting Commissioner could receive only the salary of the Deputy Commissioner.

II.

An officer, designated by a department head under a statute such as 28 U.S.C. § 510[1] to perform the duties of an officer appointed by the President by and with the advice and consent of the Senate, thus would have the same authority as the officer for whom he acts, and he could serve for an indefinite period, longer indeed than a recess appointee whose commission expires under Article II, § 2, clause 3 of the Constitution at the end of the next session of the Senate. The only direct drawback of the status of the acting officer is that while acting he is entitled only to the salary of his regular position and not to the compensation of the officer for whom he acts.

The question is occasionally raised why the President should be put to the inconvenience of having to go through the burdensome processes of selecting officers and securing the advice and consent of the Senate as to their appointment, if the same result could be obtained through an informal designation as acting officer by a department head. The answer is more practical and political than legal. Generally the Executive has recognized that the designation of acting officers should never be used as a substitute for appointment by and with the advice and consent of the Senate but only as an interim measure during the frequently difficult and time consuming processes of selecting a candidate and securing his confirmation by the Senate.

The following considerations underlie this recognition:

1. The President has the duty under the Constitution to appoint officers by and with the consent of the Senate. An attempt to circumvent the right of the Senate to participate in the appointment process is likely to result in political reprisals and repercussions. Hearings may be held on the status of the acting official which at best are time consuming and may require embarrassing explanations.

2. While, as indicated above, an acting officer has the same legal authority as a presidential appointee, his stature as a practical matter is often somewhat inferior. He is frequently considered merely a caretaker without a mandate to take far-reaching measures.

3. In contrast to the position of the Department of Justice that an official whose acting status is derived from a statutory base other than the Vacancy Act is not subject to the 30-day limitation of 5 U.S.C. § 3348, the Comptroller General contends that 5 U.S.C. § 3348 controls the time for which all acting officers may serve, or that a provision such as 28 U.S.C. § 510 does not apply to officers whose appointment requires the advice and consent of the Senate. The Executive generally chooses to avoid, if possible, disputes with the Comptroller General in view of his congressional backing.

4. The courts have never conclusively decided the question whether the 30-day limitation of 5 U.S.C. § 3348 must be read into a statute which generally

[1] Most if not all of the agencies have provisions authorizing a department head to designate any officer in his department to perform any function of the department head. These provisions, which go back to the Hoover Commission Report of 1949, were first incorporated in the Reorganization Plans issued under the Reorganization Act of 1949, Pub L No 81-109, 63 Stat. 203 Since then many of these provisions have become statutory

authorizes a department head to authorize any officer or employee of the department to perform any function vested in the department head.[2] Hence in the relatively few situations where legal actions may be undertaken only by a specific officer,[3] the department has tried to avoid the taking of such action by an acting official who served for more than 30 days.[4] This legal uncertainty is a further reason indicating the importance of having the President make appointments by and with the advice and consent of the Senate and using acting designations only as an interim measure during the regular appointment process.

III.

In many instances the potential infirmities in the authority of the acting officers discussed in the preceding parts of this memorandum will be cured by the *de facto* officer rule. Under that doctrine, a person who discharges the duties of an office under color of title is considered a *de facto* officer even if there are defects in that title. The public acts of a *de facto* officer are binding on the public; conversely, the public may safely assume that he is a rightful officer. *McDowell* v. *United States*, 159 U.S. 596, 601–02 (1895); *Waite* v. *Santa Cruz*, 184 U.S. 302, 322–24 (1902); *United States* v. *Royer*, 268 U.S. 394 (1925); *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22, 23 (7th Cir. 1945), *cert. denied*, 325 U.S. 858; *Equal Employment Opportunity Commission* v. *Sears, Roebuck and Co.*, 650 F.2d 14, 17 (2d Cir. 1981); *see also United States* v. *Joseph*, 519 F.2d at 1071 n.4. As a rule, the authority of *de facto* officers can be challenged only in special proceedings in the nature of *quo warranto* brought directly for that purpose. *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22; *United States* v. *Nussbaum*, 306 F. Supp. 66, 68–69 (N.D. Cal., 1969); F. Mechem, *Public Offices and Officers*, §§ 343, 344 (1890).

As explained in the above-cited cases, the *de facto* officer rule rests on two basic considerations. First, when a person is openly in the occupation of a public office, the public should not be required to investigate his title; conversely, an individual should not be able to challenge the validity of official acts by alleging technical flaws in an official's title to his office.[5]

A typical case of a *de facto* officer is one who has been properly appointed but who continues to serve after his term of office has expired. *Waite* v. *Santa Cruz*, 184 U.S. 302; *United States* v. *Groupp*, 333 F. Supp. 242, 245–46 (D. Maine

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[2] In *United States* v *Joseph*, 519 F.2d 1068, 1070–71 (5th Cir 1975), *cert. denied*, 424 U.S. 909 (1976), 430 U S 905 (1977), the Court of Appeals seems to have assumed *arguendo* that 5 U S.C § 3348 limits the period during which an official designated pursuant to 28 U.S.C. § 510 may act The court, however, avoided the issue by holding the decision involved had been made by the Attorney General himself rather than by the Acting Assistant Attorney General, who had merely transmitted it, and that in any event the *de facto* officer doctrine, discussed in part III *infra*, applied.

[3] In the Department of Justice this involves especially certain orders and authorizations within the competence of the Criminal and Tax Divisions

[4] At times the Department of Justice was able to obviate this difficulty by having the acting official sign the document in his permanent rather than in his acting capacity, or by having it signed by his superior.

[5] Another rationale for the *de facto* officer rule is that a person should not be able to submit his case to an officer and accept it if it is favorable to him, but challenge the officer's authority if the latter should rule against him *Glidden Company* v. *Zdanok*, 370 U S. 530, 535 (1962).

1971), *aff'd*, 459 F.2d 178, 182 n.12 (1st Cir. 1972). This consideration is of particular importance if the status of the acting officer should be attacked on the ground that 5 U.S.C. § 3348 is applicable to designations of acting officers, so that their authority expires 30 days after their designation.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Attribution of Outside Earned Income Under the Ethics in Government Act

The Federal Election Commission rule that allows federal employees to defer receipt of income from honoraria, so as to avoid the annual ceiling of $25,000 imposed by 2 U S.C. § 441i, does not apply to the provision in the Ethics in Government Act of 1978, which limits outside earned income for presidential appointees to 15 percent of their salary. For purposes of determining whether this 15 percent limit has been met, income will be attributed to the year in which the services relating to it were performed.

January 28, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to your letter concerning Advisory Opinion 1981–10 approved by the Federal Election Commission (FEC) on April 9, 1981. You have asked for our opinion as to the effect of that opinion on the 15 percent limit on outside earned income imposed by the Ethics in Government Act of 1978. 5 U.S.C. App. § 210 (1982). For the reasons set forth below, we conclude that the opinion of the Federal Election Commission does not affect the interpretation of the limit imposed by the Ethics in Government Act.

The opinion of the Federal Election Commission construed a provision administered by that Commission, 2 U.S.C. § 441i(a)(2). This section applies generally to government employees and prohibits them from accepting honoraria of more than $25,000 "in any calendar year." It was originally enacted in 1974 and was first interpreted to count all payments against the $25,000 limit during the year in which the related service was actually performed rather than in the year when the money was received.

Congress reversed this interpretation by legislation in 1977. It explicitly provided that "an honorarium shall be treated as accepted only in the year in which that honorarium is received." 2 U.S.C. § 441i(d). The FEC subsequently issued Advisory Opinion 1981–10, concluding that 2 U.S.C. § 441i permitted an agreement between a federal employee and the payor of an honorarium to defer payment in order not to exceed the $25,000 maximum. Payments are counted toward the maximum only in the year in which they are actually received. The opinion was written following the release of the hostages from Iran when the demand for public appearances for them was extremely great.

The opinion notes that, consistent with the legislative history of the 1977 amendment, the FEC's regulations were similar to those of the Internal Revenue

Service. The sponsor of the amendment indicated the desire to treat both provisions consistently. Thus, income is taxed when it is constructively received. *See* 26 C.F.R. 1.451–2(a). The FEC opinion made no reference to the Ethics in Government Act.

The Ethics in Government Act includes a somewhat different limit on outside earned income that applies only to those government employees who are appointed by the President with the advice and consent of the Senate. Such employees "may not have *in any calendar year* outside earned income attributable to such calendar year which is in excess of 15 percent of their salary." 5 U.S.C. App. § 210; 5 C.F.R. § 734.501 (emphasis added).

Your letter asks, in effect, whether the rule on receipt of income imposed by 2 U.S.C. § 441(d) also applies to 5 U.S.C. App. § 210. Although the matter is not free from doubt, we do not believe that it should.

We note first that the language of 5 U.S.C. App. § 210 is substantially different from that in 2 U.S.C. § 441i. An important distinction is that the 15 percent limit imposed by § 210 applies to earned income "attributable" to a particular year. As noted, Congress amended Title 2 in 1977 to change the interpretation so that income would only be charged to the statutory limit when it was actually received. When Congress enacted the Ethics in Government Act the following year, it thus had before it model language which would have enabled it to apply the same rule to the 15 percent limit. The difference in language is not in itself conclusive. Nevertheless, the fact that the two provisions, enacted within less than a year of each other, read so differently, strongly suggests that different interpretations are permissible.

The question remains as to what meaning should be given to earned income "attributable" to a given year. In its ordinary sense, one thing is attributed to another if it is "caused or brought about by" that other thing. Webster's Third New Int'l Dictionary 142 (1976); *cf. Ogden* v. *United States*, 432 F. Supp. 214, 216 (S.D. Miss., 1975). Thus, income would appear to be "attributable" to the year in which the services which "brought about" that income were performed.

The word "attributable" might be given a different, technical meaning if the legislative history or the statutory purpose dictated this result. There seems to be no persuasive reason, however, for rejecting the ordinary meaning. 2A C. Sands, Sutherland Statutory Construction § 47.28 (4th ed. 1973). The 15 percent limit was added to the Ethics in Government Act as an amendment on the floor of the House. The legislative history provides no guidance as to its interpretation. 124 Cong. Rec. 32006–08 (1978); H. R. Conf. Rep. 95–1756, 95th Cong., 2d Sess. 72 (1978). The Revenue Code provisions which deal with rules for taxable year of inclusion of income do not use the word "attributable," 26 U.S.C. § 451 *et seq.* It cannot therefore be argued that Congress, in using that word, was adopting a term of art from the tax code. Although it might make life somewhat easier for an appointee to use the same figures for both IRS and ethics purposes, one would not normally expect that the problem of income deferral would arise so often or that the problems would be so complex that consistency between ethics and IRS rules should be a major consideration.

Statutes on the same subject should, of course, be construed together. Sutherland at § 51.02. There is, however, no necessary inconsistency in interpreting 5 U.S.C. App. § 210 and 2 U.S.C. § 441 differently as far as postponing receipt of income is concerned. The $25,000 limit in 2 U.S.C. § 441i applies to employees of all branches, elected or appointed. The limit is large enough to permit a substantial amount of outside income which may, in fact, rival the salaries received from the government. In the Ethics in Government Act, Congress subjected a much smaller group, key presidential appointees, to a stricter rule. The dollar limit is, in practical terms, a much lower figure than that permitted by Title 2. Fifteen percent of $60,000 for example, is only $9,000. This might, of course, lead appointees to adopt devices for avoiding this limit. Although one might think that the policy of preventing avoidance should have applied equally to 2 U.S.C. § 441i, it must be recognized that the pattern of the Ethics in Government Act, in general, was to impose the strictest burdens on key Executive Branch officials. It is therefore plausible that Congress intended to prevent the use of devices for stretching out receipt of income and weakening the effect of § 210. The limit is presumably intended to prevent them from profiting from their important and visible positions and prevent them from spending a substantial amount of time on activities apart from their official duties. It is for the latter reason that the Office of Government Ethics, which is charged with administering § 210, has taken the position that under 5 U.S.C. App. § 210, income will be attributed to a given year if the personal services relating to it were performed in that year.* (This position has not been incorporated in OGE regulations or reduced to writing, but we have been informed that they have consistently advised affected persons of this view.)

For the reasons stated, we do not believe that Advisory Opinion 1981–10 of the FEC applies to 5 U.S.C. App. § 210.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

*Section 210 might have been written differently to achieve the same purpose, focusing perhaps on all outside activities rather than income This provision is, however, only one of many conflict-of-interest restrictions that apply to the activities of such appointees More obvious problems, such as bribery or corruption, are dealt with elsewhere.

Recovery of Interest on Advance Payments to State Grantees and Subgrantees

Section 203 of the Intergovernmental Cooperation Act exempts both the states and their subgrantees from accountability for interest earned on federal grant funds pending their disbursement, and such interest may thus not be recovered by the federal government.

February 5, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

This memorandum responds to your request that this Office advise you whether the federal government may recover interest actually accrued by state grantees and subgrantees on advance payments of grant funds. Section 203 of the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4213 (1976), provides that "[s]tates shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes." On the basis of this provision, prior opinions of the Office of Legal Counsel, and three recent decisions of the Comptroller General interpreting that provision, we conclude that the federal government may not recover interest earned by state grantees and subgrantees on advances of federal grant-in-aid funds.

I.

Section 203 of the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4213, which directs the scheduling of transfers of federal grant-in-aid funds to states, provides that transfers of grant funds be made as near as possible to the time of disbursement by the states, and exempts states[1] from accountability for interest earned on these funds pending their disbursement. Section 203 provides:

> Scheduling of Federal transfers to the States
>
> Heads of Federal departments and agencies responsible for administering grant-in-aid programs shall schedule the transfer of grant-in-aid funds consistent with program purposes and applica-

[1] Decisions of the Comptroller General have in the past required recipients of federal grants to return to the Treasury any interest earned on such grants prior to their use, unless Congress has specifically precluded such a requirement. *See* 42 Comp. Gen 289 (1962) and cases cited therein.

> ble Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by a State, whether such disbursement occurs prior to or subsequent to such transfer of funds. . . . *States shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes.*

42 U.S.C. § 4213 (emphasis added).

You have questioned the applicability of the exemption contained in § 203 to interest *actually* earned by state grantees in view of the Act's mandate that federal grant-in-aid funds not be transferred from the Treasury until such funds are ready for use by the state grantees, the effect of which would minimize the amount of interest accrued by the states. In addition, it is your position that even if § 203 does provide an exemption for interest earned by *state* grantees, the exemption does not extend to local governmental units which are *secondary recipients* of federal grant funds funnelled through the states.

Notwithstanding the Act's purpose to discourage the transfer of federal grant funds to states in advance of the grantees' program needs, we cannot ignore the clear language of the Act which exempts states from accountability for interest in the event that interest *is* earned prior to states' disbursement of funds. Dec. Comp. Gen. B–196794 (Feb. 24, 1981); 59 Comp. Gen. 218 (1980); Dec. Comp. Gen. B–171019 (Oct. 16, 1973); Rehnquist, Office of Legal Counsel, "Recovery of Interest on Excessive Cash Balances of LEAA Funds Held by States and Cities" (Nov. 15, 1971).[2] Moreover, while the question can be raised whether

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[2] In his 1971 opinion, then Assistant Attorney General Rehnquist gave a clear and concise account of the exemption provision contained in § 203 of the Act:

> Our reading of the legislative history concerning § 203 and the broader objectives of the Intergovernmental Cooperation Act of 1968 as well, leads us to [conclude] that Congress exempted the States from the burden of accounting for interest on grant funds to facilitate the new authorities for commingling Federal funds in the general accounts of the States and the new Treasury techniques such as the letter of credit and sight draft procedures which implemented the Act. *We do not read these, however, as support for the view that Congress intended to impose penalties on those States which accumulated interest on deposited or invested funds and to require a forfeiture of that interest* On the contrary, the [Senate and House] reports emphasize the expectation that very little interest accumulation is expected. It is clear to us that this is because an important objective of the legislation is to require the Federal Government to impose such oversight controls as will result in a scheduling of funds to the States and so prevent any long periods of disuse of funds with resulting buildups and accumulation of windfalls.
>
> *An overall legislative objective is clearly assistance to the States from the Federal Government.* In its very title the Act is described as a measure to "achieve the fullest cooperation * * * to improve the administration of grants-in-aid to the States " For these purposes, among others, the States were relieved of a number of the duties which theretofore had burdened the administration of the grant-in-aid programs, such as the requirements for maintaining funds in separate banks and the requirement of accounting for any interest earned on deposits or investments
>
> We would agree . . . that Congress never intended to permit a State "to abuse agency and Treasury regulations by drawing excessive amounts of cash for investment pending disbursement and still be relieved of having to account for the interest earned on the investment." The legislative history indicates that Congress did not intend that to happen because the Federal Government was expected to prevent it from happening by spacing the disbursement funds on the basis of need.
>
> *Perhaps the most persuasive argument against a plan to hold a State accountable for interest earned is the categorical provision in § 203 stating "States shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes." We do not find a*

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this exemption applies to local governmental units which are subgrantees of the states, both this Office and the Comptroller General have examined this issue, and neither has read § 203 to permit the federal government to recover interest earned by local governmental units receiving federal funds as subgrants from the states. *See* Dec. Comp. Gen. B–196794 (Feb. 24, 1981); 59 Comp. Gen. 218 (1980); Dec. Comp. Gen. B–171019 (Oct. 16, 1973); Ulman, Office of Legal Counsel, "Issue Raised by Conflicting Opinions Concerning Interest Earned on Grant Funds by Local Governments" (Mar. 12, 1974); Office of Legal Counsel, Internal Action Memorandum (Feb. 19, 1974). *But see* Rehnquist, Office of Legal Counsel (Nov. 15, 1971), *supra*.

II.

This Office first considered the applicability of the § 203 exemption to subgrantees of states receiving federal grant-in-aid funds in a 1971 opinion issued by Assistant Attorney General Rehnquist to the Administrator of the Law Enforcement Assistance Administration (LEAA). *See* Rehnquist, Office of Legal Counsel (Nov. 15, 1971), *supra*. In that opinion Assistant Attorney General Rehnquist noted that § 203 of the Act speaks only of relief to "States," a term which is defined in Section 102 of the Act as

> any of the several States of the United States, the District of Columbia, Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State, *but does not include the governments of the political subdivisions of the State*.

42 U.S.C. § 4201(2) (emphasis added). Because local governmental units are not encompassed by this definition, he concluded that local governmental units receiving federal funds as subgrantees of the states were *not* exempt from the general requirement that interest earned on federal funds be returned to the United States Treasury:

> [D]espite the Congressional intention to discontinue "future application" of the interest accountability "principle" (H. Rept. No. 1845, 90th Cong., Aug. 2, 1968) the specific mention of the States in § 203 without any express legislative relief to the cities and other local units leaves unchanged the general rule calling for continued accountability by the latter, whether funds are received directly or by subgrant from a State. Although we are not aware of any reason for the distinction in § 203 between "States" and "political subdivisions," it nevertheless exists, and accordingly

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contradiction to that clear statement in the Act nor in its legislative history

Rehnquist opinion at 5–6 (emphasis added) Because this Office has continued to maintain the views expressed in Assistant Attorney General Rehnquist's 1971 opinion, which are also consistent with subsequent decisions by the Comptroller General, we do not find it necessary to re-analyze in this opinion the applicability of § 203 to state grantees

we think that as a matter of law the distinction must be maintained.

Rehnquist opinion at 7.

In strictly construing the term "State" in the Act without reference to the Act's legislative history, the Rehnquist opinion failed to distinguish local governmental units which receive grant-in-aid funds *directly* from the federal government from those which are *secondary* recipients of federal grant funds, receiving federal funds as subgrantees of the states. In view of the Act's purpose to assist the states by facilitating the transfers of federal grant funds, as well as by relieving the states of various administrative and accounting duties, we believe that this distinction is critical to the Act's implementation. As subsequent decisions of this Office[3] and the Comptroller General have made clear, a requirement that local governmental units receiving federal grant funds as subgrantees of the states be held accountable for interest earned on these funds would necessarily require state grantees, in contravention of § 203, to be responsible for ascertaining and securing the interest earned by their local subgrantees. In the case of *direct* federal grants to local governmental units, however, state grant administrative machinery is in no way implicated—in these cases, of course, local grantees are directly accountable to the federal government for interest earned on federal grant funds prior to their use. *See* Dec. Comp. Gen. B–196794 (Feb. 24, 1981); 59 Comp. Gen. 218 (Jan. 17, 1980); Ulman, Office of Legal Counsel, "Issue Raised by Conflicting Opinions Concerning Interest Earned on Grant Funds by Local Governments" (Mar. 12, 1974); Dec. Comp. Gen. B–171019 (Oct. 16, 1973).

In 1973, the Comptroller General considered the issue of interest accountability by subgrantees of the states and concluded that "political subdivisions receiving Federal grants-in-aid through State governments are entitled to retain moneys received as interest earned on such Federal funds." Dec. Comp. Gen. B–171019 at 1 (Oct. 16, 1973). In reaching this conclusion, the Comptroller General noted that neither the language nor the legislative history of § 203 of the Intergovernmental Cooperation Act differentiates between grants which the states will disburse themselves and grants involving funds which the states will subgrant to local governments.[4] The Comptroller General stated:

[3] *See* Ulman, Office of Legal Counsel, "Issue Raised by Conflicting Opinions Concerning Interest Earned on Grant Funds by Local Governments" (Mar 12, 1974) On Mar. 12, 1974, Acting Assistant Attorney General Ulman responded to a request by LEAA to resolve the differences between the 1971 Rehnquist opinion and a 1973 decision by the Comptroller General which concluded that local governmental units receiving federal grant funds as subgrants from the states were permitted to retain the interest earned on those funds. In his letter, Ulman deferred to the judgment of the Comptroller General regarding the proper interpretation of § 203, noting that "the matter . involve[d] the disposition of funds in the settlement of a public account, a matter within [the Comptroller General's] official jurisdiction. " Ulman, Office of Legal Counsel, *supra* at 3 *See also* Office of Legal Counsel, Internal Action Memorandum (Feb 19, 1974) (discussing issues to be addressed in the Mar. 12, 1974, letter to LEAA)

[4] The Comptroller General referred to a Feb. 19, 1969, memorandum from the Assistant General Counsel for Education, Department of Health, Education and Welfare (HEW) to the Assistant Commissioner for Administration, HEW, which also concluded that the interpretation of § 203 that is most consistent with the Intergovernmental Cooperation Act's purposes and legislative history requires that *all* federal grant funds transferred to states be exempt from interest accountability, without regard to whether the funds are further subgranted by the states:

> [The language of § 203] quite literally instructs us not to hold a State agency accountable for interest earned on grant funds *pending their disbursement*. There is no exception to this instruction

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> Thus, it seems clear to us that States are not to be held accountable for interest earned on any grant-in-aid funds pending their disbursement, whether or not the States intend, or are required by the terms of the grant, to subgrant these funds. To hold otherwise would, of course, require the States to assume the burden of accounting for the presumably relatively small amounts of interest which would be earned on these funds in contravention of the legislative intent behind the last sentence in section 203.

Id. at 8.

This analysis of § 203 was reaffirmed by the Comptroller General in 1980, with respect to *non*-governmental subgrantees of state recipients of federal grants. *See* 59 Comp. Gen. 218 (Jan. 17, 1980). The Comptroller General concluded that "the same rationale that justifies exempting governmental subgrantees from remitting to the Federal grantor agency interest earned on Federal grant funds received from the States, applies equally to non-governmental subgrantees." *Id.*

Again in 1981, the Comptroller General reiterated his interpretation of § 203 as permitting subgrantees of federal grants to retain the interest earned on funds received by them through the states. *See* Dec. Comp. Gen. B–196794 (Feb. 24, 1981). The Comptroller General's 1981 decision was prompted by a request from the Office of Management and Budget (OMB) to reconsider the current reading of § 203 in light of the difficulties that it poses for sound cash management by the various federal grantor agencies. OMB was, and continues to be, concerned that § 203 provides an incentive to states and their subgrantees to draw on their grant funds prematurely to accrue "free" interest, and thereby frustrate the mandate of Treasury Circular 1075[5] against excessive cash withdrawals. While the Comp-

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for funds that earn interest pending their disbursement by a local educational agency, or any other agency

To depart from this plain reading of § 203 would require some clear indication of a different legislative intent in its enactment. No such indication is apparent. On the contrary, as the floor manager of the House bill, Mr Reuss, pointed out—

> The first substantive title—title II—calls for improved administration of grants-in-aid to the States * * * In addition it would relieve the States from unnecessary and outmoded accounting procedures now in effect and the maintenance of separate bank accounts while protecting the right of the executive branch and the Comptroller General to audit those accounts

Relief from "unnecessary * * * accounting procedures" is consistent with suspension of the rule requiring the States to account for interest earned on grant funds, regardless of what agency of the State may be in possession of those funds at the time that such interest accrues. *The effect of excluding political subdivisions from the term 'State' must be understood merely to withhold interest forgiveness in programs in which a local educational agency is directly accountable to the Federal Government.*

Dec Comp Gen B–171019 (Oct. 16, 1973) (emphasis added)

[5] Treasury Circular 1075 requires that:

> Cash advances to a recipient organization shall be limited to the minimum amounts needed and shall be timed to be in accord only with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program costs and the proportionate share of any allowable indirect costs

31 C.F.R § 205 4 (1978) *See also* S. Rep No 29, 96th Cong , 2d Sess (1980) on the Supplemental Appropria-

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troller General was sympathetic to the concerns expressed by OMB and indicated that § 203 is being reassessed in light of administrative changes that have taken place since the legislation was passed in 1968, he nevertheless concluded that

> [a]s long as section 203 remains in effect . . . we see no basis for changing our ruling even if this is an obstacle to better cash management. However, we should point out that our decision does not preclude agencies from complying with the three steps mentioned by the Senate Committee on Appropriations, including "[i]nitiating immediate recovery action whenever recipients are found to have drawn excess cash, in violation of Treasury Circular 1075." S. Rep. No. 96–829, 96th Cong., 2d Sess. 14 (1980). Thus, the agencies should monitor their grantees draw of cash and recover any excess.

Id. at 2.

Our own reading of § 203 of the Intergovernmental Cooperation Act of 1968, in light of its legislative history, supports the foregoing analyses of the Comptroller General. While we are mindful of the position taken by this Office in the 1971 Rehnquist opinion, we believe that the Act's legislative history, and the accompanying statements of the Act's purposes, cannot support the narrow interpretation of "State" accorded § 203 by that opinion. To exempt state grantees from the interest accountability requirement while requiring that they monitor and collect interest accrued by their *sub*grantees would reimpose the very administrative and accounting burdens of which the Act was intended to relieve the states.[6] Although the Rehnquist opinion did not appear to contemplate such a result, it nevertheless seemed compelled by its narrow reading of "States" to distinguish federal grant funds which are disbursed by the states for state programming needs from those funds which are disbursed by the states to their political subdivisions for local programming needs. In view of the Act's overall legislative objective of assisting the states by improving the administration of grants-in-aid—including the facilitation of grant fund transfers, and relieving states of the burdens of maintaining grant funds in separate bank accounts and accounting for interest earned on deposits or investments—it would make little sense to impose upon states the far more difficult task of accounting for the

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tions and Rescission Bill, 1980, directing all federal agencies to "take immediate steps to assure compliance with Treasury Circular 1075" by:

> (1) Reviewing the periodic reports filed by recipients to ascertain whether they are drawing and holding cash in excess of their current needs,
>
> (2) Auditing a sufficient number of recipient accounts to determine whether they are filing accurate reports on cash in hand; and
>
> (3) *Initiating immediate recovery action whenever recipients are found to have drawn excess cash, in violation of Treasury Circular 1075.*

S. Rep No. 829 at 14 (emphasis added).

[6] Of course, this burden would not be imposed on the states in cases where federal grant funds are transferred *directly* from the federal grantor agencies to local governmental units, without being funnelled through the states. All prior opinions of the Comptroller General and the Office of Legal Counsel, including the Rehnquist opinion, are in agreement that in such cases, the local grant recipients are responsible directly to the federal grantor agency, and are not exempt from interest accountability by operation of § 203.

interest earnings of their subgrantees when the states themselves are exempt from accountability for their own earnings. Thus, we believe that, consistent with the purposes of the Act, § 203 is properly interpreted to exempt interest accountability on all federal grant-in-aid funds that are transferred to the states, regardless of whether such funds are disbursed by the states for their own programming needs or subgranted to local governmental units.

While we are sympathetic to the cash management concerns expressed by OMB, we believe that the Act clearly places the responsibility for implementing sound fiscal policies with respect to federal grant funds with the federal grantor agencies. Section 203 requires the heads of federal departments and agencies who are responsible for administering grant-in-aid funds to schedule the fund transfers in a manner that is "consistent with program purposes and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by a State. . . ." 42 U.S.C. § 4213.

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The Pocket Veto: Historical Practice and Judicial Precedent

[The following two memoranda examine historical practice and judicial precedent under the Pocket Veto Clause of the Constitution, Art. I, § 7, cl. 2, in order to advise the President concerning the efficacy of a pocket veto during both intrasession and intersession adjournments of Congress.]

I.

February 10, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum discusses generally the President's power to pocket veto legislation, with specific reference to the President's pocket veto of H.R. 4353 during the recent intersession adjournment of the 97th Congress.

Article I, § 7, clause 2 of the Constitution provides:

> 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. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, *unless the Congress by their Adjournment prevent its Return, in which case it shall not be a Law.*

(Emphasis supplied.) The italicized phrase is commonly referred to as the "pocket veto" provision because it empowers the President to prevent a bill's becoming law simply by placing it in his pocket—*i.e.*, neither signing it nor returning it with his objections to its House of origin. The functional difference

between ordinary vetoes and pocket vetoes is that the latter cannot be overridden by Congress.

As the President's recent pocket veto of H.R. 4353 demonstrates, the questions raised by the pocket veto provision have considerable practical significance. If, contrary to the advice given orally by this Office, the pocket veto of H.R. 4353 was ineffective, that provision became law at the expiration of the ten-day period (Sundays excepted) after it was presented to the President. Because of the short time period involved, and because of the possible adverse consequence of an erroneous decision to pocket veto a bill rather than return it to Congress with objections, questions regarding the pocket veto provision often attain considerable urgency and importance. We therefore believe that it is useful to examine in advance the various issues arising under the pocket veto provision in a relatively comprehensive fashion in order to advise you regarding the legality of pocket vetoes in situations that are likely to arise in the future.

The pocket veto provision appears to have been adopted without controversy by the Framers; the proceedings and debates of the Constitutional Convention shed no light on its meaning. Interpretation of the provision must therefore rely on historical practice and on three pertinent judicial decisions: *The Pocket Veto Case*, 279 U.S. 655 (1929); *Wright* v. *United States*, 302 U.S. 583 (1938); and *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

I. Historical Practice

Presidents throughout our history have used the pocket veto power frequently—a fact which is not surprising in light of the tendency on the part of Congress to present a mass of legislation to the President just before it adjourns and in view of the convenience to the President of exercising a veto that cannot be overridden by Congress. Most pocket vetoes have occurred after final adjournments of Congress or intersession adjournments between the first and second sessions.[1] Presidents have also pocket vetoed bills during intrasession adjournments[2] of varying lengths,[3] but this practice has been relatively unusual.[4] The historical practice therefore strongly supports the pocket veto during final and intersession adjournments, but is inconclusive for intrasession adjournments.[5]

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[1] *See* House Doc. No. 493, 70th Cong., 2d Sess. (1928) (memorandum prepared by the Attorney General and presented to Congress; relied on by Supreme Court in *The Pocket Veto Case*, 279 U.S. 655 (1929)).

[2] The Attorney General rendered an opinion in 1943 concluding that the pocket veto provision was triggered by an adjournment within the first session of the 78th Congress which lasted from July 8 to September 14, 1943. 40 Op. Att'y Gen. 274 (1943).

[3] *See* Office of Legal Counsel, Pocket Vetoes During Short Holiday Recesses (Jan. 13, 1971), Pocket Vetoes During Adjournments of Congress Within a Session (Nov 19, 1968).

[4] *See Kennedy* v *Sampson*, 511 F.2d at 442–45 (appendix analyzing pocket vetoes during all intrasession adjournments of more than three days since 1800)

[5] While highly relevant, the practice engaged in by the Executive Branch and generally acquiesced in by Congress is not dispositive *See The Pocket Veto Case*, 279 U.S. at 690 (executive practice, acquiesced in by the legislature, is entitled to "great regard" but is "not absolutely binding on the judicial department. . . .") (quoting *State* v *South Norwalk*, 77 Conn 257, 264). It is ultimately the province and duty of the Judicial Branch to "say what the law is." *United States* v *Nixon*, 418 U.S. 683, 703 (1974), quoting *Marbury* v. *Madison*, 5 U S (1 Cranch) 137, 177 (1803). Executive practices, even ones of long duration, must yield to contrary judicial interpretations.

II. Judicial Decisions

A. The Pocket Veto Case

The Pocket Veto Case involved a Senate bill which authorized certain Indian tribes to bring suit against the United States in the Court of Claims. The bill passed both Houses and was duly presented to the President on June 24, 1926. On July 3, 1926, the House of Representatives adjourned *sine die* and the Senate adjourned to November 12, the date to which, sitting as a court of impeachment, it had previously adjourned for the trial of certain articles of impeachment.[6] The July 3 adjournment was the final adjournment of the first session of the 69th Congress. The ten-day period (Sundays excepted) provided for presidential action under Article I, § 7, clause 2 expired on July 6, 1926, three days after the first session of Congress adjourned. The President neither signed the bill nor returned it to the Senate and the bill was not published as a law.

Contending that the bill had become a law without the President's signature, the Indian tribes filed suit in the Court of Claims. The Court of Claims sustained the United States' demurrer and the Supreme Court affirmed unanimously. Justice Sanford's opinion concluded that the word "adjournment" was not limited to final adjournments of a Congress, but also included interim adjournments between or within sessions. The determinative question, therefore, was not whether Congress had "adjourned," but rather whether the adjournment was one which "prevent[ed]" the President from returning a bill to the House in which it originated in the time allowed.

The specific question, in the Court's view, was whether the intersession adjournment of Congress prevented the President from returning the bill, or whether the Constitution was satisfied by the possibility of delivery to an officer or agent of the House of origin, to be held by him and delivered to the House when it resumed its sittings for the next session. The Court concluded that "the 'House' to which the bill is to be returned, is the House in session." 279 U.S. at 682. It followed that

> under the constitutional mandate [the bill] is to be returned to the "House" when sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill; and that no return can be made to the House when it is not in session as a collective body and its members are dispersed.

Id. at 683.

In rejecting the contention that delivery to an agent sufficed when the House was not in session, the Court observed that Congress had never authorized agents to receive bills returned by the President during its adjournment. Moreover,

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[6] The impeachment proceedings were brought against George W. English, a federal district judge. English resigned before the date for the Senate trial. *See* 68 Cong. Rec. 3–4 (1926).

delivery to such an agent, even if authorized by Congress, "would not comply with the constitutional mandate." *Id.* at 684:

> The House, not having been in session when the bill was delivered to the officer or agent, could neither have received the bill and objections at that time, nor have entered the objections upon its journal, nor have proceeded to reconsider the bill, as the Constitution requires; and there is nothing in the Constitution which authorizes either House to make a *nunc pro tunc* record of the return of a bill as of a date on which it had not, in fact, been returned. Manifestly it was not intended that, instead of returning the bill to the House itself, as required by the constitutional provision, the President should be authorized to deliver it, during an adjournment of the House, to some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid. In short, it was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date when the time for the return of the bill to the House had expired.

Id.

B. Wright v. *United States*

Wright v. *United States*, 302 U.S. 583 (1938), involved a Senate bill which granted jurisdiction to the Court of Claims to adjudicate the petitioner's claim against the United States. The bill passed both Houses during the first session of the 74th Congress and was presented to the President on April 24, 1936. On May 4, 1936, the Senate recessed until noon on May 7; the House of Representatives remained in session. Because the Senate was in recess for not more than three days, it was not necessary to obtain the consent of the House of Representa-

tives pursuant to Article I, § 5, clause 4 of the Constitution.[7] On May 5, the tenth day (Sundays excepted) after receiving the bill, the President returned it to the Senate with a message stating his objections. The bill and the message were delivered to the Secretary of the Senate. The Senate received the President's message when it reconvened on May 7 and referred the bill and the President's message to committee. No further action was taken.

The petitioner presented his petition to the Court of Claims, contending that the President's veto of the bill was ineffective because, under *The Pocket Veto Case*, delivery to an agent of the Senate did not constitute a constitutionally sufficient return.[8] The Court of Claims denied the petition and the Supreme Court affirmed. The Court's opinion, *per* Chief Justice Hughes, held only that the President's veto of the legislation was effective; it did not directly concern the pocket veto. In holding that the President was not prevented from vetoing the bill by the temporary recess of the Senate, however, the opinion necessarily implied that a pocket veto of the bill would have been ineffective. Moreover, the Court's analysis contained broad language which stands in sharp contrast to *The Pocket Veto Case*.

The Court held, first, that "Congress" had not adjourned when only one of its Houses was in recess. Because "Congress" was comprised of both Houses, the recess of the Senate while the House remained in session did not amount to an adjournment of Congress.

Second, the Court rejected the argument that the President was prevented from returning the bill because of the Senate's recess. It noted that the Constitution did not forbid return of a bill to an agent of the Congress such as the Secretary of the Senate. Nor was there any practical difficulty in returning the bill during a recess:

> The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill. . . . There is no greater difficulty in returning a bill to one of the two Houses when it is in recess during a session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence. . . . To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President's objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right.

Id. at 589–90.

The Court distinguished *The Pocket Veto Case* on the ground that the dangers which the Court had envisaged with respect to an intersession adjournment by

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[7] Article I, § 5, clause 4 provides: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting."

[8] The petitioner contended that the bill had not been pocket vetoed because the pocket veto provision applies only when both Houses have adjourned. Brief for Petitioner in *Wright* v *United States* at 18

both Houses were illusory in the context of an intrasession adjournment by one House for a period of three days or less. In the case of such a brief recess, there was no danger that the public would not be promptly and fully informed of the return of the bill with the President's objections, or that the bill would not be properly safeguarded or duly recorded upon the journal of the House, or that it would not be subject to reasonably prompt action by the House. *Id.* at 595.

The Court specifically declined to address the question whether an intrasession adjournment of more than three days, for which the consent of both Houses is required pursuant to Article I, § 5, clause 4, would prevent the return of a bill and thereby trigger the pocket veto provision. *Id.* at 598. It held only that

> where the Congress had not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of that House within the prescribed ten days and the Congress does not pass the bill over his objections by the requisite votes.

Id.[9]

C. Kennedy v. *Sampson*

Kennedy v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974), involved a Senate bill which was presented to the President on December 14, 1970. On December 22 both Houses adjourned pursuant to a concurrent resolution, the Senate until December 28 and the House until December 29. The Senate authorized its Secretary to receive presidential messages during the adjournment. On December 24 the President issued a memorandum announcing that he would withhold his signature from the bill; the President did not, however, return the bill to the Senate. The ten-day period (Sundays excepted) for presidential approval expired on December 25. The bill was not published as a law.

The plaintiff, a United States Senator who had voted for the measure, brought suit in district court against the Administrator of the General Services Administration and the Chief of White House Records seeking a declaration that the bill had become law and an order requiring the defendants to publish the bill as law. The defendants contended that the bill had been validly pocket vetoed and had not become law. The district court granted summary judgment for the plaintiff and the United States Court of Appeals for the District of Columbia Circuit affirmed.[10]

The court, *per* Judge Tamm,[11] began by observing that the pocket veto power is an exception to the general rule that Congress may override the President's veto.

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[9] Justice Stone wrote an opinion, joined by Justice Brandeis, which agreed that the bill did not become a law but concluded, contrary to the majority opinion, that the bill had been validly pocket vetoed. Justice Cardozo took no part in the decision of the case.

[10] The Solicitor General determined not to petition the Supreme Court for a writ of certiorari.

[11] Judges Fahy and Bazelon concurred in the opinion.

As such, in the court's opinion, the power must be limited by the specific purpose which it was intended to serve. Applying this narrow construction, the court held that the congressional adjournment at issue fell within the rule of *Wright* v. *United States* rather than that of *The Pocket Veto Case*. The court found it immaterial that the adjournment was for five days rather than three days, as in *Wright*. Nor was it significant that both Houses had adjourned, rather than only the House of origin as in *Wright*, since the presence or absence of the non-originating House could have no relevance to the validity of the pocket veto.

Moreover, Judge Tamm concluded that a pocket veto would have been inappropriate even under the standards set forth in *The Pocket Veto Case:* "[t]he modern practice of Congress with respect to intrasession adjournments creates neither of the hazards—long delay and public uncertainty—perceived in *The Pocket Veto Case*." 511 F.2d at 440. Intrasession adjournments virtually never involved interruptions of the magnitude considered in *The Pocket Veto Case;* and "[m]odern methods of communication," *id.* at 441, make the return of a disapproved bill to the appropriate officer of an originating House a matter of public record. The court therefore concluded broadly that

> an intrasession adjournment of Congress does not prevent the President from returning a bill which he disapproves so long as appropriate arrangements are made for the receipt of presidential messages during the adjournment.

Id. at 437. *See also id.* at 442.[12]

III. Interests Served by the Pocket Veto

These cases identify three distinct interests—sometimes conflicting, sometimes reinforcing—served by the pocket veto provision of the Constitution: (1) the interest in ensuring that both Congress and the President have their due say in the process of lawmaking (the interest in mutuality); (2) the interest in avoiding delay in the process by which Congress determines whether to override a presidential veto (the interest in prompt reconsideration); and (3) the interest in ensuring public awareness of, and certainty about, the status of legislation (the interest in public certainty).

A. Mutuality

Article I, § 7 of the Constitution provides generally that both the President and the Congress play a role in the lawmaking process—the President by approving

[12] Following the *Kennedy* decision, the Department of Justice issued a press release stating

> President Ford has determined that he will use the return veto rather than the pocket veto during intrasession and intersession recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

Department of Justice Press Release, Apr. 13, 1976, at 2 [NOTE: The immediate occasion for this press release was the consent judgment in *Kennedy* v *Jones*, 412 F.Supp. 353 (D.D C. 1976) Ed.]

or vetoing legislation, the Congress by passing legislation initially and by overriding presidential vetoes. The Framers evidently intended that both branches would play their assigned role whenever possible. As the Court said in *Wright* v. *United States*, 302 U.S. at 596:

> The constitutional provisions [for presidential veto, congressional override, and pocket veto] have two fundamental purposes: (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes.

The Framers recognized that certain technical rules were necessary in order to prevent frustration of the interest in mutuality. *See* 1 J. Story, Commentaries on the Constitution of the United States § 891 (5th ed. 1905). First, there was the possibility that the President would fail to act on a bill presented to him by Congress. Because the bill would not be signed, it would not become a law; but because the President would not return it with his objections to its House of origin, there would be no opportunity for Congress to override a veto. To avoid a *de facto* veto which would deprive Congress of its power to override, the Framers provided that the President must act within ten days (Sundays excepted) or the bill would become law as if he had signed it.

This solution, however, created a second problem. If Congress was in adjournment on the tenth day (Sundays excepted) after a bill was presented to the President, so as to prevent the President from returning the bill with his objections, the bill would automatically become law on the expiration of the tenth day and the President would be deprived of his veto power. Congress could hold up the presentation of legislation to the President until the day it went out of session, thereby essentially writing the President out of the lawmaking process. The pocket veto power dealt with this problem by providing that a bill would not become law if the President failed to sign it and was prevented from returning it because of a congressional adjournment.[13]

The pocket veto serves the interest in mutuality because it achieves the best possible approximation of the shared lawmaking generally contemplated in Article I, § 7 in those situations in which the presidential veto and congressional override powers cannot coexist. When the choice is between depriving the President of his veto or retaining the presidential veto but denying Congress the power to override, the interest in mutuality is best served by the latter alternative. Congress has power to avoid any possibility of a pocket veto by arranging to be in session on the tenth day (Sundays excepted) after a bill is presented to the President, or by delaying presentation of a bill until a time when it is scheduled to be in session on the tenth day (Sundays excepted) following. Moreover, even if a

[13] If the President signed the bill, it would become law notwithstanding the adjournment of Congress *Edwards* v *United States*, 286 U.S 482 (1932), *La Abra Silver Mining Co* v. *United States*, 175 U S 423 (1899)

bill is pocket vetoed, the Congress can simply reenact it when it returns to session. *See The Pocket Veto Case*, 279 U.S. at 679 n.6. The President, on the other hand, in the absence of a pocket veto would have no means of preventing Congress from presenting bills to him on the last day before an adjournment, thus preventing him from exercising his veto. And when the bill became law, the President would have no way to repeal it without affirmative action by a majority of both Houses of Congress. The interest in ensuring that both the President and Congress play their assigned roles in lawmaking is thus better served by the presence of the pocket veto than by its absence.

Because the pocket veto does not provide for congressional override, it serves the interest in mutuality only when, at the expiration of the ten-day period (Sundays excepted) following presidential receipt of a bill: (1) Congress has adjourned *sine die* at the end of its final session and has thereby terminated its legislative existence; or (2) Congress has taken some other adjournment and has failed to provide any effective means by which the President may return a bill during the adjournment. Only in these situations is the President unable to exercise his veto power by returning the bill with objections. In all other situations, the interest in mutuality is served by an ordinary veto subject to congressional override and is disserved by a pocket veto.

B. Prompt Reconsideration

The pocket veto also serves the interest in ensuring the possibility of prompt congressional reconsideration of a bill following a presidential veto. In *The Pocket Veto Case*, for example, the Court was concerned that delivery to a congressional agent during an intrasession adjournment would permit the agent to hold the disapproved bill for "days, weeks or perhaps months, . . . keeping the bill in the meantime in a state of suspended animation . . . and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid." 279 U.S. at 684. In *Wright* v. *United States*, 302 U.S. 583, the Court emphasized that a three-day recess of one House did not pose the dangers of "undue delay," identified in *The Pocket Veto Case*, because a mere "brief," "short," and "temporary" recess, extending for a "very limited time only," did not create the danger that a vetoed bill "would not be subject to reasonably prompt action by the House." *Id.* at 595. And *Kennedy* v. *Sampson* recognized that "long delay" was one of the hazards perceived in *The Pocket Veto Case*. 511 F.2d at 440.

The interest in prompt reconsideration does not lend itself to precise quantification. The adjournment at issue in *The Pocket Veto Case* lasted roughly five months; the adjournments at issue in *Wright* v. *United States* and *Kennedy* v. *Sampson* were of three and five days, respectively. Between these figures lies a broad area of uncertainty, in which the argument favoring the validity of a pocket veto becomes stronger as the period of adjournment increases.

The interest in prompt reconsideration will sometimes reinforce the interest in mutuality. A final adjournment of Congress, in which the interest in mutuality is

strongly implicated, will typically continue for a substantial period of time. Similarly, non-final adjournments in which Congress has appointed agents to receive presidential messages, in which the interest in mutuality is not served by a pocket veto, are also typically of brief duration. On the other hand, non-final adjournments can extend for a considerable period of time and final adjournments can be very brief. In some cases, therefore, the interest in mutuality and the interest in prompt reconsideration will conflict.

C. Public Certainty

The third interest underlying the pocket veto provision is that of ensuring that the public is reliably informed about the process of lawmaking. In *The Pocket Veto Case,* the Court said that return of a disapproved bill to a congressional agent during an intersession adjournment would not provide "certain knowledge on the part of the public as to whether it had or had not been seasonably delivered" because return of the bill would not be "a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill. . . ." 279 U.S. at 684–85. In *Wright* v. *United States,* the Court recognized that the pocket veto provision safeguarded against "[t]he prospect that . . . the public may not be promptly and properly informed of the return of the bill with the President's objections, or that the bill would not be properly safeguarded or duly recorded upon the journal of the House," although in the context of a three-day recess of one House only, the Court found this danger was "wholly chimerical." 302 U.S. at 595. And *Kennedy* v. *Sampson* recognized that the pocket veto provision was designed, in part, to ensure public certainty. *See* 511 F.2d at 440.

The interest in public certainty seems to have factual and legal components. Factually, there is a strong interest in guaranteeing that the public has full knowledge of the President's decision to veto a bill, and of the reasons for that decision as stated in the President's objections. Legally, there is a strong interest in providing the public with certain knowledge whether the bill has become law. Obviously, segments of the public affected by a bill will often have a compelling interest in knowing whether the bill has become a law so that they may structure their actions in order to comply with the law or to obtain the benefits provided thereunder.

As a practical matter, as the Court observed in *Kennedy* v. *Sampson,* the interest in obtaining the facts of a veto will usually be well served by the availability of "[m]odern methods of communication," 511 F.2d at 441. Presidential vetoes are widely reported in the press. The problem of legal uncertainty, on the other hand, remains pressing today. The need for legal certainty requires hard-and-fast rules that can easily and clearly be applied in individual cases. In this respect, the interest in public certainty stands in tension with the interest in prompt reconsideration since the latter interest increases incrementally in

strength with the length of an adjournment and is not susceptible to resolution through a clear, non-arbitrary rule.[14]

The interest in public certainty reinforces the interest in mutuality in the case of final adjournments. In the case of non-final adjournments, the interest in public certainty might occasionally conflict with the interest in mutuality when there are legal questions regarding whether Congress has designated an agent to receive presidential messages during its adjournment.

IV.

The above analysis provides some guidance as to the validity of pocket vetoes in a variety of recurring situations.

A. Final Adjournments

A pocket veto is certainly appropriate after the final adjournment of a Congress. If it were not, there would be a serious question as to whether the pocket veto provision of the Constitution had any meaning at all. That pocket vetoes are appropriate after a final adjournment was settled in *The Pocket Veto Case*[15] and has not been questioned by the subsequent decisions which narrowed *The Pocket Veto Case* in other respects. Moreover, in the context of a final adjournment of Congress all three interests served by the pocket veto provision suggest the appropriateness of a pocket veto. Without a pocket veto, the President could be denied his proper role in lawmaking by the presentation of numerous bills towards the end of the final session of Congress (interest in mutuality); final adjournments are often lengthy (interest in prompt reconsideration); and a rule providing for pocket vetoes in this situation is capable of hard-and-fast application (interest in public certainty).

Accordingly, the President may pocket veto bills after the final adjournment of a Congress without fear that his veto will be ineffective and the bills will become law.

B. Intersession Adjournments

We also believe the President may pocket veto bills during intersession adjournments. Adjournments between sessions are typically accomplished by means of concurrent resolutions[16] adjourning the session *sine die*.[17] The Presi-

[14] Judge Tamm's distinction between intrasession and intersession adjournments in *Kennedy* v. *Sampson* appears based, largely, on the need for hard-and-fast rules in this area. A sharp distinction between intersession and intrasession adjournments would be inappropriate if the only criterion were the length of an adjournment, since while intersession adjournments are also generally relatively lengthy and intrasession adjournments relatively brief, this is not always the case

[15] "It is also conceded, as we understand, that the President is necessarily prevented from returning a bill by a final adjournment of the Congress, since such adjournment terminates the legislative existence of the Congress and makes it impossible to return the bill to either House." 279 U.S at 681.

[16] A concurrent resolution is required by Article I, § 5, clause 4, prohibiting either House from adjourning for more than three days without the consent of the other. *See* note 7 *supra*

[17] A *sine die* adjournment is necessary because any adjournment to a date certain within the session would not terminate the session. In *The Pocket Veto Case* Congress adjourned its first session even though the Senate adjourned to a date certain within the session rather than *sine die*. This was because of an unusual situation in which the Senate agreed to return to perform non-legislative business, the consideration of certain articles of impeachment After meeting to consider these articles, the Senate, sitting as a court of impeachment, voted to adjourn *sine die* *See* note 6 and accompanying text, *supra*.

dent's pocket veto of H.R. 4353 on December 29, 1981, occurred during a *sine die* adjournment of the first session of the 97th Congress, beginning December 16, 1981.[18] By joint resolution, Congress agreed to reconvene for the second session on January 25, 1982.[19] In this section we confirm the advice given orally by this Office that the President was authorized to pocket veto H.R. 4353.

The Pocket Veto Case stands at least for the proposition that a pocket veto is appropriate during an intersession adjournment. The Court in *Wright*, distinguishing *The Pocket Veto Case*, strongly implied that the case retained force in the context of intersession adjournments:

> However real th[e] dangers [envisaged by the Court in *The Pocket Veto Case*] may be when Congress has adjourned and the members of its Houses have dispersed at the end of a session, the situation with which the Court was dealing, they appear to be illusory when there is a mere temporary recess.

302 U.S. at 595. Similarly, the court in *Kennedy* v. *Sampson* limited its holding to intrasession adjournments and sharply distinguished these from intersession adjournments.

Although we believe, and have frequently advised, that the pocket veto is appropriate in the context of intersession adjournments, we recognize that objections could be made to this conclusion based on an analysis of the interests underlying the pocket veto provision. The interest in mutuality is not particularly strong in the case of a pocket veto during an intersession adjournment, at least so long as the House of origin has appointed an agent to receive presidential messages. The President could veto the bill and return it, together with his objections, to the agent who would lay the matter before the House for reconsideration upon its return. Thus the President would not be deprived of his power to veto legislation. A pocket veto, on the other hand, arguably disserves the interest in mutuality in this circumstance because it would deprive Congress of its power to override. The interest in prompt reconsideration is served by a pocket veto during lengthy intersession adjournments but not by pocket vetoes during brief intersession adjournments. Thus, pocket vetoes during brief intersession adjournments are somewhat more vulnerable than those during lengthy intersession adjournments. However, we believe that the interest in public certainty justifies a hard-and-fast rule that pocket vetoes are always appropriate during intersession adjournments. *See* note 14 *supra*. The alternative of a rule based upon the length of an adjournment lacks any constitutional basis. The alternative of a rule that intersession pocket vetoes are not appropriate could seriously frustrate the interest in prompt reconsideration in the case of lengthy adjournments.

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[18] *See* S. Con. Res 57, 97th Cong ; 1st Sess , 127 Cong. Rec. S15631 (daily ed Dec 16, 1981)
[19] *See* H.J. Res 377, 97th Cong , 1st Sess , 127 Cong. Rec. H9638 (daily ed Dec 16, 1981).

It is our opinion, therefore, that the President may validly pocket veto bills during all intersession adjournments.[20] Accordingly, the President's pocket veto of H.R. 4353 was effective and prevented the bill from becoming law.

C. Intrasession Adjournments

Any decision to pocket veto legislation during an intrasession adjournment would in all probability be met with an immediate court challenge in which the prospects that the Executive's position will be sustained are uncertain at best. *Wright* v. *United States* rejected the contention that the President could pocket veto legislation during a three-day intrasession adjournment of the House of origin. Although the *Wright* decision contained language that could be read as limited to adjournments of three days or less, for which the consent of the other House is not required under Article I, § 5, clause 4, the subsequent decision in *Kennedy* went further. *Kennedy* involved, on its facts, a recess of both Houses for which the consent of the other House was required. Moreover, the court in *Kennedy* clearly stated that pocket vetoes are never appropriate during intrasession adjournments.

The rule adopted by the Court in *Kennedy* may best be understood by examining the interests underlying the pocket veto provision. The interest in mutuality is disserved by the pocket veto during intrasession adjournments because the President is not disabled from returning a bill with his objections so long as the House of origin has empowered an agent to receive presidential messages. The interest in prompt reconsideration is served only during lengthy intrasession adjournments, which have always been uncommon and which have become increasingly rare in recent years. The interest in public certainty would be served by a hard-and-fast rule permitting pocket vetoes during all adjournments of the House of origin which require the consent of the other House under Article I, § 5, clause 4; but the *Kennedy* and *Wright* decisions indicate that the courts are more likely to endorse a flat rule against any pocket vetoes during intrasession adjournments. It could plausibly be argued, however, that the interest in public certainty is equally served by a rule permitting pocket vetoes during adjournments lasting more than a set period of time. For example, the interest in public certainty would be served by a rule permitting pocket vetoes during adjournments of ten days or more.

A pocket veto during an intrasession adjournment would be directly contrary to the language in *Kennedy* and inconsistent with at least the spirit of *Wright*. The interests underlying the pocket veto provision do not clearly resolve the question whether pocket vetoes are appropriate during intrasession adjournments. This is not to say that a pocket veto should never be considered during a session. There is room to argue that *Kennedy* was an erroneous decision and that the broad dicta in

[20] Pocket vetoes during intersession adjournments are, we believe, valid whether or not the House of origin has appointed an agent to receive presidential messages It appears that the House of Representatives did not appoint such an agent during the intersession adjournment of the 97th Congress

Wright should not be followed today. It must be recognized, however, that such an argument would face an uphill battle in the courts.

We would recommend that the President not pocket veto legislation during intrasession adjournments unless he is willing to risk an almost certain court challenge in which he may not be successful. If the President does wish to exercise his pocket veto, he may wish to choose a bill which would not appreciably damage his program if it were enacted into law.[21] We would advise that the President not pocket veto bills unless the intrasession adjournment involved extends for a significant period of time—ten days at least—and that both Houses be in adjournment on the date set for return of the bill.

D. One House Only Adjourns Sine Die

An intermediate case is that in which one House adjourns *sine die* and the other remains in session.[22] Read broadly, *Wright* v. *United States* would preclude a pocket veto since that case stated that the adjournment of one House only does not trigger the pocket veto provision. *See* 302 U.S. at 587–88. This clearly was not the basis for the Court's decision, however, since the Court expressly reserved the question whether a one-House adjournment lasting for more than three days would "prevent" the return of a vetoed bill. *Id.* at 598. *See Kennedy* v. *Sampson* at 440 n.29.

We are of the opinion that a pocket veto would be effective when the House of origin has adjourned *sine die* at the end of a final session. A similar conclusion is appropriate when the House of origin has remained in session and the other House has adjourned *sine die* at the end of its final session, since it would be impossible in this situation for Congress as a whole to override the President's veto. Somewhat more difficult is the situation in which the House of origin has adjourned *sine die* at the end of the first session and the other House has remained in session. This Office has advised that either a pocket veto or a return veto would be appropriate in this situation.[23] However, a pocket veto would probably be ineffective when the House of origin remains in session and the other House adjourns *sine die* at the end of the first session.

V. Miscellaneous Problems

Finally, we address certain miscellaneous problems which have arisen in connection with the pocket veto.

A. Procedure in Uncertainty

The President is placed in a somewhat difficult position when he wishes to veto a bill but is uncertain whether or not he has authority to exercise the pocket veto.

[21] H R. 4353, which the President pocket vetoed on December 29, 1981, is an example of a good test case. As the President noted in his veto statement, the measure "would benefit the creditors of a single large asset bankruptcy" and was in effect an "effort to confer special relief in the guise of general legislation." 17 Weekly Comp. Pres Doc. 1429 (1981)

[22] During the first session of the 96th Congress, for example, the Senate adjourned *sine die;* the House did not adjourn *sine die* but held *pro forma* sessions up to and including the date it reconvened for the second session.

[23] Memorandum for Honorable Lloyd N Cutler, Jan 2, 1980

If the President attempts a pocket veto, there is always the danger that his action will be ineffective and that the bill will be held to have become law without his signature. On the other hand, if he attempts to return the bill with his objections to the House of origin, there is the danger that his actions will undermine the argument, which he might wish to make in a future case, that he was "prevented" from returning the bill within the meaning of the pocket veto provision.[24]

This dilemma is not fully resolvable; difficulties will persist so long as the contours of the pocket veto power remain indistinct. We believe that the President would be justified in taking either of two courses of action. First, he could establish a policy of pocket vetoing all bills during final adjournments, intersession adjournments, and intrasession adjournments lasting for a set period of time or longer. This policy would have the virtue of consistency and would frame the constitutional issues sharply for a court challenge. On the other hand, it must be recognized that this policy would pose serious litigation risks if the policy was to pocket veto bills during intrasession adjournments of relatively brief duration.

Second, the President could adopt a case-by-case approach to the problem, taking account of the degree of litigation risk and of the importance to the President's program that the bill not be enacted. If the bill is unimportant to the President's program and the chances of success in court appear high, the better course may be to pocket veto.[25] If the bill is important or the chances of success appear low, the better course may be to return the bill with objections which explicitly state that the President believes he would be within his right to pocket veto the legislation.

B. Recess Appointments

Article II, § 2, clause 3 of the Constitution provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session." The President's power to make recess appointments has been the subject of some uncertainty and disagreement with Congress in recent years. The recess appointment and pocket veto powers are related because of the similarity between the concepts of a "recess" of the Senate in which the President can make temporary appointments without obtaining the advice and consent of the Senate and an "adjournment" of the House of origin which, if it prevents the return of a bill with objections, will permit the President to prevent the bill from becoming law without submitting his veto to a possible congressional override. Practice under

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[24] A different problem may arise when the President wishes to ensure that a bill which has been presented to him less than ten days (Sundays excepted) before an adjournment becomes law. If the President fails to sign the bill, there is no guarantee that the bill will automatically become law upon the expiration of the time period since it may have been pocket vetoed. This problem does not pose a serious dilemma, however, for the President can simply sign the bill within the ten-day period, thus ensuring that the bill becomes law while preserving his arguments under the pocket veto provision. It has long been settled that the President may sign legislation after Congress has adjourned. *See* note 13, *supra*.

[25] To avoid an implication that he has exercised a return rather than a pocket veto, the President should not deliver a message to the House of origin stating his objections if he intends to exercise the pocket veto power.

the pocket veto provision may therefore have some bearing on an interpretation of the scope of the recess appointment power.

There are sound reasons to believe that the President has authority to make recess appointments in situations in which a pocket veto might well be inappropriate. First, even if "recess" and "adjournment" have the same meaning in the Constitution, this fact would not equate the pocket veto and recess appointment powers. The decisions holding that the President could not pocket veto bills during brief intrasession adjournments were not premised on the notion that these were not "adjournments" in the constitutional sense; rather, they were bottomed on the theory that, although they were adjournments, they did not "prevent" the return of disapproved bills. Second, it is by no means clear that "adjournment" and "recess" do have the same meaning in the Constitution. In common parlance, the word "recess" connotes a brief break in continuity, whereas an "adjournment" may include relatively brief periods but will more typically refer to a longer or indefinite suspension of activity. It is therefore possible that a very brief suspension will amount to a "recess" but not an "adjournment."

Despite the above analysis, the decisions in *Wright* v. *United States* and *Kennedy* v. *Sampson* counsel caution in making recess appointments. This Office has generally advised that the President not make recess appointments, if possible, when the break in continuity of the Senate is very brief.

C. Nominations

You have expressed concern that the President may prejudice his ability to pocket veto legislation if he sends nominations to the Senate during an intersession adjournment. We assume that a nomination would be delivered to the Secretary of the Senate, who is typically designated by that body to receive messages from the President during adjournments.[26] The sending of a nomination to the Senate would not, we believe, seriously prejudice the President's stand on the pocket veto. Simply sending over a nomination has no legal significance unless and until the Senate takes action evidencing its understanding that a nomination has been validly made. At most, it would evidence the President's understanding that the Secretary of the Senate is indeed authorized to receive presidential messages—a question which is not seriously in doubt in light of the *Wright* and *Kennedy* decisions and the explicit authorization to this effect typically approved by the Senate. However, we can perceive no strong reason to send nominations to the Senate during intersession adjournments.

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Office of Legal Counsel

[26] *See, e.g.*, 127 Cong. Rec. S15632 (daily ed. Dec. 16, 1981). The Secretary of the Senate may have inherent authority even in the absence of specific authorization to receive presidential messages. *See Wright* v. *United States*, 302 U.S. at 599 (Stone, J., dissenting in part).

The Pocket Veto: Historical Practice and Judicial Precedent

II.

November 15, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum supplements our memorandum of February 10, 1982, to you, which discussed generally the President's power to pocket veto legislation. That memorandum also addressed the propriety of President Reagan's pocket veto of H.R. 4353 during the intersession recess of the 97th Congress.[1] Since that memorandum was prepared several matters have come to our attention. While none of them casts doubt on the conclusions articulated in our earlier memorandum, we believe that they should be brought to the attention of those who might rely on our February 10, 1982, memorandum in making decisions about the advisability of future pocket vetoes.[2]

In our February 10 memorandum we discussed the 1974 D.C. Circuit decision in *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974). We did not discuss the subsequent district court decision in *Kennedy* v. *Jones*, 412 F. Supp. 353 (D.D.C. 1976). In *Kennedy* v. *Jones*, the government entered into a consent judgment with the plaintiff in a case challenging the validity of two pocket vetoes: one, an intersession pocket veto; the other an intrasession pocket veto during an election recess of 31 days. On the same day that judgment was entered, President Ford announced publicly that he would not invoke his pocket veto power during intrasession or intersession recesses if the originating House of Congress had specifically authorized an officer or other agent to receive return vetoes during such periods. Department of Justice Press Release, Apr. 13, 1976.[3] That an-

[1] The constitutionality of President Reagan's pocket veto of H R 4353 may be litigated in the Lifetime Communities, Inc., New York bankruptcy proceeding now pending in the Second Circuit, *Lifetime Communities, Inc.* v. *The Admin. Office of the U S Courts* (*In re* Fidelity Mortgage Investors), No. 82–5005 The Administrative Office of the U.S Courts, represented by the Department of Justice, filed a response on September 27, 1982, to appellants' motion for leave to supplement its petition for rehearing to include a challenge to the pocket veto. In that response, appellee agreed that appellants' newly raised challenge to President Reagan's pocket veto of H.R 4353 should be reheard on the merits by the Second Circuit panel. The pocket veto of H R 4353 was, of course, an *inter*session pocket veto However, the rationale supporting the availability of intersession pocket vetoes would seem equally applicable to pocket vetoes during extended *intra*session recesses. The *Lifetime Communities* case may afford a more favorable factual setting than the two *Kennedy* cases, as well as a different forum, for litigating the pocket veto issues it presents [The pocket veto issue was not decided by the court of appeals, *see* 690 F 2d 35 (2d Cir 1982), and *certiorari* was denied by the Supreme Court 462 U S 1106 (1983)]

[2] With respect to the discussion in that memorandum regarding the implications of the pocket veto cases for the President's recess appointment power, *see* our Feb 10, 1982, memorandum to you at pp [134]. We refer you to our October 25, 1982, memorandum to Counsel to the President Fred F Fielding for a discussion of recent developments in the recess appointments area

[3] Thus, the immediate occasion for the 1976 Ford announcement was the 1976 *Kennedy* v. *Jones* consent judgment. That announcement was not made, as erroneously suggested in our previous memorandum, in response only to the 1974 *Kennedy* v *Sampson* case.

nouncement addressed only President Ford's intended use of the pocket veto power, and did not purport to bind, nor could it have bound, future Presidents. President Reagan has made no similar statement, nor did President Carter during his Presidency.

President Ford's statement confines its application to those situations in which the House of origin has specifically authorized an agent to receive messages during the adjournment in question, as had been done in the case of the intrasession pocket veto challenged in *Kennedy* v. *Jones*. *See* S. Con. Res. 120, § 3, 120 Cong. Rec. 36038 (1974) (intrasession election adjournment of the 2d Session of the 93d Congress). Specific authorizations of an agent to receive messages from the President became customary for intrasession and intersession recesses in both the Senate and the House,[4] and apparently still are in the Senate.[5] At the beginning of the 97th Congress, however, the House amended its Rules to add new Rule of the House III–5, which authorizes the Clerk to receive messages "at any time that the House is not in session."[6] The House Parliamentarian's comments on new Rule III–5 state that this language is an effort to prevent *intra*session pocket vetoes, citing *Kennedy* v. *Sampson*. Those comments make no mention of *inter*session pocket vetoes or of *Kennedy* v. *Jones*. The legislative history of new Rule III–5 supports this interpretation. Congressman Michel entered an analysis of the January 1981 Rules changes into the Congressional Record prior to their adoption. 127 Cong. Rec. 100–03 (1981). His explanation of proposed new Rule III–5 states that it applies only to "non *sine die* adjournments." *Id.* at 100.

With respect to President Reagan's pocket veto of H.R. 4353 during the intersession recess of the 97th Congress, to which our February 10, 1982, memorandum was addressed, several observations should be made. First, it was an intersession veto, and thus fell outside the scope of the D.C. Circuit's decision in *Kennedy* v. *Sampson*. Second, there was no specific resolution adopted by the House authorizing its agent to receive presidential messages during the intersession recess of the 97th Congress, nor was there unanimous consent to do so, as we noted in that memorandum. Third, although the broad language of new House Rule III–5, quoted above, arguably covers intersession pocket vetoes, its commentary and legislative history indicate that it was aimed specifically at *intra*session pocket vetoes. Thus, we believe that the pocket veto of H.R. 4353 would probably have been considered appropriate even under President Ford's self-imposed limitations on the exercise of his pocket veto power.

More importantly, however, we do not believe that subsequent Presidents should consider themselves bound by President Ford's self-imposed restrictions on his use of the pocket veto power. Our February 10, 1982, memorandum and the Supreme Court cases which it analyzes set forth the rationale supporting the

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[4] *See, e g.*, S Con. Res 120, § 3, 120 Cong Rec 36038 (1974), H.R. Con Res 518, § 3, 121 Cong Rec. 41973 (1975), H R Con Res 442, § 2, 123 Cong. Rec 39132 (1977).

[5] 127 Cong. Rec. S15632 (daily ed. Dec 16, 1981); 128 Cong Rec S13262 (daily ed. Oct 1, 1982).

[6] *See* H R Res 5, 127 Cong Rec 98–113 (1981) The Senate Rules have not been similarly amended *See* Senate Manual 1981 (S Doc. No. 1, 97th Cong., 1st Sess. (1981)).

use of pocket vetoes during both intersession and extended intrasession recesses. While we strongly believe that the pocket veto power should be interpreted in accordance with the principles set forth in our February 10, 1982, memorandum, the cases discussed there, as well as the subsequent developments mentioned here, suggest caution in exercising that power during at least intrasession recesses until more favorable court decisions have been obtained. The consequence of an unfavorable court ruling on a pocket veto is that the legislation becomes law. If a return veto is utilized, of course, the veto must be overridden in order for the bill to become law. With respect to the present extended (October 2–November 29) intrasession adjournment, the broad statement of the holding by the court in *Kennedy* v. *Sampson* counsels against use of a pocket veto,[7] at least with regard to important legislation. The adjournment *sine die* of the 2d Session of the 97th Congress will presumably terminate that Congress, and bills presented within ten days of that final adjournment would be subject to pocket vetoes. As noted in our February 10 memorandum, the propriety of a pocket veto after a final adjournment (as opposed to an intrasession or intersession adjournment) remains unquestioned, "since such an adjournment terminates the legislative existence of the Congress and makes it impossible to return the bill to either House." *The Pocket Veto Case,* 279 U.S. 655, 681 (1929).

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[7] Even though the case itself involved an intrasession pocket veto during an adjournment of only six days' duration.

Department of Justice Representation in Federal Criminal Proceedings

The Attorney General's statutory authority to provide legal representation to individual federal employees sued for acts occurring in the course of their official government duties does not extend to representation in a federal criminal proceeding, since in such a case the interests of the United States have been defined by the prosecuting authority to be adverse to those of the defendant.

February 11, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE

This responds to your request that the Department of Justice amend its regulations regarding representation of federal employees who are defendants in federal criminal proceedings. Current regulations prohibit representation of federal employees by Department of Justice attorneys whenever "[t]he representation requested is in connection with a federal criminal proceeding in which the employee is a defendant." *See* 28 C.F.R. § 50.15(b)(1) (1981).

Your concern over the existing policy apparently arises from a set of events involving a Navy lieutenant who was charged with violation of the Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.* (1976 & Supp. IV 1980) a federal misdemeanor offense. The lieutenant, who was not afforded Department of Justice representation, defended himself and was acquitted. You have suggested that application of the regulation prohibiting representation in a federal criminal proceeding is inappropriate when a "low-level, statutory, strict-liability misdemeanor," such as a violation of the Migratory Bird Conservation Act, is at issue. You suggest that such a case is really more like a civil case, for which the Department of Justice routinely defends naval personnel, and that denial of representation "amounts to a prejudgment against the accused officer," in light of the potential legal fees. Thus, you recommend that the Department of Justice amend its regulations to permit representation in a criminal proceeding when the Department of Justice and the employing agency concur that the individual was acting legitimately within the scope of his or her official capacity.

The authority to represent federal employees in civil cases derives from the Attorney General's power to conduct litigation in which the United States "is interested." *See* 28 U.S.C. §§ 509, 516–17 (1976 & Supp. IV 1980). Generally, the United States is considered to have two basic "interests" in defending

employees who are sued in their individual capacities—or who are subject to state prosecution—for acts occurring in the course of their official government duties: (1) establishing the lawfulness of authorized conduct on its behalf is important to the government, and (2) extending legal assistance to employees tends to prevent their being deterred from vigorous performance of their tasks by the threat of litigation and the burden of defending suits. Thus, the interests of the United States are deemed to be served best by extending legal assistance to its employees when an outside party challenges conduct occurring in the course of government service.

In the case of a federal criminal prosecution, however, the interests of the United States have been defined by the prosecuting authority to be adverse to those of the defendant. Therefore, the Attorney General's authority to conduct litigation on behalf of the United States does not extend to representation of an employee being prosecuted by the United States. First, the United States can no longer be considered to have an interest in establishing the lawfulness of the employee's conduct, which it seeks to prove unlawful. Second, the federal government does not have an interest in relieving its employees of the threat of *federal* prosecution, as it does in relieving them of the threat and burdens of outside litigation. To the contrary, the governmental interest is in securing compliance with its own laws. Even in a civil suit, the interests of the United States will not justify representation of an employee if the employee is suing or being sued by the United States. *See* 28 C.F.R. § 50.15(b)(4) (1981). Thus, even if a violation of the Migratory Bird Conservation Act were treated as a "civil" offense for purposes of representation, as you suggest, Department of Justice attorneys could not represent the federal employee. In sum, representation of federal employees is undertaken not to protect the personal interests of the employees, but to protect the interests of the United States. Therefore, when the interests of the United States have been determined to be adverse to the interests of one of its employees, the Attorney General's authority to represent the United States cannot extend to representation of that employee.

You have suggested that (1) criminal charges not be brought against a government official for conduct taken in his or her official capacity without first determining the employing agency's position, and (2) if the agency and the Department of Justice agree that the employee was acting legitimately within the scope of his or her official authority, that the Department of Justice represent the employee in a subsequent criminal proceeding. Essentially, this would provide for the same procedure now mandated when determining whether or not to authorize representation in civil litigation. For the reasons explained above, however, the Justice Department could not in any event agree to represent an employee subject to federal prosecution. Thus, the consultation suggested could not achieve the result you seek. Furthermore, we believe that it would be inappropriate to require formal consultation with a federal employee's agency before bringing criminal charges. Such a rule would give federal employees a favored status over other subjects of criminal investigations.

We do not mean to suggest, however, that investigators do not seek to obtain information from the employee's agency. To the contrary, a federal criminal investigation of events occurring in the course of official duties normally would entail considerable contact between the Justice Department and the involved federal agency. If, for some reason, the Justice Department investigators fail to obtain all the relevant information from the employing agency, that agency of course may come forward with the information that it believes is relevant. The ultimate decision to prosecute, however, must remain with the Justice Department. Once that decision is made, Justice Department representation of the employee-defendant becomes inappropriate. This represents not merely a policy decision, but a statutory construction of the representation authority vested in the Attorney General, and we therefore do not believe that the regulations can be amended as you suggest.

I am sympathetic to the arguments that you have made, particularly in light of the specific incident recited in your letter. Of course, it would be inappropriate for me to express any judgment concerning the handling of that case, or the decision to prosecute under the facts there present. However, I do think that the best resolution to the point that you make would result if the "surrounding circumstances [are] carefully evaluated in each case" at the stage where the decision to prosecute is made. I recognize that no system or policy position is foolproof, but in light of the important concerns underlying the existing policy, I am not inclined to recommend a change in basic policy simply because anomalies may occasionally occur. Rather, I would hope that the exercise of proper good judgment and prosecutorial discretion would take care of the isolated situation in which the established policies would otherwise appear to work an injustice.

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Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act

The Emoluments Clause of the Constitution prohibits government employees from accepting any sort of payment from a foreign government, except with the consent of Congress Congress has consented to the receipt of minimal gifts from a foreign state, 5 U.S.C. § 7342, but has not consented to receipt of compensation for services rendered.

The fact that an employee of the Nuclear Regulatory Commission would be paid by an American consulting firm for services he rendered in connection with construction of a nuclear power plant in Mexico would not, under the circumstances presented here, avoid the Emoluments Clause, since the Mexican government would be the actual source of the payment

February 24, 1982

MEMORANDUM OPINION FOR THE
ASSISTANT GENERAL COUNSEL,
UNITED STATES NUCLEAR REGULATORY COMMISSION

This responds to your letter asking for an interpretation of the Emoluments Clause of the Constitution, Article I, § 9, cl. 8, and the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (Supp. III 1979).

According to your letter and subsequent conversations with Nuclear Regulatory Commission (NRC) staff, an employee of the NRC is seeking authorization to work on his leave time for an American consulting firm. In that capacity he would review the design of a nuclear power plant being constructed in Mexico. The plant is being built by the Mexican government through its Federal Electrical Commission.

The American consulting firm would be under contract to the Federal Electrical Commission; that firm would compensate the NRC employee for his expenses and services. The American firm has no other nuclear contracts and would be relying solely on the experience of this employee in securing the contract. The employee's work at NRC involves the assessment of operating reactors. This is the same job he will perform in Mexico. The consulting firm is a small firm that has three other engineers in unrelated fields. It has not been created for the purpose of securing this particular contract or insulating the employee from the Mexican government. The employee would be paid from the funds received from the Mexican government in connection with the proposed contract, although not all of the proceeds from the contract will go to him.

The employee expects to spend from seven to ten work days on the contract. He has worked previously on this project in an official capacity when he was made available for a year to work on it under the auspices of the State Department and the International Atomic Energy Agency. As a result, when the employee, together with others from the NRC, circulated a proposal to act as consultants, the Mexican government initiated discussions with him personally. Subsequent negotiations, we understand, have been conducted through the consulting firm.

At the outset we note that your agency has concluded that the proposed activity is permissible under the NRC conflict of interest regulations governing outside employment by NRC employees. 10 C.F.R. § 0.735–50 (1981). We have not been asked for our views concerning these regulations and therefore take no position as to them.

The Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (Supp. III 1979), generally prohibits employees from requesting or otherwise encouraging the tender of a gift or decoration, or from accepting or retaining a gift of more than minimal value. That section defines "gift" as "a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign goverment." It seems clear that this Act only addresses itself to gratuities, rather than compensation for services actually performed, as would be the case here. We therefore conclude that 5 U.S.C. § 7342 is not applicable to the conduct contemplated.

The Emoluments Clause presents more difficult problems. Article I, § 9, cl. 8 provides:

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

A threshold question is presented as to whether the NRC employee is a "Person holding any Office of Profit or Trust" under the United States. We understand that he is not employed in a supervisory capacity. In past opinions, this Office seems to have assumed without discussion that the only persons covered by the Emoluments Clause were those holding an "Office" in the sense used in the Appointments Clause, Article II, § 2, cl. 2. We so stated in a letter from Deputy Assistant Attorney General Ulman to the General Counsel of your agency on July 26, 1976. It is not clear, however, that the words "any Office of Profit or Trust," as used in the Emoluments Clause, should be limited to persons considered "Officers" under the Appointments Clause. Both the language and the purpose of the two provisions are significantly different.

The latter finds its roots in separation of powers principles. The Supreme Court has said that "any appointee exercising significant authority pursuant to the laws of the United States" is an officer under the Appointments Clause and must be appointed in the manner prescribed by that Article. Employees are "lesser functionaries" subordinate to officers. *Buckley* v. *Valeo*, 424 U.S. 1, 126 & n. 162 (1976). *See generally* 424 U.S. at 124–137. The Emoluments Clause, on the

other hand, is designed "to exclude corruption and foreign influence." 3 M. Farrand, *The Records of the Federal Convention of 1787*, 327 (Gov. Randolph at the Virginia Convention) (rev. ed. 1937, 1966 reprint). Even though the Framers may have had the example of high officials such as "foreign Ministers" in mind when discussing the clause, 2 *id.* 389, its policy would appear to be just as important as applied to subordinates. The problem of divided loyalties can arise at any level. This may be particularly true in a field where, as here, secrecy is pervasive.

It is presumably for this reason that Congress, in enacting the Foreign Gifts and Decorations Act, assumed without discussion that under the Emoluments Clause its consent was necessary for *any employee* to accept a gift from a foreign government. 5 U.S.C. § 7342(a). *E.g.*, H.R. Rep. No. 2052, 89th Cong., 2d Sess. (1966). Although the view of Congress is not, by itself, conclusive, we are persuaded that the interpretation suggestion by the Foreign Gifts and Decorations Act is appropriate here. It is not necessary therefore for us to decide whether the NRC employee in this case must be considered an officer in the Appointments Clause sense.

The next issue presented under the Emoluments Clause is whether the payment in this case is "from any King, Prince, or foreign State." As noted, Congress has consented only to the receipt of minimal *gifts* from any foreign state as provided by 5 U.S.C. § 7342. Therefore, any other emolument stands forbidden unless the conclusion can be reached that the payment is not "from" a foreign government at all. We must thus decide whether payment through the consulting firm, in effect, shields the employee from payment by the Mexican government.

The question of when a foreign government, as opposed to an intermediary, is the actual source of a gift or payment has, as far as we know, only been discussed in writing once before. In 1980, this Office noted that no relevant opinion or commentary addressed this issue. We considered a proposed contract under which a large university provided expert consultants to a foreign government. The foreign government had no control over the selection of the experts and their payment and in the years in which the consulting relationship has been in effect, had never sought to influence the selection of experts. These matters were within the discretion of the university. This Office concluded therefore that the payment of an individual consultant could not be said to be "from" a foreign government.

In the present case, the retention of the NRC employee by the consulting firm appears to be the principal reason for selection of the consulting firm by the Mexican government. He is the firm's sole source of expertise and was, at least in part, selected because of prior experience gained while working on the same project in an official capacity. As we understand the situation, it seems clear that ultimate control, including selection of personnel, remains with the Mexican government. It is difficult to state what the outer limits of our earlier opinion may be. Each situation must, of course, be judged on its facts. Under the circumstances presented here, however, we cannot conclude that the interposition of the

American corporation relieves the NRC employee of the obligations imposed by the Emoluments Clause.

ROBERT B. SHANKS
Deputy Assistant Attorney General
Office of Legal Counsel

Employment Status of "Volunteers" Connected with Federal Advisory Committees

The Department of Commerce may employ volunteers as consultants to the President's Task Force on Private Sector Initiatives pursuant to 5 U.S.C. § 3109, as long as the services involved are temporary or intermittent, and purely advisory in nature. It must also be clearly understood that such volunteers expect no governmental compensation.

Federal agencies ordinarily may not accept voluntary services or other donations in the absence of express statutory authority, and volunteers should not in any case be used on a broad scale or to accomplish tasks ordinarily performed by paid government employees.

February 25, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Members of your staff have asked us for advice concerning the employment status of persons who volunteer to assist a federal advisory committee. We have been given materials describing the President's Task Force on Private Sector Initiatives (Task Force), an advisory committee created by Executive Order No. 12329, 46 Fed. Reg. 50919 (1981), and we have been asked to comment specifically on the propriety of accepting certain donations and voluntary services in this context. We conclude that, subject to the specific limitations described below, voluntary services of consultants and other donations may be accepted by the government to assist this advisory committee.

Background

The Task Force was established in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App. I), to advise the President and the Secretary of Commerce concerning methods of promoting private sector activities designed to meet public needs, and to serve as a focal point for such private sector initiatives. *See* Exec. Order No. 12329, §§ 1 and 2. The membership of the Task Force consists of both private citizens and public officials from the federal, state, and local governments. *Id.* at § 1. Members of the Task Force serve without compensation, but the government may pay their expenses pursuant to 5 U.S.C. §§ 5701–5707. *Id.* at § 3(b). The Department of Commerce is responsible for providing the Task Force with "such administrative

services, funds, facilities, staff, and other support services as may be necessary for the effective performance of its functions." *Id.* at § 3(c).[1]

In addition to staff provided by the Department of Commerce,[2] the Task Force would be "loaned" personnel from various corporations or other private entities,[3] and it would receive donations and loans of equipment from such private sources.[4] One corporation also has proposed to contribute the salary of another Task Force employee by donating money to a charitable organization[5] that would compensate the "employee" directly for his services to the Task Force.

Discussion

A. Personnel

(1) Voluntary Service. The Federal Advisory Committee Act provides that the Director of the Office of Management and Budget (OMB) shall establish guidelines with respect to rates of pay for services of members, staffs, and consultants of advisory committees. 5 U.S.C. App. I, § 7(d). The OMB guidelines address the question of voluntary services as follows:

> The provisions of this section [dealing with pay for members, staff and consultants] shall not prevent an agency from accepting the voluntary services of a member of an advisory committee, or a member of the staff of an advisory committee, provided that the agency has authority to accept such services without compensation.

OMB Circular No. A–63, § 11(d) at A–9 (1974).

As a general matter, federal agencies do not have the authority to accept voluntary services. In fact, Congress has expressly provided in the Anti-Deficiency Act that "[n]o officer or employee of the United States shall accept voluntary service for the United States . . . except in cases of emergency involving the safety of human life or the protection of property." 31 U.S.C. § 665(b) (1976). In addition, employees may not waive a salary for which Congress has set a minimum. *See, e.g., Glavey* v. *United States*, 182 U.S. 595 (1901).

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[1] Travel and support services, of course, may be provided only to the extent otherwise authorized by law, and subject to the availability of funds. *See* §§ 3(b) and 3(c) of Exec. Order No. 12329

[2] The Commerce Department staff includes regular Commerce Department employees who are assigned to assist the Task Force, as well as employees hired specifically for the Task Force and paid with funds provided by the Commerce Department

[3] We understand that the "loaned" personnel will serve the Task Force in either a full-time or a part-time capacity, but that they are all otherwise employees of the donors. To date, the Task Force has been offered the services of one person from each of the following entities the American Stock Exchange, RCA Corporation, Armco Steel, Aetna Life and Casualty, and Call for Action (a national volunteer network).

[4] The donations in kind consist of the following: four typewriters (from IBM), stationery (from Mead Paper Corporation), one Apple Computer, word processing software, and one televideo CRT unit (from Armco); and a one-year loan of a duplicating machine, including free installation, servicing, and supplies (from Xerox Corporation)

[5] The organization would be exempt from taxation under 26 U S C. § 501(c)(3)

Although the interpretation of § 665(b) has not been entirely consistent over the years, the weight of authority does support the view that the section was intended to eliminate subsequent claims against the United States for compensation of the "volunteer," rather than to deprive the government of the benefit of truly gratuitous services.[6] Section 665(b) accordingly has been read as a complete bar to subsequent compensation of a "volunteer," and as an admonition to federal agencies to reach an express understanding with such volunteers that they will receive no government compensation.[7]

In addition to the limitation of liability rationale underlying § 665(b), agencies contemplating the acceptance of volunteer services must also take account of the fact that an individual may not waive a salary for which Congress has fixed a minimum. *See, e.g., Glavey, supra.* Whether this principle is expressed as a matter of personnel management or unauthorized augmentation of appropriations, it has always been interpreted to limit the situations in which services may be accepted.[8]

There are, however, discrete situations where Congress has not set minimum salaries for employees. For example, there is no minimum salary set for persons employed as consultants pursuant to 5 U.S.C. § 3109.[9] Although consultants may not be employed to perform "governmental functions," and their services must be intermittent or temporary and limited to tasks of a purely advisory nature, it seems likely to us that some of the Task Force staff positions would fit this description.[10] To the extent that individuals serving the Task Force work as consultants, they may do so on a volunteer basis, so long as it is clear that they expect no governmental compensation. We understand that the Commerce Department will require each "consultant volunteer" to execute a written waiver of compensation, which should be sufficient to protect the government from subsequent salary claims.

We should emphasize that our research on this subject has revealed a virtually unanimous view that there is an avowed preference for paid government employ-

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[6] The legislative history, as well as the judicial and administrative interpretations of § 665(b) are discussed at some length in an opinion of this Office dated May 25, 1976 You should refer to the 1976 opinion for a full analysis of the law of voluntary services. In this opinion, we will simply apply the prevailing interpretation of the law to the Task Force Advisory Committee.

[7] Our interpretation of § 665(b) is bolstered by a subsequent congressional enactment permitting federal employees who serve "without compensation" (WOCs) to accept a salary for their government service from a source outside the government *See* 18 U S C. § 209. Section 209 makes no reference in its text or legislative history to a bar on the acceptance of voluntary services by the government, but it surely contemplates that there are circumstances where the acceptance of uncompensated service is proper For a discussion of voluntary services that have been specifically authorized by Congress, *see Antitrust Subcommittee of the House Comm. on the Judiciary,* 84th Cong , 2d Sess , Interim Report on WOCs and Government Advisory Groups (Comm. Print, 1956) (hereinafter referred to as Interim Report). *See also* 5 U S C § 3111 which specifically authorizes the acceptance of volunteer services from students.

[8] *See* discussion in opinion of May 25, 1976, referred to in footnote 6 As you know, most federal positions are covered by the General Salary (GS) schedule, for which Congress has set fixed minimums. *See* 5 U.S.C. § 5101 *et seq.* While this fixed salary schedule actually exempts persons who serve "without compensation," 5 U S.C § 5102(c) 13, the policy underlying the schedules has been read to counsel against the use of volunteers to accomplish tasks that would ordinarily be performed by employees covered by the schedule

[9] As we have recently advised you, there is also no minimum salary set for certain employees of the White House staff.

[10] *See* OMB Circular A-120 (1980) for a full description of the limitations on the use of consultants We will leave it to the judgment of the Commerce Department to determine which of the Task Force staff positions may appropriately be filled by consultants

ment. *See, e.g., Interim Report, supra* at 23–9. The express prohibition in § 665(b) on the acceptance of voluntary services admittedly has caused some uncertainty about the propriety of uncompensated government service when such service is not expressly authorized by statute.[11] Although there is no express statutory authorization for volunteer consultants to the Task Force, we are comfortable with the position that the absence of a minimum salary level, and the nature of consultant services, make the use of volunteer consultants acceptable in this context. We must advise caution, however, against the use of volunteers on a broad scale or to accomplish tasks ordinarily performed by paid government employees.[12]

(2) Conflict of Interest. Having determined that it is appropriate as a general matter for the Commerce Department to accept volunteer consultants to serve the Task Force, we next must determine the extent to which the conflict of interest statutes and agency conduct regulations will apply to these volunteers. The Federal Personnel Manual (FPM), Ch. 735, App. C (1969), sets forth the principles for determining whether persons serving the government on a temporary or intermittent basis are subject to the conflict of interest laws. Briefly, the FPM distinguishes between (1) persons "whose advice is obtained by an agency . . . because of [their] individual qualifications and who serve . . . in an independent capacity" and (2) persons who are asked "to present the views of a nongovernmental organization[s] or group[s] which [they] represent, or for which [they are] in a position to speak." FPM, App. C at p. C–4. The former category of independent experts is deemed to be subject to the conflict of interest laws because their service to the government is expected to be impartial, and free from outside influence or control. The latter category of private representatives, on the other hand, is not subject to the conflict of interest laws because it is expected that such persons would be influenced by the private groups that they have been chosen to represent.[13]

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[11] For a discussion of statutes which expressly authorize government employment without compensation, *see Interim Report, supra* at 120. *See also* 5 U S C. § 3111

[12] *See in particular, Interim Report, supra* at 23 and App B, citing Executive Order No 10182 (Nov. 21, 1950) 15 Fed. Reg 8013 which governed the use of "WOCs" as authorized by the Defense Production Act of 1950. The Executive Order provides that

> So far as possible, operations under the Act shall be carried on by full-time, salaried employees of the Government, and appointments under this authority shall be to advisory or consultative positions only.
>
> Appointments to positions other than advisory or consultative may be made under this order only when the requirements of the position are such that the incumbent must personally possess outstanding experience and ability not obtainable on a full-time, salaried basis.

Interim Report, supra at 121.

[13] We have found that these FPM criteria are ordinarily the most useful standard to apply in determining whether particular persons who serve an advisory committee are federal employees for purposes of the conflict of interest laws There are, however, other factors that may be relevant to such a determination. For example, if a person performs a government function, receives a government salary, or is supervised directly by government employees, it is likely that he will be deemed a federal employee for other personnel purposes. *See* 5 U S C. § 2105(a), and *Lodge 1858, AFGE* v *NASA*, 424 F. Supp. 186 (D.D.C 1976) Similarly, the Standards of Conduct for the Commerce Department apply to "[e]very other person who is retained, designated, appointed, or employed by a Federal officer or employee, who is engaged in the performance of a function of the Department under authority of law or an Executive act, and who is subject to the supervision of a Federal officer or employee while engaged in the performance of duties of his position not only as to what he does but also as to how he performs his duties, regardless of whether the relationship to the Department is created by assignment, detail, contract, agreement or otherwise" 15 C F.R § 0 735–4 (1981).

Although the members of the Task Force may not be subject to the conflict of interest laws under this formulation, members of the Task Force staff (*i.e.*, the regular Commerce Department employees or the staff hired with Commerce Department funds) would be subject to those statutes. Given our understanding of the Task Force and the role of the consultant volunteers, we would be inclined to place the volunteers in the category of the staff employees who are fully subject to the conflict of interest laws. We reach this conclusion based upon our understanding that the volunteers will be performing impartial professional services for the Task Force.[14]

One conflict of interest issue will be especially significant to the Task Force volunteers. As Commerce Department employees, the volunteers will be subject to rules governing outside compensation and gifts. While government employees serving without compensation are not prohibited by 18 U.S.C. § 209 from accepting a salary from an outside source, they should not accept anything of value (including a salary) under circumstances that will create, or appear to create, a conflict of interest. The Commerce Department Standards of Conduct prohibit employees from soliciting or accepting any compensation or other thing of value from a person who:

> (1) Has, or is seeking to obtain, contractual or other business or financial relations with the Department of Commerce;
>
> (2) Conducts operations or activities that are regulated by the Department of Commerce; or
>
> (3) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duty or by actions of the Department.

15 C.F.R. § 0.735–11(a).

There is an exception to this rule when the acceptance of the compensation

> is determined by the head of the operating unit concerned to be necessary and appropriate in view of the work of the Department and the duties and responsibilities of the employee.

15 C.F.R. § 0.735–11(b)(5).

We are not in a position to give you a definitive interpretation of this regulation for purposes of the Task Force. While we would note the likelihood that a donor such as Armco Steel has business relations with the Commerce Department, we are not aware of any particular interest of this donor in the work of the Task Force. The Commerce Department, therefore, may feel that it is appropriate to apply the above-quoted exemption to the situation of the "volunteer" from Armco. In this manner each payment should be reviewed carefully and individually, and we will

[14] Since it appears that the volunteers will be serving for more than 130 days, they will be subject to the conflict of interest laws as regular, rather than special government employees. Appendix C of the FPM summarizes the conflict statutes as they apply to both regular and special government employees. Specific questions about the application of these statutes or the Commerce Department Standards of Conduct should be directed to the Designated Agency Ethics Official for that Department or the Office of Government Ethics.

defer to the judgment of the Commerce Department about the propriety of payments in specific cases.[15]

B. Equipment

The Secretary of Commerce has been given authority by Congress to accept gifts of property for the purpose of aiding or facilitating the work of that Department. *See* 15 U.S.C. § 1522. In order to implement this authority, the Secretary has issued an Administrative Order (DAO–203–9), dated July 30, 1965, governing the acceptance of gifts and bequests by the Department.[16] We understand that the anticipated donation of supplies and equipment to the Task Force will be processed by the Commerce Department pursuant to this order. You should be aware that the order provides that gifts shall not be accepted unless they meet specific conditions, which include the following:

> [the gift] would not involve in substance, or have the appearance of involving, personal benefit to an employee for or in contemplation of services to the donor.
>
> Its acceptance would not tend to result in public misunderstanding concerning the ability of any Department employee to carry out his official duties in a fair, independent, impartial, or objective manner.
>
> Its acceptance would not compromise or appear to compromise the honesty and integrity of departmental programs or of its employees and their official actions or decisions.

Administrative Order at p. 2. We would interpret these conditions to suggest that the Commerce Department direct the same kind of attention to the identity of donors as we described previously with regard to the volunteers.[17]

Conclusion

For the reasons discussed above, we conclude that it would be appropriate for the Commerce Department to accept "volunteer" consultants to assist the Task Force. These volunteer consultants may receive a salary from an outside source, so long as the salary payment does not otherwise create a conflict of interest.

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[15] We do not fully understand the reasons for the one proposed corporate payment to a volunteer through a tax-exempt organization. While we are not prepared to state unequivocally that such payment is improper, we must express special concern about the advisability of this proposal At the least, we would note that the conflict of interest regulations may not be circumvented by such a mechanism, both the corporation and the tax-exempt organization should be scrutinized as to any disqualifying conflicts.

[16] The order expressly provides that it shall not govern the donation of personal services.

[17] You have not asked us for advice concerning the propriety of soliciting, as opposed to accepting, donations of property or services. Since we do not know whether, or in what manner, the Task Force would be soliciting donations, we have not attempted to address that issue in this memorandum.

Under similar standards, donations of equipment may be accepted on behalf of the Task Force.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Compensation of Standing Trustees Under the Bankruptcy Reform Act

The compensation scheme made applicable to court-appointed chapter 13 standing trustees by the Bankruptcy Reform Act of 1978 is designed to encourage maximum economic efficiency in administering plans, and it would be contrary to congressional intent to permit a subsequent year's surplus to be applied to a prior year's deficit so as to increase the trustee's compensation for that prior year. However, a subsequent surplus may be applied to offset out-of-pocket losses suffered by the trustee in a prior year so as to permit the trustee to break even for that year.

February 26, 1982

MEMORANDUM OPINION FOR THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

Your predecessor requested the opinion of this Office on two questions relating to the accounts of those chapter 13 standing trustees who are under the administration of the United States Trustees. These are: (1) whether such standing trustees may, in a particular year, establish or add to a reserve fund to cover anticipated expenses of subsequent years; and, (2) whether such standing trustees may carry operating deficits from one year forward to the next, to be repaid from subsequent surpluses. The answers to these questions are dependent upon the meaning of 28 U.S.C. § 586(e) (Supp. II 1978).

Section 586(e) provides:

> (e)(1) The Attorney General, after consultation with a United States trustee that has appointed an individual under subsection (b) of this section to serve as standing trustee in cases under chapter 13 of title 11, shall fix—
>
> (A) a maximum annual compensation for such individual, not to exceed the lowest annual rate of basic pay in effect for grade GS–16 of the General Schedule prescribed under section 5332 of title 5; and
>
> (B) a percentage fee, not to exceed ten percent, based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee.
>
> (2) Such individual shall collect such percentage fee from all payments under plans in the cases under chapter 13 of title 11 for

which such individual serves as standing trustee. Such individual shall pay to the United States trustee, and the United States trustee shall pay to the Treasury—

(A) any amount by which the actual compensation of such individual exceeds five percent upon all payments under plans in cases under chapter 13 of title 11 for which such individual serves as standing trustee; and

(B) any amount by which the percentage for all such cases exceeds—

(i) such individual actual compensation for such cases, as adjusted under subparagraph (A) of this paragraph; plus

(ii) the actual, necessary expenses incurred by such individual as standing trustee in such cases.

Section 586(e) was added to Title 28 by the Bankruptcy Reform Act of 1978, Pub. L. No. 95–598 92 Stat. 2663. A companion section of that Act added 11 U.S.C. § 1302(e) which, with the exception noted below, contains identical provisions applicable to the compensation and reimbursement for fees and expenses of court-appointed standing trustees under chapter 13.

It is clear that the plain language of 28 U.S.C. § 586(e) does not deal expressly with the issues raised by your predecessor's questions and we have found no relevant cases interpreting that section or 11 U.S.C. § 1302(e). Nor does the legislative history of those sections, in terms, fully resolve the questions posed. In the main, the legislative history simply emphasizes what is apparent from the face of the sections: that Congress intended to establish a system for chapter 13 cases in which a set percentage fee would be collected by standing trustees from all payments made under all plans administered by them to cover their compensation and expenses; that their compensation would be limited, both in absolute terms and as a percentage of payments made under plans; and that any excess of fees collected over otherwise allowed compensation and expenses would be paid to the Treasury. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 105–07, 440 (1977).[1] However, the House Report does contain one illuminating statement of intent, *viz:* "The fee system is designed to encourage the standing trustees to keep costs low at the risk of reduced compensation." *Id.* at 107.

While the limitations, both absolute and percentage, placed by § 586(e) on the compensation of standing trustees were not innovations of the Bankruptcy Reform Act,[2] the concept that this compensation and their expenses should be defrayed from a set percentage fee was. Under the applicable section of Title 11

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[1] Section 586(e) and 11 U S C. § 1302(e) were derived from the House version of the Bankruptcy Reform Act of 1978. The Senate report is therefore unilluminating

[2] *See* 11 U S.C. § 1059(3) (1976) (providing, in addition to reimbursement for actual and necessary costs and expenses, for the payment of commissions to chapter XIII trustee of "not more than 5 per centum to be computed upon and payable out of the payments actually made by or for a debtor under the plan.") and H R. Doc. No. 184, 88th Cong., 1st Sess., Report of the Proceedings of the Judicial Conference of the United States, Sept 17–18, 1963 at 87 (approving the recommendation that the annual compensation of trustees in chapter XIII cases not exceed the maximum compensation of a full-time referee).

prior to the 1978 Act, the commissions paid chapter XIII trustees, including standing trustees, and their actual and necessary costs and expenses were distinct priority payment items, payable from monies paid in by or for the debtor. *See* 11 U.S.C. § 1059(2) and (3) (1976); *see also* Bankruptcy Rule 13–209. Similarly, under the Bankruptcy Reform Act, compensation and reimbursement for actual, necessary expenses for chapter 13 trustees, other than standing trustees, remain payable, as distinct items, from monies otherwise available for payment to creditors under the plan, *i.e.*, from all monies paid in by or for the debtor. *See* 11 U.S.C. §§ 330(a), 503(b)(2), 507(a)(1) and 1326(a)(1) (Supp. II 1978). In light of the statement of intent in the House Report and the difference in treatment between chapter 13 standing trustees under the Bankruptcy Reform Act and other chapter 13 trustees under that Act as well as chapter XIII trustees under the predecessor act, it would seem that Congress clearly intended that, ultimately, the amount of a standing trustee's compensation, payable as it is only from the same finite source available to defray expenses, would depend, at least in part, on his economic efficiency. That is, that it would depend on his ability to hold his expenses to a minimum.

This intended result suggests a partial answer to one of the questions which you have asked. It would be contrary to congressional intent to permit a subsequent surplus[3] to be applied to prior year's deficit in a manner that would effectively increase a standing trustee's compensation for that prior year.[4] This means that a subsequent surplus may not be applied to raise a standing trustee's net income from a prior year's percentage fees above the level of zero. In other words, a subsequent surplus may not be applied to "reinstate" any part of the compensation to which a standing trustee was entitled for the prior year under 28 U.S.C. § 586(e) but did not receive because his actual, necessary expenses incurred (and paid either from the percentage fee or out of pocket) effectively reduced his actual compensation from the percentage fee below the permissible level. A question remains, however, whether under 28 U.S.C. § 586(e) a subsequent surplus may be applied to offset out-of-pocket *losses* suffered when actual, necessary expenses in a prior year have exceeded the total dollar amount collected in percentage fees; that is, whether a subsequent surplus may be used to offset negative compensation to raise it to the break-even point.

Two arguments can be advanced why such application of a subsequent surplus may be impermissible under 28 U.S.C. § 586(e). The first is that such a setoff would be contrary, in a general way, to the principle of economic efficiency stated above. The second is that it may be in derogation of the requirement of the statute that surpluses be paid over to the Treasury.

The argument concerning economic efficiency is easily met. Whereas the legislative history of § 586(e) clearly indicates a congressional intent that the annual compensation of a standing trustee be dependent, in part, upon his ability

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[3] By surplus we mean the excess of the percentage fee set under 28 U.S C § 528(e)(1)(B) and collected under § 528(e)(2) in a given year over the maximum permissible compensation of the standing trustee for that year and his actual, necessary expenses incurred during that year

[4] Under § 586(e)(1)(A) & (B), compensation for standing trustees must be computed on an annual basis

to keep expenses low during the year, there is no evidence that Congress either contemplated or intended that a standing trustee be required to pay actual and necessary expenses out of his own pocket, from monies not attributable to fees collected in chapter 13 cases. It simply does not follow that because Congress believed that a more efficient standing trustee should receive greater annual compensation than a less efficient one, it also intended that all standing trustees be held to a standard of efficiency which would require them to accept negative compensation (incurred by their payment of expenses defined as both "actual" and "necessary") if that result may be avoided without a clear violation of an essential element of § 586(e). In short, we find no evidence on which to base the conclusion that some abstract "spirit" of § 586(e) precludes the application of a subsequent surplus to offset prior negative compensation.

The second argument raises issues not of spirit but of text—whether such setoff would violate an essential element of § 586(e). Section 586(e)(2) requires that a surplus—that portion of the percentage fee which exceeds the total of a standing trustee's maximum annual compensation (taking into account both the absolute and percentage caps) and his actual, necessary expenses—be paid by the standing trustee to the United States Trustee for payment over to the Treasury. This provision is intended to apply in those situations in which "the standing trustee served in more cases with greater payments to creditors than anticipated at the beginning of the year when the budget was prepared and the fee fixed." House Report at 106. The intended effect is to make available to the Treasury, to partially defray the costs of the United States Trustee system, monies which, if retained by the standing trustees, would exceed their actual and necessary expenses and the compensation to which they are limited. *Id.* at 107. The provision ensures that standing trustees will not be unjustly enriched while participating in a system which is partially subsidized by the United States. Unlike its corresponding provision related to disposition of surpluses by standing trustees not under the administration of United States Trustees, it does not specifically require that excess fees be paid to the Treasury annually or on any other fixed schedule. *Compare* 11 U.S.C. § 1302(e)(2).[5]

We see nothing in the language of § 586(e)(2) or in the congressional intent behind it which requires that provision to be read as mandating that a surplus of a standing trustee in a particular calendar (or fiscal) year be turned over immediately and in full to the United States Trustee for payment to the Treasury without consideration of his prior out-of-pocket losses. We do not believe that application of a current surplus to pay for prior, unrecovered actual and necessary expenses would violate the plain language of § 586(e)(2), would cause the overcompensation of standing trustees which Congress intended to prevent, or would deprive the United States of monies which Congress intended it to have—*i.e.*, monies which would otherwise be a windfall to the standing trustees.

[5] The legislative history gives no clue as to why 11 U.S.C. § 1302(e)(2) provides that excess fees collected by court-administered standing trustees be paid to the Treasury annually while § 586(e)(2) is silent on the schedule for payment

We have little to add in answer to the question whether, in a particular year, a standing trustee may establish or add to a reserve fund to cover anticipated expenses of subsequent years. We think that our conclusion that § 586(e)(2) does not require, as an absolute rule, that the full amount of a given year's surplus be turned over for payment into the Treasury in that same year, without regard to what has gone before, applies equally to what can reasonably be expected to occur in the future. So long as the establishment of a reserve fund is a reasonable business practice for a standing trustee and that fund is used to pay actual and necessary expenses (as opposed to supplementing compensation) of the trustee, we see nothing in § 586(e) to prohibit it.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Bonneville Power Administration's Claim for Reimbursement in Connection with Land Transfer

Under the Federal Property and Administrative Services Act of 1949, the Bonneville Power Administration is entitled to be reimbursed the fair value of certain property that it transferred to the Secretary of the Interior for the use and benefit of the Puyallup Indian Tribe, without regard to whether said property is located within the Puyallup Indian Reservation.

Under the Federal Property and Administrative Services Act of 1949, fair value reimbursement to the transferor agency by the acquiring agency is mandatory in all cases where the property was acquired with funds from a revolving fund, 40 U.S.C. §§ 483(a)(1), 485(c). The General Services Administration has no discretion to waive such a repayment obligation by the acquiring agency, even where, as is arguably the case here, the acquiring agency is under an independent statutory obligation to acquire the land.

March 2, 1982

MEMORANDUM OPINION FOR THE ASSISTANT GENERAL COUNSEL, DEPARTMENT OF ENERGY

This responds to your request for our opinion on a matter in dispute between the Bonneville Power Administration (Bonneville) and the General Services Administration (GSA) relating to Bonneville's claim for reimbursement in connection with its transfer to the Secretary of the Interior of certain real property under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471–75 (1976 & Supp. IV 1980) (the Act).[1] At issue is whether Bonneville is entitled to be reimbursed the fair value of the property which the Secretary of the Interior has taken in trust for the Puyallup Tribe of Indians. We conclude that it is so entitled.

According to the information you provided us, the property in question consists of 1.34 acres of land in Pierce County, Washington, purchased some years ago for the United States by Bonneville from private parties with funds appropriated from the Treasury. The Treasury has since been reimbursed the purchase price from revenues generated by Bonneville's sale of electric power. As a practical matter, then, the land has been paid for by Bonneville's customers. Recently, Bonneville determined that it no longer had any need for the property,

[1] As you know, we solicited the views of both the Department of the Interior and the Department of Energy on the questions presented by Bonneville. The former agency was in substantial agreement with GSA's interpretation of the Act. We also received an unsolicited submission from the attorney for the Puyallup Nation of Indians discussing a second issue raised by Bonneville—the continuing existence of the Puyallup Indian Reservation within whose boundaries the property in question is purported to be located. *See* note 4, *infra*.

and so reported to GSA.[2] GSA then sought to ascertain, as required under § 483(a)(1) of the Act,[3] whether any other federal entity was interested in acquiring the property. Subsequently, at the request of the Puyallup Indian Tribe, the Bureau of Indian Affairs of the Department of the Interior certified to GSA that the property was located within the reservation boundaries of the Puyallup Tribe, and requested that the land be transferred to the Secretary of the Interior to be held in trust by him for the benefit and use of the tribe, as required by § 483(a)(2) of the Act.

Bonneville takes the position that under §§ 483(a)(1) and 485(c) of the Act it is entitled to be reimbursed the fair value of the property. GSA does not dispute that Bonneville would ordinarily be entitled to fair value reimbursement by an agency acquiring the property under the above-mentioned provisions of the Act. Rather, GSA contends that no reimbursement is required because the land is located within an Indian reservation, is therefore subject to the terms of § 483(a)(2), and consequently its transfer generates no proceeds from which reimbursement would be possible. The Department of the Interior appears to be in essential agreement with GSA on this point of statutory construction.[4]

I.

Section 483(a)(1) of the Act provides for the transfer among federal agencies of "excess" property,[5] and reads in pertinent part as follows:

> Subject to the provisions of paragraph (2) of this subsection, in order to minimize expenditures for property, the Administrator

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[2] Under 16 U.S C § 832a(e) (1976) Bonneville would appear to have its own authority, independent of GSA, to sell or otherwise dispose of real property owned by it, provided that it obtains the prior approval of the President for the particular transaction It is not clear to us why Bonneville chose in this case to dispose of the property through GSA, and thereby necessarily in accordance with the procedures mandated by the Act, rather than simply sell it on the open market. We note, however, that the decision to dispose of the property through GSA facilitates its transfer into trust for the Puyallup Tribe.

[3] Relevant sections of the Act will be identified in this opinion by citation to Title 40 of the United States Code. Thus § 202(a)(1) of the Act will be cited as § 483(a)(1), § 204(c) as § 485(c), etc

[4] Bonneville argues in the alternative that the parcel of excess land in question is not currently located "within" an Indian reservation, and that its transfer is therefore not governed by § 483(a)(2) In support of this position, Bonneville cites several recent Supreme Court cases which, in its view, cast doubt upon the continued existence of the Puyallup Reservation GSA defers to the determination of the Interior Department on the question of the location of the property within an Indian reservation, and its concomitant eligibility for transfer pursuant to § 483(a)(2) The Department of the Interior urges that the holding of the Court of Appeals in *United States* v *State of Washington*, 496 F 2d 620 (9th Cir. 1974), *cert. denied*, 419 U S 1032 (1975) be considered conclusive of the issue of the continued existence of the Puyallup Reservation.

We agree with the Department of the Interior that it would be inappropriate, in light of the United States' fiduciary obligations as trustee for the Indians, to reopen the question of the reservation's status in this context We are mindful, in this regard, of the government's longstanding litigating position on the issue *See, e.g* , *City of Tacoma* v *Andrus*, 457 F Supp. 342 (D D.C. 1978) (Secretary of Interior acted within his power under 25 U.S.C. § 465 (1976) in acquiring trust lands within historic boundaries of Puyallup Reservation) In any event, because our conclusion with respect to Bonneville's entitlement to reimbursement under the Act does not depend upon the location of the property, we need not address the considerations raised by Bonneville with respect to the continued existence of the reservation

[5] "Excess property" is defined in § 472(e) of the Act of "any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof." It is distinguished from "surplus property," which is defined in § 472(g) as "any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator [of GSA] "

> shall prescribe policies and methods to promote the maximum utilization of excess property by executive agencies, and he shall provide for the transfer of excess property among Federal agencies and to the organizations specified in section 756(f) of this title. The Administrator, with the approval of the Director of the Office of Management and Budget, shall prescribe the extent of reimbursement for such transfers of excess property: *Provided, That reimbursement shall be required of the fair value, as determined by the Administrator, of any excess property transferred whenever net proceeds are requested pursuant to section 485(c) of this title* or whenever either the transferor or the transferee agency (or the organizational unit affected) is subject to the Government Corporation Control Act (59 Stat. 597; 31 U.S.C. 841) or is an organization specified in section 756(f) of this title . . . .

(Emphasis added.) By the terms of this section, the Administrator of General Services has some discretion in determining the extent to which an agency accepting transfer of excess property must "reimburse" the Treasury for its acquisition. However, "fair value" reimbursement "shall be required" from an acquiring agency "whenever net proceeds are requested pursuant to section 485(c) of this title." This latter section deals with the situation in which excess property was originally acquired by the transferor agency "by the use of funds either not appropriated from the general fund of the Treasury or appropriated therefrom but by law reimbursable from assessment, tax, or other revenue or receipts. . . ." In such a case, and upon the request of the transferor agency, the proceeds of the transfer "shall be credited to the reimbursable fund or appropriation or paid to the Federal agency which determined such property to be excess. . . ." In other words, "fair value" reimbursement to the transferor agency by the acquiring agency is mandatory under § 483(a)(1) whenever the property was acquired by the transferor agency with funds from a so-called "revolving fund."[6]

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[6] As originally enacted, § 483 of the Act required fair value reimbursement by the acquiring agency in *all* excess property transfers *See* § 202(e) of the Act of June 30, 1949, ch 288, 63 Stat. 385 Amendments to the Act in 1952 gave the Administrator of General Services discretion to waive this reimbursement requirement in all but a few situations. *See* Act of July 12, 1952, ch 703, 66 Stat. 593 The Senate Report explained the need for the amendments as follows

> The purpose of this provision of the bill . . is to permit better utilization of excess property by other Federal agencies which have need for such property. Experience has clearly demonstrated that a considerable amount of excess property which has been reported to the GSA for redistribution to other Federal agencies cannot under existing authority be transferred to the needing agencies, since reimbursement is required under the "fair value" provision of section 202 of the Federal Property and Administrative Services Act of 1949, as amended. The *needing agencies contend that they have no funds available for reimbursing the owning agency, and GSA does not have authority to transfer without reimbursement,* and as a result the best utilization of excess property is not attained. This amendment to the act would liberalize the effect of the statute and at the same time provide a more flexible method for transfer so that greater utilization of excess property could be attained, while at the same time retaining existing exceptions specifically authorized by law.

S. Rep No 2075, 82d Cong., 2d Sess 3 (1952) (emphasis supplied). One of the "existing exceptions" referred to in the above passage is the situation in which "net proceeds are requested pursuant to § 485[c] "

The regulations implementing GSA's responsibilities under § 483(a)(1) are found in Subpart 101-47.2 of Title 41 of the Code of Federal Regulations. Reimbursement for transfers of excess real property is prescribed in 41 C.F.R. 101-47.203-7(f). Subsection (f)(1) mandates fair value reimbursement where the transferor agency requests the "net proceeds" of a transfer under § 485(c) of the Act; subsection (f)(2) prescribes in some detail procedures governing reimbursement "in all other transfers of excess real property." Briefly, GSA may or may not require reimbursement from an acquiring agency under (f)(2), depending upon whether the agency has available appropriated funds to spend on the acquisition, or whether Congress has specifically authorized the transfer without reimbursement.[7] In accordance with the mandate of the statute, the regulations embody no analogous waiver authority where § 485(c) property is involved.

II.

Bonneville contends, and GSA does not dispute, that the property in question here falls within the scope of § 485(c). Although initially the funds used to purchase the property were appropriated from the Treasury, the Treasury is being reimbursed through revenues generated from the sale and transmission of electric energy generated at the Bonneville project. *See* 16 U.S.C. § 832j. Bonneville would therefore appear to be entitled to fair value reimbursement from the agency to which its excess property is transferred, both under § 483(a)(1) of the Act and under GSA's implementing regulations.

In this case, however, GSA argues that under 1975 amendments to the Act dealing with excess property located within Indian reservations, Bonneville is not entitled to reimbursement. These amendments make § 483(a)(1) expressly "subject to" a new § 483(a)(2), which requires GSA to transfer any excess property located within an Indian reservation to the Secretary of the Interior to be held in trust for the tribe. *See* Act of Jan. 2, 1975, Pub. L. No. 93-599, 88 Stat. 1954. The subsection reads in pertinent part as follows:

> The Administrator shall prescribe such procedures as may be necessary in order *to transfer without compensation to the Secretary of the Interior* excess real property located within the reservation of any group, band, or tribe of Indians which is recognized as eligible for services by the Bureau of Indian Affairs. Such excess real property shall be held in trust by the Secretary for the benefit and use of the group, band, or tribe of Indians, within whose reservation such excess real property is located. . . . (Emphasis added.)

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[7] Examples of situations in which Congress has specifically authorized the transfer of property without reimbursement are found in 16 U.S.C. § 667b (transfer of real property for wildlife conservation purposes to state agencies or Department of the Interior), 50 U.S.C. App. § 1622(g) (conveyance of real property to state or local government for public airports); 40 U.S.C. § 484(k)(3) (conveyance of real property to state or local governments for use as historic monument). However, as we read GSA's regulations, the reimbursement obligation may be excused *only* in situations where § 485(c) does not apply. Thus the general obligation to reimburse a revolving fund under (f)(1) will always prevail over any defense to a reimbursement obligation set out in (f)(2).

GSA's position, with which Interior is in essential agreement, is based on a reading of the above provision in which the phrase "without compensation" modifies the word "transfer." The transaction contemplated by (a)(2) is thus characterized as a "transfer without compensation." From this characterization GSA argues that a § 483(a)(2) transfer generates no proceeds which could be credited to Bonneville's revolving fund.

If GSA's reading of the language of subsection (a)(2) is correct, the fair value reimbursement requirement contained in subsection (a)(1) will never be realized in a transfer of land located within an Indian reservation. Thus, subsection (a)(2) would qualify subsection (a)(1) in not one but two respects: it would limit the GSA Administrator's discretion under (a)(1) with respect to which agency is entitled to the excess property, and also impliedly repeal that section's fair value reimbursement requirement for self-financing agencies like Bonneville. We hesitate to give the provision such a broad effect without the clearest expression of congressional intent, particularly since in certain circumstances it could raise constitutional issues. *See* note 10, *infra*. We look, therefore, to a possible alternative reading of the language of subsection (a)(2): a transfer governed by this section is to be effected "without compensation to the Secretary of the Interior." Certainly, this is a reasonable alternative reading of somewhat ambiguous phraseology—phraseology whose ambiguity is compounded by the use of the word "compensation" instead of the term generally used in this statute, "reimbursement."[8]

Because the language which Congress chose admits of more than one reasonable construction, we turn to the legislative history to ascertain what relationship Congress intended the new section to have to other parts of the Act, and in particular to § 483(a)(1) itself.[9] There we find strong support for the alternative reading we have suggested, and none for GSA's.

III.

Public Law No. 93-599 was enacted in 1975 principally to curtail the discretion which both the Administrator of General Services and the Secretary of the Interior then enjoyed under the Act in connection with the disposition of excess property located within an Indian reservation. Under the law as it then existed, a tribe's ability to benefit from the use of excess federal property on its reservation was entirely dependent upon the willingness of the Secretary of the Interior to

[8] Had Congress intended to preclude an owning agency's being reimbursed in any circumstances by the Secretary of the Interior under § 483(a)(2), it might have stated clearly that excess property located within an Indian reservation should be "transferred to the Secretary of the Interior without compensation *to the owning agency*." Alternatively, the statute could have referred to "transfer without reimbursement to the transferor" which would have been consistent with the language and structure of (a)(2). While speculation regarding what Congress might have said is not particularly useful, its departure from the more obvious choices leads one to an inquiry into the legislative history to see if there is any explanation for the words it did select.

[9] References to the legislative history may be appropriate even where a statute's meaning appears plain on its face, particularly where apparently contradictory directives are given by more than one applicable provision of law. *See Watt* v. *Alaska*, 451 U.S. 259 (1981). *See also Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U S 1, 10 (1976)

apply to GSA for its transfer, and GSA's willingness to choose Interior over some other agency interested in acquiring the land. The 1975 amendments to the Act were intended to make mandatory GSA's transfer of excess property located within a reservation to the Secretary of the Interior, to be held in trust "for such use as the Indian tribe located on the reservation believes best." *See* H.R. Rep. No. 1339, 93d Cong., 2d Sess. 4 (1974) (House Report). Neither the terms of the statute nor its legislative history suggest that Congress intended there to be any exceptions to this requirement, or that any discretion was to remain in either GSA or the Secretary once the land was determined to be located "within [a] reservation."

As originally introduced in the House, and reported out of Committee in the Senate, the legislation authorized the Secretary of the Interior under certain limited circumstances to require reimbursement from an Indian tribe when excess property located within a reservation was transferred to Interior in trust for the tribe. *See* House Report at 2; *Disposal of Excess Property Located within Indian Reservations: Hearing on H.R. 8958 Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 2d Sess. 3 (1974). Specifically, H.R. 8958, 93d Cong., 1st Sess. (1973) authorized the Secretary to require reimbursement "in the event that the group, band, or tribe of Indians receiving excess property under this section was compensated for such real property when title was acquired by the United States." This limited authority was stricken by the House Committee, however, with the following comments:

> Amendment two provides that excess property shall be transferred to the Interior Department *for the use [sic] by Indian tribes "without compensation."* Since the land in question will remain in Federal hands, *it does not seem appropriate to exact a charge for its use from the tribes*. The fact that many tribes have only limited financial resources also contributed to the committee's belief that they should not be charged for land located within their own reservations. In some instances, at least, the exactment of a charge would prevent a tribe without adequate resources from obtaining needed property. This would clearly defeat efforts to institute self-sufficiency in Indian tribes.

House Report at 2 (emphasis added).

As this passage makes clear, the addition of the phrase "without compensation" in the first sentence of (a)(2) was intended to do no more than ensure that Indian tribes were not "charged for land, located within their own reservation," and preclude the Secretary's exacting a charge from the tribes in connection with his acquisition of the land for their benefit. There is no suggestion that the phrase in (a)(2) was intended to change existing law on reimbursement in connection with interagency transfers under (a)(1), or that the terms of a transfer transaction under (a)(2) were not intended to be governed, at least as between the owning and acquiring federal agencies, by the preceding section. And, as we have noted, the

existing law would have required an agency acquiring excess § 485(c) property to reimburse the owning agency its fair value.

Moreover, the very use of the term "reimbursement" to describe the Secretary's proposed authority to levy on the Indians in the original version of the bill suggests that its drafters anticipated that the Secretary would at least in some cases have to pay something to acquire the property. This may indicate that Congress contemplated that the Secretary might have to expend funds in connection with accepting transfers under § 483(a)(2).[10]

We conclude, therefore, that Bonneville's entitlement to reimbursement under §§ 483(a)(1) and 485(c) of the Act is not affected by the passage of the 1975 law. In reaching this conclusion we are mindful of the basic canon of statutory interpretation that a statute "ought to be so construed as to make it a consistent whole," and that "the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail." 2A C. Sands, Sutherland's Statutory Construction § 46.05 at 57 (4th ed. 1973), citing *Attorney General* v. *Sillem*, 159 Eng. Rep. 178 (1863). *See also Watt* v. *Alaska*, 451 U.S. at 267 ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose.").

The question of the Interior Department's authority to expend appropriated funds on the acquisition of the excess property in question for the use and benefit of the Puyallup Tribe is not before us, although we note as possibly relevant in this regard the general authority to expend funds for the benefit of the Indians set forth in 25 U.S.C. § 13 and, more particularly, the authority to purchase land for the use and benefit of the Indians contained in 25 U.S.C. § 465. In addition, because we believe that § 483(a)(2) of the Act must be construed to leave Interior no discretion to refuse to accept transfer of excess property located within a reservation simply because the transferring agency must under § 483(a)(1) be reimbursed for it, § 483(a)(2) itself may constitute an additional source of authority to expend funds otherwise available for that purpose.[11] *Cf. New York Airways, Inc.* v. *United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) (Congress' failure to appropriate funds to meet an agency's statutory obligation does not defeat that obligation). It may be, of course, that Interior simply does not have sufficient funds to spare from its general appropriation, consistent with fulfilling the other obligations which must be funded from this source. In this event, either

[10] There is no indication in the legislative history of the 1975 amendments that Congress considered the situation involving lands paid for not with public funds but with funds generated from assessments of a particular group of citizens. Statements in the legislative history suggest that it did not. *See, e.g.*, House Report at 2 ("the land in question will remain in Federal hands"). This does not, however, cast doubt on our conclusion with respect to the purpose of the "without compensation" language in (a)(2). Indeed, it reinforces it. One may well ask whether Congress, if asked, would have thought it fair or appropriate that land in effect paid for by one group of citizens, here Bonneville's customers, could be transferred to a federal agency without compensation.

[11] It is a well settled principle of law that a lump sum appropriated for an agency's general programs and activities may be used by the agency for any otherwise authorized purpose. *See, e.g., In re Newport News Shipbuilding and Drydock Co.*, 55 Comp. Gen. 812, 819–21 (1976). *See also City of Los Angeles* v. *Adams*, 556 F.2d 40, 49–50 (D.C. Cir. 1977) (an agency head's discretion to reprogram funds among authorized programs under a lump sum appropriation is limited only if a specific statutory directive requires the expenditure or distribution of funds in a particular manner). Thus Interior is not legally obliged to seek a new appropriation to reimburse Bonneville for the land, as long as there are funds available from its unrestricted general appropriation which could be allocated or reprogrammed for this purpose.

Interior or Bonneville could seek an additional supplemental appropriation for that specific purpose.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Removal of Members of the Advisory Council on Historic Preservation

Congress did not intend to limit the President's power to remove members of the Advisory Council on Historic Preservation without cause prior to the expiration of their terms of office. While certain of the Council's structural attributes and substantive functions suggest that Congress intended to vest the Council with a measure of day-to-day independence from other federal agencies, this does not mean that it intended the Council to operate free of the supervision and control of the President himself through his exercise of the removal power.

The primary functions of the Council are executive in nature, and thus not such as would permit Congress constitutionally to insulate its members from the President's removal power; it will therefore not be inferred from Congress silence on the matter that it intended to do so.

A legislative scheme in which disputes between executive agencies are to be settled in federal or state court would raise a number of serious constitutional problems, under both Article II and Article III, and such an intent on Congress part will not be assumed absent the most compelling and unambiguous language.

March 11, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum addresses the question whether the members of the Advisory Council on Historic Preservation (Council) are removable by the President without cause prior to the expiration of their terms of office. For the reasons set forth below, we conclude that Congress did not intend the Council to operate free of the supervision and control of the President, and specifically that it did not intend to impose restraints on the President's presumptive authority to remove his appointees to the Council. We conclude in addition that the primary functions of the Council are not such as would permit Congress, consistent with the Constitution, to insulate Council members from the President's removal power.

I. The Council

The Council was created by the 1966 National Historic Preservation Act (the Act), Pub. L. No. 89–665, 80 Stat. 915, 917, with the specific mandate of advising the President and Congress on matters relating to historic preservation, recommending measures to coordinate public and private preservation efforts, and "reviewing" federal agency actions affecting properties listed on the National Register of Historic Places. *See* H.R. Rep. No. 1916, 86th Cong., 2d Sess.

1 (1966). As amended in 1980 by Pub. L. No. 96–515, 94 Stat. 2987, the Act provides that the Council should be composed of 19 members, 17 of whom are appointed by the President.[1] Of the 17 presidential appointees, seven are otherwise officers of the United States: the Secretary of the Interior, the Secretary of Agriculture, and the Architect of the Capitol serve *ex officio;* the President appoints the heads of four other "agencies of the United States" whose activities affect historic preservation. The remaining ten members consist of one governor, one mayor, four experts in the field of historic preservation, three at-large members from the general public, and a chairman selected from the general public, all appointed by the President. The tenure of the federal agency heads on the Council is, we believe, dependent on their continuing service as agency heads. And, with the exception of the two members whose tenure depends in part upon state or local election results, the non-federal presidential appointees serve for terms of four years. The statute and its legislative history are silent on the matter of Council members' removal from office prior to the end of a term.[2]

The Council is established "as an independent agency of the United States Government." 16 U.S.C. § 470i. It is exempt from the Federal Advisory Committee Act, but is subject to the Administrative Procedure Act, 16 U.S.C. § 470g. It has an independent budget as a "related agency" of the Department of the Interior, 16 U.S.C. § 470t, and authority to hire its own executive director and staff, 16 U.S.C. § 470m(a). Its executive director is in turn authorized to appoint a general counsel and other staff attorneys. 16 U.S.C. § 470m(b). The Council must submit an annual report to the President and Congress, 16 U.S.C. § 470j(b), and is authorized to submit legislative recommendations and testimony directly to relevant congressional committees without prior clearance from the Office of Management and Budget. 16 U.S.C. § 470r.

Because the nature of the functions performed by an entity is an important factor in determining the constitutional limits of congressional power to restrict the President's power to remove his appointees, *see Wiener* v. *United States*, 357 U.S. 349, 353 (1958), that subject has also become a focal point in determining congressional intent concerning presidential removal power. We therefore set out the Council's duties in full in the following paragraphs.

The Council's advisory functions are described in § 202 of the Act, 16 U.S.C. § 470j. As there directed, the Council shall:

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[1] The Chairman of the National Trust for Historic Preservation and the President of the National Conference of State Historic Preservation Officers serve on the Council *ex officio* *See* 16 U.S.C. § 470i(a)(7) and (8) Because these two members of the Council are not appointed by the President, they may not participate in any Council functions in which they must constitutionally act as officers of the United States, and must confine their participation in the Council's activities to those areas in which its role is purely advisory *See* letter of Dec 1, 1980, from Alan A Parker, Assistant Attorney General, to the Director, Office of Management and Budget.

[2] The discussion of the President's removal power in this memorandum applies to all of his appointees whose tenure *in office is not otherwise subject to his control* by virtue of their positions as officers of the United States—a group which constitutes at least ten persons, and thus a majority of the Council The President's power to remove the two Cabinet members who serve *ex officio* is unquestioned. The four other agency heads are likewise subject to presidential removal, at least in their capacity as *head* of an Executive Branch agency. Though the Architect of the Capitol is listed as a congressional officer or agent of Congress in the Congressional Directory, and is largely subject to congressional direction in the performance of his duties, he is appointed and subject to removal by the President alone. *See* letter of August 13, 1979, from Assistant Attorney General Harmon to Senator Domenici, citing an opinion of the Office of Legal Counsel dated June 1, 1953

(1) advise the President and the Congress on matters relating to historic preservation; recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation; and advise on the dissemination of information pertaining to such activities;

(2) encourage, in cooperation with the National Trust for Historic Preservation and appropriate private agencies, public interest and participation in historic preservation;

(3) recommend the conduct of studies in such areas as the adequacy of legislative and administrative statutes and regulations pertaining to historic preservation activities of State and local governments and the effects of tax policies at all levels of government on historic preservation;

(4) advise as to guidelines for the assistance of State and local governments in drafting legislation relating to historic preservation; and

(5) encourage, in cooperation with appropriate public and private agencies and institutions, training and education in the field of historic preservation;

(6) review the policies and programs of Federal agencies and recommend to such agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under this Subchapter; and

(7) inform and educate Federal agencies, State and local governments, Indian tribes, other nations and international organizations and private groups and individuals as to the Council's authorized activities.

16 U.S.C. § 470j(a).

In addition, under § 106 of the Act, federal agency heads are required to afford the Council "a reasonable opportunity to comment" before approving any expenditure of federal funds on, or licensing of, an undertaking which would affect properties on the National Register of Historic Places. *See* 16 U.S.C. § 470f.[3] Section 211 of the Act authorizes the Council to promulgate "such rules

[3] Several courts have had occasion to construe the "reasonable opportunity to comment" authority in § 106. In *WATCH* v. *Harris*, 603 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S 995 (1979), Judge Oakes reviewed the legislative history of § 106 and concluded that Congress intended to provide a "meaningful review" of federal or federally assisted projects which affect historic properties. 603 F.2d at 324. The Secretary of Housing and Urban Development was found to have violated § 106 in failing to consider the impact of a housing project on certain historic properties, and in failing to solicit the Council's advice. The court of appeals therefore affirmed the district court's injunction against proceeding with the project. *But see Commonwealth of Pennsylvania* v. *Morton*, 381 F. Supp. 293, 299 (D.D.C. 1974), in which the Secretary of the Interior had initially failed to consult with and subsequently failed to follow the recommendations of the Advisory Council in a matter involving a land exchange agreement and the construction of a tower on previously federal property near Gettysburg National Cemetery. The court found that the Secretary had "substantially complied" with § 106 by referring the matter to the Council for its comments after the land exchange agreement had been signed, and that "[i]f he deviated from its recommendation, the Secretary was authorized to do so in his discretion by the express terms" of 16 U.S.C. § 460l-22(b). *See* 381 F. Supp. at 298 n.7. The Council's reviewing authority under § 106 is enhanced by Executive Order 11593, 36 Fed.

Continued

and regulations as it deems necessary to govern the implementation" of § 106 of the Act. 16 U.S.C. § 470s.

As previously noted, the Council's executive director is authorized to appoint a General Counsel and other staff attorneys, who in turn are authorized:

> to assist the General Counsel, represent the Council in courts of law whenever appropriate, including enforcement of agreements with Federal agencies to which the Council is a party, assist the Department of Justice in handling litigation concerning the Council in courts of law, and perform such other legal duties and functions as the Executive Director and the Council may direct.

16 U.S.C. § 470m(b). The Council would appear, therefore, to be authorized to bring lawsuits under some circumstances against at least some other federal agencies.[4]

The 1980 Amendments to the Historic Preservation Act expanded the Council's authority in a new § 214, under which the Council is authorized to make rules for exempting certain federal actions from the requirements of the Act:

> The Council, with the concurrence of the Secretary, shall promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this Act when such exemption is determined to be consistent with the purposes of this Act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties.

16 U.S.C. § 470v.[5]

Reg. 8921 (1971), which requires that an agency proposing to "sell, demolish or substantially alter" any federally owned property which "might qualify" for nomination to the National Register, may take no action until the Advisory Council has been provided "an opportunity to comment." Executive Order 11593 also requires that federal agencies consult with the Council in adopting procedures to assure that their policies and programs contribute to the preservation of both federally and non-federally owned properties of historic significance *See WATCH* v *Harris*, 603 F.2d at 325

Under the 1980 Amendments to the Act, a similar "opportunity to comment" must be afforded the Council under § 110(f) of the Act whenever federal agency actions "may directly and adversely affect" any designated National Historic Landmark. *See* § 206 of Pub. L. No. 96-515, 94 Stat. 2987, 2996.

[4] The phrase "including enforcement of agreements with Federal agencies to which the Council is a party" was added to the statute in 1980 *See* § 301(i) of Pub. L. No. 96-515, 94 Stat. at 2999. While no reference to them appears elsewhere in the Act, the legislative history of the 1980 Amendments suggests that the referenced "agreements" are those described in the Council's regulations in Part 800 of Title 36, Code of Federal Regulations *See* 36 C.F.R. § 800.6(c) (Memorandum of Agreement). *See also* H.R Rep. No. 1457, 96th Cong., 2d Sess. 42 (1980) (1980 House Report) ("specifically added is language that refers to the enforcement of agreements with Federal agencies under Section 106, other authorities contained in this Act and implementing regulations"). The agreements are entered into by parties to the "consultation process" by which the Council carries out its commenting function under § 106 of the Act, whenever it is determined that a federal undertaking will have an adverse effect on an historic property. The agreement must "detail[] the actions agreed upon by the consulting parties to be taken to avoid, satisfactorily mitigate, or accept the adverse effects on the property." 36 C.F.R. § 800.6(c)(1). "The consulting parties" include the head of the federal agency having responsibility for the undertaking, the Historic Preservation Officer of the State involved, and the executive director of the Council. Other public and private "parties in interest" may be invited by the consulting parties to participate in the consultation process.

[5] The terms of § 214 are ambiguous with respect to the nature of the authority conferred, and have not yet been interpreted by either the Council or the courts. The rulemaking authority under § 214 clearly cannot be exercised absent prior secretarial "concurrence." Once exercised with the Secretary's concurrence, however, that authority, unlike the "opportunity to comment" requirement of § 106, appears to contemplate the establishment and enforcement of a substantive standard of conduct which will be binding on "Federal programs or undertakings" having an impact on historic properties

Finally, § 202(b) directs the Council to submit an annual report on its activities to the President and Congress, as well as any additional periodic reports that it deems advisable:

> Each report shall propose such legislative enactments and other actions as, in the judgment of the Council, are necessary and appropriate to carry out its recommendations and shall provide the Council's assessment of current and emerging problems in the field of historic preservation and an evaluation of the effectiveness of the programs of Federal agencies, State and local governments, and the private sector in carrying out the purposes of this Act.

16 U.S.C. § 470j(b).

In sum, the Council's role under the statute is primarily that of an advocate, advisor, and educator in matters relating to historic preservation, with certain ancillary responsibilities as "watchdog" over federal agencies whose activities affect historic properties.

II. Statutory Restraints on the President's Power to Remove Council Members

At no time since the Council's establishment has Congress expressed any intent to limit presidential control over the tenure of its members. It is true that certain of the structural attributes and substantive functions described in the foregoing section suggest that Congress intended to vest the Council with a measure of day-to-day independence from other federal agencies. This does not mean, however, that Congress intended the Council to operate free of the supervision and control of the President himself through the exercise of the removal power.

With respect to the Council's structure, we do not regard a statutory description of an entity as "independent" as dispositive of the question of the President's power to remove its members. In this case, the legislative history of the Act confirms the limited sort of "independence" Congress intended for the Council. Under the 1966 Act, the Council was organizationally part of the Department of the Interior, with its budget and staff integrated into those of the National Park Service. By 1976, dissatisfaction with the limits this arrangement placed on the Council's ability to function "on an equal and independent basis," particularly in reviewing actions of the Department of the Interior under § 106 of the Act, gave rise to the amendments which reorganized the Council "as an independent agency in the Executive Branch." *See* § 201(5) of Pub. L. 94–422 as described in S. Rep. No. 367, 94th Cong., 1st Sess. 11 (1975) ("1975 Senate Report"). In Committee Reports and in Hearings, the Council's need for "equal and independent" status is discussed in terms of the conflicts arising from its administrative involvement with the Department of the Interior, and the resulting day-to-day pressures which had hampered the efficiency and impaired the objectivity of the Council. The change in status was effectuated, however, by nothing more

than modifying arrangements for the Council's budget and staff. *See* 1975 Senate Report at 11; *Hearings on S. 327 before the Subcommittee on Parks and Recreation of the Senate Committee on Interior and Insular Affairs (Part 3)*, 94th Cong., 1st Sess. 301–05 (1975) (Statement of Clement M. Silvestro, Chairman, Advisory Council on Historic Preservation) (1975 Senate Hearings). There is no suggestion in the 1976 Amendments or their legislative history that Congress intended that the Council be insulated from the ultimate control of the President, or, in particular, that its members should no longer be subject to his power to remove them.[6] Indeed, the Council's new "independence" enhances its ability to perform its duty of advising the President apart from influence from the Department of the Interior, and strengthens the Council's direct relationship and responsiveness to the President rather than weaken them.

The statute's provisions dealing with the Council's relationship with Congress are more problematic. As noted above, the Council has since its creation been explicitly charged with advising Congress as well as the President. In addition, since § 210 was added to the Act in 1976, the Council is relieved of any requirement to submit its legislative recommendations or testimony to any "officer or agency" in the Executive Branch prior to their submission to Congress. Because this direct reporting authority may have an important bearing on the removal power of the President, it is worth quoting in full:

> No officer or agency of the United States shall have any authority to require the Council to submit its legislative recommendations, or testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress. In instances in which the Council voluntarily seeks to obtain the comments or review of any officer or agency of the United States, the Council shall include a description of such actions in its legislative recommendations, testimony, or comments on legislation which it transmits to the Congress.

16 U.S.C. § 470r.

On the one hand, the Council's direct access to Congress suggests a legislative intent to have its own lines of communication with the Council kept free from political or policy influence from elsewhere in the Executive Branch. On the other hand, this reporting scheme need not necessarily interfere with the President's general administrative control over the Council's activities, and as far as we are aware, it has never done so.[7] In this regard, it is significant that the 1980

[6] None of the structural attributes and substantive functions of the Council which might suggest a legislative intent to make its members "independent" of the President's removal power were part of the statute under the 1966 Act Prior to 1976, therefore, there can have been no doubt that its members were removable by the President.

[7] Indeed, we question whether the statutory classification "officer or agency" in § 470r must necessarily be construed to include the President himself Compare the definition of "officer" in § 2104 of Title 5 of the United States Code, which on its face would appear not to include the President. To the extent that a broad construction of this permissive bypass provision in the legislative reporting area would itself raise constitutional separation of powers issues, we would be inclined to read it narrowly to permit the President himself a continued supervisory role. *See Congress Construction Corp* v. *United States*, 314 F 2d 527, 530–32 (Ct Cl. 1963) (President's power of control includes the right to supervise and coordinate all replies and comments from the Executive Branch to Congress)

Amendments to the Act repealed what had been the first sentence of § 210, which directed the Council's concurrent submission to Congress of any and all of its legislative recommendations to the President.[8] The present reporting scheme thus leaves the Council free to communicate with Congress directly and independently if it chooses, but does not obligate the Council to share simultaneously with Congress all or indeed any of its advice to the President. The result is a potentially strengthened tie between the Council and the President, one freed of the congressional oversight imposed by the 1976 Amendments. Congress' willingness in 1980 to give up the mandatory features of its own direct access to the Council and restore some measure of privacy to the relationship between the Council and the President, is scarcely consistent with an intention that the Council should not be subject to the President's supervision and control, and in particular its members to his removal power.

In summary, we find nothing in any of the structural aspects of the Council that establish an intent on the part of Congress to insulate the Council's membership from the President's removal power.[9] Indeed, the most recent amendments to the Act suggest an intent to strengthen, rather than attenuate, the Council's relationship with the President, to the point that Congress has actually relinquished some of the control it asserted in 1976.

An examination of the Council's functions leads us to the same basic conclusion. The Council's advisory and reviewing roles under §§ 106 and 202 of the Act are primarily executive in nature, and, on a constitutional spectrum, locate the Council squarely within "the Executive Branch." While its "watchdog" functions suggest the desirability of the Council's maintaining a certain independence from other Executive Branch agencies, this need for independence does not extend to the President himself. Indeed, it is likely that the Council would find it useful in fulfilling its statutory tasks to be able to call upon the President for support and assistance in its dealing with other federal agencies whose heads are subject to his removal power. A power to make rules and grant exemptions from them does not distinguish the Council from a number of other

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[8] The deleted sentence provided:

> Whenever the Council transmits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit copies thereof to the House Committee on Interior and Insular Affairs and the Senate Committee on Interior and Insular Affairs

The 1980 House Report comments on the requirement as having

> proven to hinder the Council in its provision of independent advice to both the President and the Congress.

See 1980 House Report at 42. We would in any event question the constitutionality of a legislative requirement that the Council's reports and recommendations be transmitted to Congress without affording it the opportunity to communicate them first to the President *See* note 7, *supra*, and Feb. 21, 1977, Memorandum Opinion for the Attorney General on "Inspector General Legislation," 1 Op. O.L.C. 16, 17 (1977) *Cf Buckley* v *Valeo*, 424 U.S. 1, 137–38 (1976)

[9] Congress may, of course, utilize its own committees for the gathering of information or appoint advisory committees to assist in its own legislative functions. Where Congress places the power of appointment in the President, however, it must be assumed to have been aware that as a practical matter presidential appointees will be dependent upon the President and not on Congress, and that as a constitutional matter the power to remove will follow from and be dictated by the structure chosen.

similarly charged Executive Branch agencies whose heads are clearly subject to the President's removal power. *See, e.g.*, 42 U.S.C. § 7418 (federal facilities must comply with EPA emissions rules under Clean Air Act); 42 U.S.C. § 2000e–16 (federal employers are subject to rules and regulations of Equal Employment Opportunity Commission).

Authority in the Council to bring lawsuits against other Executive Branch agencies to enforce the provisions of the Act is somewhat more difficult to reconcile with a congressional intent that its members be subject to the President's removal power. We therefore must examine closely the provisions in § 205(b) of the Act purporting to give the Council authority to seek judicial "enforcement of [its] agreements with Federal agencies."

As noted in the preceding section, § 205(b) of the Act authorizes the Council's legal staff to "represent the Council in courts of law whenever appropriate, including enforcement of agreements with Federal agencies to which the Council is a party," and to "assist the Department of Justice in handling litigation concerning the council. . . ." 16 U.S.C. § 470m(b). Our understanding of this ambiguous mandate is not enhanced by reference to the legislative history of the provision. As originally enacted in 1976, this provision appears to have been intended to deal with the "jurisdictional conflicts" generated by the Council's close administrative association with the Department of the Interior, and in particular the provision of day-to-day legal services to the Council by the Solicitor of the Interior. *See* 1975 Senate Report at 12, 32; 1975 Senate Hearings at 303–04. It did not include the phrase referring to the enforcement of agreements with other federal agencies. While the legislative history does not explain what Congress considered "appropriate" representation of the Council in court by its own attorneys, it is possible that Congress had in mind some situation in which the Department of Justice was unwilling or unable for some reason to represent the United States in connection with a violation of the Act. Whatever litigating authority was intended for the Council in 1976, the addition in 1980 of the phrase referring to the enforcement of the Council's agreements with other agencies suggests that Congress may by that time have been thinking of a situation in which the Department of Justice might be obligated to represent some other federal agency whose position as a party to one of the "agreements" described in the Council's regulations conflicted with that asserted by the Council itself.[10]

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[10] Thus the 1980 House Report states:

> Section 301(i) clarifies the existing authority of the Council to institute legal proceedings on its own behalf to ensure compliance with the Act. Specifically added is language that refers to the enforcement of agreements with Federal agencies under Section 106, other authorities contained in this Act and implementing regulations. In most instances it is expected that the Council will utilize the services of the Department of Justice with regard to litigation However, it is recognized that *situations may arise where a Federal agency may violate the provisions of this Act and the only recourse is initiation of legal proceedings by the Council in its own name.*

1980 House Report at 42 (emphasis supplied). We know of no situation in which the Council has asserted for itself a litigating authority independent of the Justice Department, much less an authority to take an opposing position in litigation.

A legislative scheme in which disputes between Executive Branch agencies are to be settled in some forum other than one responsible to the President—in this case federal or state court—would raise a number of serious problems under both Article II and, potentially, Article III of the Constitution.[11] Indeed we doubt that Congress could constitutionally authorize one Executive Branch agency to sue another in a context such as this one. We will, therefore, not assume that Congress intended such a scheme absent the most compelling and unambiguous statutory language.[12]

III. Constitutional Analysis

An examination of the relevant principles of constitutional law reinforces our conclusion that Congress intended Council members to be freely removable by the President.

Although the Constitution does not explicitly provide for the removal of officers of the United States, it has long been the general rule that "[i]n the absence of specific provision to the contrary, the power of removal is incident to the power of appointment." *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). *See also Myers* v. *United States* at 119. The specification of a term of office does not indicate a congressional intent to preclude mid-term removal, but is merely a limitation of the period that the officer may serve without reappointment. *See Parsons* v. *United States*, 167 U.S. 324 (1897). Where the President's appointment power is involved, the presumption against limiting the removal power is rooted in the "take care" clause of the Constitution, and any limitations on it

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[11] Article II of the Constitution vests the executive power of the United States in the President, a power which includes general administrative control over those executing the laws *See Myers* v. *United States*, 272 U S 52, 163–64 (1926) This power of control extends to the entire Executive Branch, and includes the coordination and supervision of all litigation undertaken in the name of the United States. It was the intention of the Framers, as recognized by the Supreme Court in the *Myers* case, that the executive power would be exercised in a "unitary and uniform" way. 272 U.S. at 135. The President thus has a special obligation to review decisions or actions that have given rise to conflict within the Executive Branch, and Congress has no power to prevent his exercising his supervisory authority for the purpose of resolving inter-agency disputes *See* discussion in Feb 21, 1977, Memorandum Opinion for the Attorney General on "Inspector General Legislation," 1 Op. O L C 16 (1977) Similarly, Congress may not, consistent with Article III of the Constitution, direct federal courts to adjudicate controversies which do not meet constitutional standards of justiciability *See Muskrat* v *United States*, 219 U.S. 346 (1911). If both the Council and the agency alleged to have violated the Act are within the Executive Branch, then the President has both the power and the duty to resolve any dispute between them as to whether a violation of the Act has occurred To provide instead that the judiciary should resolve the dispute would go against the established principle of federal jurisdiction that a person cannot create a justiciable controversy against himself, and itself raise a separation of powers issue. The courts might well question whether, in light of the President's overall authority over both agencies, sufficient adversariness exists in such a situation. *Cf. South Spring Hill Gold Mining Co.* v *Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892). They might also conclude that legal disputes between Executive Branch agencies are more properly for the President to resolve as part of his constitutional duty to "take Care that the Laws be faithfully executed." Art II, § 3. *See* Memorandum Opinion for the Acting Assistant Attorney General, Tax Division, April 22, 1977, 1 Op. O L C. 79, 83 (1977) (dispute between Internal Revenue Service and Postal Service not justiciable). *Compare United States* v *Nixon*, 418 U S. 683 (1974) and *United States* v. *ICC*, 337 U.S. 426 (1949). In this case it is unlikely that the Council's enforcement of one of its agreements with another federal agency would be regarded as an action taken on behalf of a private party or parties, so as to satisfy the requirements of justiciability suggested by the holding of *United States* v. *ICC*.

[12] We express no views as to whether the Council's legal staff may be authorized by the Act to bring suit against independent regulatory commissions such as the Federal Trade Commission whose members do not serve at the pleasure of the President, or to represent the position of the United States in court in connection with a violation of the Act where the Justice Department is unwilling or for some reason unable to do so. Neither of these authorities would in any event be inconsistent with Council members' being subject to the President's removal power

must be strictly and narrowly construed. *See Myers* v. *United States* at 161, 164. Therefore Congress may constitutionally restrict the President's removal power only if the officer serves on an "independent" body whose tasks are primarily quasi-legislative or quasi-judicial, and which tasks "require absolute freedom from Executive interference." *Wiener* v. *United States*, 357 U.S. 349, 353 (1958). *See Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). If an agency's primary functions are "purely executive," the President's power to remove its members must under the Constitution be unfettered. *Id.* at 631–32.[13]

As discussed in the preceding section, the Council is structured in such a way as to make it administratively "independent" within the Executive Branch. In particular, we have noted the statutory provisions which purport to prohibit its being required to channel its reports to Congress through the Executive Office of the President. None of its structural features is, however, necessarily incompatible or inconsistent with its also being ultimately subject to the authority and supervision of the President himself. More importantly, as the Court noted in *Wiener*, "the most reliable factor for drawing an inference regarding the President's power of removal . . . is the nature of the function that Congress vested in the [Council]." 357 U.S. at 353. An examination of the Council's functions leaves no doubt that they are primarily executive in nature. The Council's advisory and reviewing roles under §§ 106 and 202 of the Act suggest the desirability of its maintaining a certain independence of other Executive Branch agencies, but these are "purely executive" functions which do not require "absolute freedom from Executive interference" under the standards set forth in *Humphrey's Executor* and *Wiener*.[14] While the rulemaking and exemption-granting authorities arguably conferred on the Council by §§ 211 and 214 of the Act are closer to the quasi-legislative or quasi-adjudicative functions which may constitutionally be insulated from the threat of removal, these are not its primary tasks. Finally, even if one assumes some limited authority in the Council to litigate in the name of the United States, this is the prototype of a "purely executive" function.[15]

In sum, the primary functions of the Council, as interpreted in light of the relevant constitutional principles, are not such as to permit its members' insula-

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[13] In *Humphrey's Executor* the Court ruled that members of the Federal Trade Commission needed security against mid-term removal in order to "exercise [their] judgment without the leave or hindrance of any other official or any department of the government." 295 U.S. at 625–26. Specifically, its quasi-legislative and quasi-judicial functions required that it be free of executive control. *See* 295 U.S. at 628. Similarly, in *Wiener*, the adjudicative functions of the War Claims Commission were held to require freedom from "control or coercive influence" by the Executive. 357 U.S. at 355, quoting from 295 U.S. at 629.

[14] In the context of examining the nature of the functions of another advisory body created to advise an Executive Branch Department, the District Court for the District of Massachusetts recently recognized that giving advice and making recommendations "fall into the category of 'purely executive'" *Martin* v *Reagan*, 525 F. Supp. 110, 113 (D. Mass. 1981) (National Institute of Justice Advisory Board). *See also Patino* v *Reagan*, Civil No. S-81-469 MLS (E.D. Cal. Sept. 29, 1981). Those cases involved removal by the President of his appointees to advisory boards which advised the National Institute of Justice (NIJ). The NIJ, as the Council here, has been expressly endowed by Congress with a measure of independence from the Attorney General in its day-to-day decisionmaking; its director, however, serves at the pleasure of the President.

[15] We doubt that Congress could constitutionally authorize the Council's legal staff to sue other Executive Branch agencies if those agencies were, like the Council, subject to direction and supervision by the President. *See* note 11, *supra*.

tion from the President's authority and control. We will not, therefore, infer from Congress' silence on the matter that it intended to impose any restrictions on his power to remove his appointees to the Council whenever he wishes to do so, and for whatever reason he chooses.

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Power of the President to Remove Presidential Appointees from the National Capital Planning Commission

There is no indication in the text or legislative history of the Home Rule Act that Congress intended to limit the President's power to remove his appointees from the National Capital Planning Commission.

The composition of the Commission and the duties imposed on it indicate that Congress did not intend it to be a quasi-legislative or quasi-judicial body operating free of the President's policy influence, and its duties are essentially of an executive nature. Thus any limitation on the President's removal power would be unconstitutional.

March 17, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to your request for our opinion concerning the President's power to remove presidential appointees from the National Capital Planning Commission (Commission). For the reasons stated hereafter, we conclude that those appointees serve at the pleasure of the President and may be removed summarily by him from their positions.

The Commission dates from the enactment of legislation in 1924, Act of June 6, 1924, ch. 270, 43 Stat. 463. Its present composition, functions, and responsibilities, however, are based on the District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93–198, 87 Stat. 774 (Home Rule Act), in particular on § 203, 87 Stat. 779, 40 U.S.C. § 71a (1982). The Commission consists of seven *ex officio* members, *viz.*, the Secretary of the Interior, the Secretary of Defense, the Administrator of General Services, the Mayor of the District of Columbia, the Chairman of the District of Columbia Council, the Chairmen of the Committees on the District of Columbia of the Senate and the House of Representatives, and of five appointed members with experience in city or regional planning, three of whom are to be appointed by the President alone and two by the Mayor. 40 U.S.C. § 71a(b). We understand that your inquiry is directed only at the President's power to remove the presidentially appointed members.

The members of the Commission appointed by the President serve for six-year, staggered terms. 40 U.S.C. § 71a(b)(2). The Commission was created as:

> [T]he central Federal planning agency for the Federal Government in the National Capital, and to preserve the important historical and natural features thereof, . . . 40 U.S.C. § 71a(a)(1).

The statute charges the Commission with the "principal duties"

> to (1) prepare, adopt, and amend a comprehensive plan for the Federal activities in the National Capital and make related recommendations to the appropriate developmental agencies; (2) serve as the central planning agency for the Federal Government within the National Capital region, and in such capacity to review their development programs in order to advise as to consistency with the comprehensive plan; and (3) be the representative of the Federal and District Governments for collaboration with the Regional Planning Council, as hereinafter provided.

40 U.S.C. § 71a(e).

The Commission has the following planning responsibilities for the National Capital:

a. to adopt a comprehensive plan for the federal activities in the Nation's Capital, 40 U.S.C. § 71a(e);

b. to disapprove those parts of the comprehensive plan adopted by the appropriate District of Columbia agencies which have a negative impact on the interests or functions of the federal establishment in the Nation's Capital, 40 U.S.C. § 71a(a)(4); and

c. to prepare a comprehensive plan consisting of the Commission's recommendations for the federal element developed under (a) *supra*, and of those parts of the plans prepared by the District authorities with respect to which the Commission has not determined that they have a negative impact on the federal establishment and which shall be incorporated in the comprehensive plan without change, 40 U.S.C. § 71c(a).

The District of Columbia Court of Appeals has summarized and characterized the Commission's planning functions under the Home Rule Act as follows:

> [T]he NCPC's [Commission's] planning role is limited to preparing the federal elements of the comprehensive plan for the National Capital and to exercising veto authority over those proposed District elements which it finds will have a negative impact on the interests of the Federal Establishment. *Citizens Ass'n of Georgetown* v. *Zoning Commission of the District of Columbia*, 392 A.2d 1027, 1034 (1978).

Our initial inquiry focuses on the question whether, in enacting legislation establishing and maintaining the Commission, Congress has evidenced an intent to limit the power of the President to remove the presidential appointees to the Commission. The second inquiry is whether, assuming Congress intended to limit the President's removal power, Congress constitutionally could have done so. We have set out the functions of the Commission in detail, since the nature of those functions is relevant under existing case law to the issue of congressional intent as well as to the constitutional issue.

According to the basic rule of construction, first announced by James Madison during the first session of the First Congress, the power of appointment carries with it the power of removal. 1 Ann. Cong. 496 (1789). The courts have consistently upheld the general applicability of that rule. *Matter of Hennen*, 13 Pet. (38 U.S.) 230, 259–60 (1839); *Blake* v. *United States*, 103 U.S. 227, 231 (1880); *Myers* v. *United States*, 272 U.S. 52, 119 (1926); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896–97 (1961); *National Treasury Employees Union* v. *Reagan*, 663 F.2d 239, 246–48 (D.C. Cir. 1981).

The Home Rule Act does not on its face limit the President's removal power. We have carefully examined the legislative history of the Act and have not found any evidence of such intent or any indication that Congress wanted the presidential appointees to the Commission to be "independent" of the President. The provision in § 203(b)(2), (40 U.S.C. § 71a(b)) that the terms of the members of the Commission appointed by the President shall be for six years does not have the legal effect of limiting the President's removal power. It has been established, since *Parsons* v. *United States*, 167 U.S. 324, 338 (1897), that a provision for a term merely means that the officer shall not serve beyond his term without a reappointment which would subject him to the scrutiny of the appointing authority. A term of office in itself therefore does not create a right to serve for its maximum duration; it constitutes a limitation on, rather than a grant of, the officer's tenure. *Parsons*, *ibid.* To the same effect are *Martin* v. *Tobin*, 451 F.2d 1335, 1336 (9th Cir. 1971) (U.S. Marshal); *Carey* v. *United States*, 132 F. Supp. 218 (Ct. Cl. 1955) (U.S. Attorney); *Farley* v. *United States*, 139 F. Supp. 757, 758 (Ct. Cl. 1956) (U.S. Marshal). This point was conceded even in the dissenting opinion of Justice Brandeis in *Myers* v. *United States*, *supra*, 272 U.S. at 241.[1]

Wiener v. *United States*, 357 U.S. 349, 355–56 (1958), indicates that a congressional intent to limit the President's removal powers may be inferred from the imposition of quasi-legislative or quasi-judicial functions on an officer or a

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[1] *Borders* v. *Reagan*, 518 F Supp 250, 255, 260 (D D C. 1981), *appeal pending* D.C. Cir Docket No. 81-1998, which involved the interpretation of § 434 of the Home Rule Act, seeks to distinguish *Parsons* on the theory that when Congress, in providing for a term of office, uses the words "shall serve for x years," as it does in § 434, Congress expresses an intent that the officer shall serve out the term independent of Presidential direction and, therefore, from summary removal. On the other hand, the court reasoned, when Congress uses the words "shall be appointed for a term of x years," as it did in the statute involved in *Parsons* and now in 28 U S.C §§ 541(b) and 561(b), Congress indicates that the officer shall be subject to the President's direction and, therefore, his removal power Such literalism might have been appropriate in the context of 17th century conveyancing, but we believe it does not constitute a suitable method of discerning legislative purpose Indeed, the Home Rule Act, and especially § 203, 40 U S.C 71a, the section here involved, uses both formulas interchangeably Section 203 provides that "the terms of office of the members appointed by the President shall be for six years ," while "[m]embers appointed by the Mayor shall serve for four years " Nowhere is there any indication that Congress intended the presidential appointees to be removable, while the members appointed by the Mayor are entitled to serve out their terms. We believe the correct means of ascertaining the legislative purpose is to proceed on the assumption Congress is aware of the longstanding judicial interpretation placed on a provision for a term, *viz* , that it constitutes a limitation rather than a grant, and that Congress uses unmistakable and express language, rather than subtle modifications in the term formula, when it intends to make an official nonremovable during his term. Congress knows that the Executive Branch has consistently taken the position that the President may remove appointees except where Congress clearly (and constitutionally) intended the contrary result. We are compelled to conclude that Congress will make its intentions unmistakably clear when it intends to limit the President's removal power [NOTE: In *Borders* v. *Reagan*, the court of appeals granted the government's motion to vacate the district court's order and remanded for dismissal on grounds of mootness 732 F.2d 181 (D.C. Cir. 1982) Ed]

Commission. The composition of the Commission and the duties imposed on it demonstrate, however, that Congress did not intend it to be a quasi-legislative or quasi-judicial body in the context suggested by *Wiener*. The inclusion in the Commission of two Cabinet Members (the Secretary of Defense and the Secretary of the Interior) and of the Administrator of General Services suggests very strongly the absence of any congressional purpose that the Commission should be free from the policy influence of the President.[2] In addition, a contrary inference is to be drawn from the Commission's functions. The preparation of a comprehensive plan for the federal activities in the Nation's Capital, *i.e.*, to plan the location and appearance of buildings used by federal agencies, and to prevent the planning authorities of the District of Columbia from encroaching on the interests or functions of the federal establishment, are essentially of an executive nature. They cannot be and have not been considered to be quasi-legislative or quasi-judicial in character. This analysis of the Commission functions and duties has been adopted by the courts. In *D.C. Federation of Civic Associations* v. *Airis*, 275 F. Supp. 533, 540 (D.D.C. 1967) the court held, per Holtzoff, J.:

> The National Capital Planning Commission is not a judicial, or a quasi-judicial tribunal; it is not a regulatory commission or an adjudicatory body. . . . This Commission is purely and solely an administrative group.

We recognize that some courts have characterized zoning as a quasi-legislative function in view of the limitations it usually imposes on the use of private property. *See, e.g., Gerstenfeld* v. *Jett*, 374 F.2d 333, 335 (D.C. Cir. 1967). Planning and zoning, however, are not identical or interchangeable terms. 8 McQuillin, Mun. Corp., § 25.08 (3rd Ed., 1983 Revised Vol.).[3] This is evidenced by the circumstance that, in the District of Columbia, the planning authority for non-federal property is vested in the Mayor and Council, D.C. Code § 1–2002 (1981), while the zoning authority for those projects is vested in the Zoning Commission of the District of Columbia. D.C. Code § 5–412 (1981). Moreover, since the Commission regulates only the use of federal property and prevents encroachments on the federal interest by the local planning and zoning authorities, it does not possess the "quasi-legislative" power limiting land use by a private property owner.[4]

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[2] We believe that the presence of the two congressional committee chairmen on the Commission does not confer upon it a quasi-legislative character, and is not indicative of a congressional intent to that effect. In the fields of managing and protecting the property of the United States, Congress acts in a dual capacity, *i.e.*, not only as a legislative body but also, under Article IV, § 3, cl. 2 of the Constitution, as the owner or trustee of the property. *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976), and the authorities there cited. Since the principal functions of the Commission are to plan for the proper use of the federal holdings in the District of Columbia, to protect them against local encroachment, and to acquire property for certain federal purposes (40 U S C. § 72), the two committee chairmen are essentially acting as officers of Congress appointed to represent Congress rather than to exercise in any fashion Congress' *legislative* power.

[3] This point is made graphic by a comparison of the opinions in *American University* v. *Prentiss*, 113 F.Supp. 389, 393 (D.D.C. 1953), *aff'd*, 214 F.2d 282 (D.C. Cir.), *cert. denied*, 348 U S. 898 (1954), with *D.C. Federation of Civic Associations* v. *Airis*, *supra*, both of which were handed down by Judge Holtzoff. The former opinion held that a zoning commission performs a [quasi] legislative function, the latter, as shown above, decided that the Commission is "purely and solely an administrative group."

[4] To the extent that the D.C. elements of the comprehensive plan prepared and adopted by the Commission pursuant to 40 U.S.C. § 71c(a) limit private land use, the Commission only acts as a conduit without power of amendment

Borders v. *Reagan*, 518 F. Supp. 250, 259, 264–68 (D.D.C. 1981), *appeal pending*, D.C. Cir. Docket No. 81–1998, appears to be based on the assumption—erroneous in our view—that the power of Congress to limit the President's removal power is somehow increased or more readily assumed in the case of officers confined exclusively to local District of Columbia matters. The Commission, however, is not such an agency.

The very language of the Home Rule Act defines the Commission as the central *federal* planning agency for the federal government in the Nation's Capital (§ 203(a)(1), 40 U.S.C. § 71a(a)(1)). The use of the term "Federal" was no drafting accident. The legislative history of the Home Rule Act is replete with statements stressing that the Commission is designed to be a *federal* agency charged with the protection of the *federal* interest. Thus the House Report (H.R. Rep. No. 482, 93d Cong., 1st Sess. (1973) states (at p.7):

> The NCPC is designated as a Federal Planning Agency for the Federal Establishment in the District, and the Commissioner (Mayor) is designated as the central planning agency for the District except for Federal and international projects.

And again (at p.17):

> [Section 203 establishes] the National Capital Planning Commission as a Federal Planning Agency. . . .

The conference report (H.R. Rep. No. 703, 93d Cong., 1st Sess. 74 (1973)) shows that the conference adopted the pertinent House provisions:

> The House amendment contained provisions, not included in the Senate bill, which established the NCPC as a Federal planning agency for the Federal government to plan for the Federal establishment in the National Capital region and provided that the Mayor would be the central planning agency for the District. . . .
>
> The Conference substitute (sections 203, 423) adopts, in essence, the House provisions. . . .

These passages in the committee reports are corroborated by statements made during the debates on the adoption of the bill in which the Commission was characterized as "a Federal entity" (Congressman Broyhill, 119 Cong. Rec. 33381); "Our Federal protection arm" (Delegate Fauntroy, *id.* at 33384); "a Federal body" (Congressman O'Neill, *id.* at 33386); "[t]he bill will: first, strengthen the role of NCPC as the principal planning agency for the Federal Government in the city and in the National Capital region as a whole" (Congressman Stark, *id.* at 33392). Similar statements were made during the debate on the adoption of the conference report in that body. The Commission was characterized as "the Federal planning agency" (Congressman Diggs, who was in charge of the bill, 119 Cong. Rec. 42037); "a Federal entity" (Congressman Broyhill, *id.* at 42043); "a Federal agency such as the National Capital Planning Commission which is designed to protect the Federal interest" (Congressman Nelsen, *id.* at 42051).

Similarly, the court of appeals held in *D.C. Federation of Civic Associations* v. *Airis*, 391 F.2d 478, 484 (D.C. Cir. 1968), that the Commission's duties "are federal in nature."[5]

The Commission thus is not confined to local matters within the meaning of the district court's opinion in *Borders, supra*. To the contrary, the Commission is a federal agency and an important part of its responsibilities is to prevent local activities from interfering with the federal establishment.

We therefore conclude that Congress neither expressly nor by implication limited the President's power to remove his appointees to the Commission.

Assuming, *arguendo*, that Congress had sought to limit the President's removal power in the premises, such attempt would, in our view, have been unconstitutional under controlling precedent. It has been firmly established that Congress cannot limit the President's power to remove executive officers. *Myers* v. *United States, supra*. This aspect of *Myers* was recently reaffirmed in *Buckley* v. *Valeo*, 424 U.S. 1, 135–36 (1976). *See also Martin* v. *Tobin*, 451 F.2d 1335 (9th Cir. 1971).[6] The Constitution permits express or implied statutory limitations on the President's removal power only in the case of officers performing quasi-judicial or quasi-legislative functions. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); *Wiener* v. *United States*, 357 U.S. 349 (1958). As discussed above, the Commission's duties are of an executive, rather than quasi-judicial or quasi-legislative, nature.[7]

We therefore conclude that Congress did not limit the President's power to remove the presidential appointees to the Commission.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[5] This decision is not an appeal from the case involving the same parties referred to earlier in this opinion

[6] The *Myers* case, it is true, is limited to officers appointed by the President by and with the advice and consent of the Senate, and the presidential appointees to the Commission are appointed by the President alone. *Perkins* v. *United States*, 116 U.S. 483 (1886), held that where Congress vests the appointment power in a Department head under the terminal clause of Article II, § 2 of the Constitution, it may limit his removal power. *Myers* did not decide the question whether *Perkins* applies also to the situation where the power of appointment is vested in the President alone because that issue was not before it. It suggested, however, strongly that this question is to be answered in the negative 272 U.S. at 161–62 In *Martin* v *Reagan*, 525 F. Supp 110 (D. Mass 1981), the court held that an officer appointed by the President alone serves at the pleasure of the President.

[7] To the extent that *Borders, supra*, suggests that Congress has the power under the Constitution to limit the President's removal power with respect to officers whose duties are confined to local District of Columbia matters, as discussed, *supra*, the functions and duties of the Commission are federal rather than local

Award of Attorney Fees in Administrative Adjudications Under § 609 of the Federal Aviation Act

The Equal Access to Justice Act (EAJA) authorizes an award of attorney fees to prevailing parties in administrative adjudications conducted by the National Transportation Safety Board under § 609 of the Federal Aviation Act to review decisions of the Federal Aviation Administration

There is no support in the terms of the EAJA or its legislative history for an argument that an individual's eligibility for an award of fees—and an agency's liability—are confined to situations in which the agency whose position is at issue in the adjudication also controls its conduct; in any case, agencies generally have only a limited power to review their administrative law judges' decisions under the EAJA.

March 23, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

This responds to your request for the Department's opinion whether the Equal Access to Justice Act authorizes an award of attorney fees to a party which prevails in administrative adjudications conducted by the National Transportation Safety Board (NTSB) under § 609(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1429 (1976).[1] For reasons stated hereafter we believe it does.

A second question raised in your November 17 request, relating to the source of funds to pay a fee award under the Act, is addressed in a separate opinion of this date.

I. Proceedings Under § 609(a)

The NTSB has jurisdiction to review on appeal orders of the Federal Aviation Administration (FAA) amending, suspending, or revoking certain certificates issued by the Secretary of Transportation under the Federal Aviation Act. *See* 49 U.S.C. § 1903(a)(9). These certificates include airman certificates issued to pilots and other flight operators, and aircraft operating certificates issued to owners and operators of air carriers. *See* 49 U.S.C. §§ 1422 and 1423. Under

[1] Your letter phrases the question somewhat differently: it asks "whether the Act authorizes one agency to make fee awards against another agency in covered administrative proceedings." As will become apparent, we think the question so phrased is, as we understand your particular concerns, unnecessarily broad The issue of the Act's applicability in § 609 proceedings is separate from that of the FAA's authority and responsibility to expend its funds to pay awards made under the Act. The latter issue is discussed in our separate opinion to you of this date on "Funding of Attorney Fee Awards under the Equal Access to Justice Act."

§ 609 of that Act, an FAA action must be based upon a determination that "safety in air commerce or air transportation and the public interest" requires the action; in practice, its order is generally occasioned by the certificate holder's apparent violation of one or more sections of the Federal Aviation Regulations, 14 C.F.R. Parts 1 through 199 (1981). *See, e.g., Barnum* v. *NTSB,* 595 F.2d 869 (D.C. Cir. 1979) (FAA order suspending pilot's license for two low-flying incidents upheld). While § 609 requires the FAA to advise the certificate holder of charges against him, and to give him an opportunity to respond to them prior to taking any action to amend, suspend, or revoke his certificate, the law does not require that the FAA's action be preceded by any sort of formal hearing, nor does the FAA provide such a hearing as matter of discretion. A certificate holder is, however, afforded an opportunity to appeal the FAA's action to the NTSB, a procedure which, as described below, provides for such a hearing.

Section 609 describes the procedures governing appeals to the NTSB from an FAA order amending, suspending, or revoking a certificate, and reads in pertinent part as follows:

> Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006 [49 U.S.C. § 1486], and the Administrator shall be made a party to such proceedings.

Federal Aviation Act of 1958, Pub. L. No. 85–726, § 609, 72 Stat. 731, 779–80 (1958). *See* 49 U.S.C. § 1429(a).

Formal hearings in connection with appeals from FAA orders are conducted by administrative law judges employed by the NTSB. *See* 49 C.F.R. § 800.23. Procedures governing these hearings are set out in 49 C.F.R. Part 821, with special rules applicable to proceedings under § 609 contained at §§ 821.30–821.33. Under these rules, the order of the FAA from which appeal has been taken is filed with the NTSB as a complaint; the allegations must be proven by the Administrator of the FAA in the subsequent hearing before the law judge. The Administrator has the burden of proving that the action taken against

the certificate holder was reasonable and in accordance with NTSB precedent. Both the certificate holder and the FAA are entitled to appeal a law judge's initial decision to the NTSB itself; in the absence of such an appeal, however, the law judge's initial decision becomes final. *See* 49 C.F.R. § 821.43. If such an appeal is taken, the NTSB reviews the law judge's findings of fact and conclusions of law and, if it determines that either are in error, may itself make findings and issue an appropriate order, or may remand the matter with instructions. An order of the NTSB may be appealed to the Court of Appeals for the District of Columbia by "any person disclosing a substantial interest in such order." 49 U.S.C. § 1486(a).[2]

II. The Equal Access to Justice Act

Section 203(a)(1) of the Equal Access to Justice Act (the Act), Pub. L. No. 96–481, 94 Stat. 2321, 2325 (1980), amends Title 5 of the United States Code to provide for an award of attorney fees and other expenses to parties prevailing against an agency of the United States in certain types of administrative adjudications. The pertinent provision, to be codified as 5 U.S.C. § 504(a)(1), reads as follows:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

An "adversary adjudication" is defined in § 504(b)(1)(C) as:

> an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license. . . .

Your letter concedes, as it must, that § 609 proceedings before the NTSB and its administrative law judges meet the definition of an "adversary adjudication" under § 504(a)(1): they are conducted under 5 U.S.C. § 554, and are neither for the purpose of "fixing a rate" nor for "granting or renewing a license." Notwithstanding this, you take the position that a fee award under the Act is unavailable in § 609 proceedings, arguing that § 504(a)(1) is confined in its applicability to

[2] While the statutory language is unclear with respect to whether the FAA is entitled to appeal from an NTSB order, and while there appear to be no judicial holdings on point, we understand that the statutory phrases "person substantially affected" and "person disclosing a substantial interest" have been interpreted by both the FAA and the NTSB to limit the right to seek judicial review of an NTSB order to holders of certificates. *See also* H.R. Rep. No. 2556, 85th Cong., 2d Sess. 89 (1958) (provision permitting FAA Administrator to seek judicial review omitted from final version of 1958 Act).

those proceedings under 5 U.S.C. § 554 in which an agency both prosecutes and adjudicates an action. That is, you believe that § 504(a)(1) by its terms applies only to a proceeding in which the "agency that conducts" it is also the "party to the proceeding" against whom the private party must prevail. We do not agree that the authority conferred by § 504(a)(1) may be construed so narrowly, particularly where such a construction would result in exempting from the Act's coverage a class of adversary adjudications no different in their effect on private individuals than other adjudications plainly covered by the terms of the Act.

The terms of § 504(a)(1) admittedly do not speak directly to the situation in which the agency conducting the adversary adjudication is not also the agency whose position is at issue.[3] We do not agree, however, that the language of the section must be read to confine its application to situations involving a single agency. The use of the article "the" to identify the agency whose position as a party to the proceeding may or may not be found to be substantially justified does not, in our view, necessarily identify it as the same agency which conducts the adversary adjudication and employs the adjudicative officer. Finding the plain language of § 504(a)(1) not to be conclusive, we must interpret the fee-shifting provisions of § 504(a)(1) in light of other provisions of the statute, the legislative history of the Act, and Congress' purpose in enacting it.[4]

The purpose of the Act, as reflected in its preamble, is "to diminish the deterrent effect of seeking review of or defending against, [unreasonable] governmental action" because of the expense involved. *See* 5 U.S.C. § 504 note. The legislative history of the Act is replete with references to situations in which individuals are forced to expend large sums to defend themselves against unjustified governmental action. The House Judiciary Committee noted in its report that:

> [f]or many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.

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[3] Such situations are, to be sure, comparatively rare in the administrative context. Indeed, we are aware of only two similar situations to which the Act on its face would appear otherwise to be applicable: these are appeals from citations of the Secretary of Labor before the Occupational Safety and Health Review Commission under 29 U.S.C. § 659, and appeals from citations of the Secretary of Labor before the Federal Mine Safety and Health Review Commission, 30 U.S.C. § 815. However, as discussed in the text *infra*, Congress was clearly cognizant in enacting this Act of the review procedure contained in 29 U.S.C. § 659.

[4] Even if the terms of § 504(a)(1) were less ambiguous with respect to their applicability to adjudications involving more than one agency, it is a familiar maxim of statutory construction that a remedial statute should be liberally construed to effect the remedial purpose for which it was enacted. *See* 3 D. Sands, Sutherland Statutory Construction § 60.01 (4th ed. 1974). Thus, even if the meaning of a statute seems plain on its face, "[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981), *citing Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892). And, if the plain meaning of the statute produces "an unreasonable [result] 'plainly at variance with the policy of the legislation as a whole' [the Supreme Court] has followed that purpose rather than the literal words." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). *See also Steelworkers* v. *Weber*, 443 U.S. 193, 201 (1979); *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976).

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980) (hereafter House Report). The result in many cases is that "the Government with its greater resources and expertise can in effect coerce compliance with its position." *Id.* at 10.

The fee-shifting provisions of the Act were intended not only to reduce substantially the deterrent effect on individuals of this disparity in resources, but also to "insure[] the legitimacy and fairness of the law." *Id.* The Act thus recognizes that "the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of federal authority." *Id. See also* S. Rep. No. 253, 96th Cong., 1st Sess. 5–6 (1979).

We believe it would be inconsistent with the Act's broad remedial purpose to carve out of the Act's coverage any particular category of "administrative adjudications" as that term is defined in the Act, at least absent any suggestion in the legislative history that Congress intended to do so. More importantly, we find no support in the Act or its history for your position that an individual's eligibility for a fee award—and an agency's liability—should be confined to situations in which the agency whose position is at issue in the adjudication also controls its conduct.[5]

Reference to other specific provisions of the Act reinforces our conclusion that § 504(a)(1) was not intended to apply only to proceedings conducted by one agency as a review of action taken by another agency. For example, § 504(d)(1) provides that awards under § 504(a)(1) "may be paid by *any* agency over which the party prevails. . . ." (emphasis added). This language suggests that Congress at the very least contemplated that a prevailing party would be entitled to an award from an agency other than the one actually conducting the proceeding.

Our conclusion that Congress did not intend to render the Act inapplicable in proceedings conducted by one agency to review actions taken by another is reinforced, if not required, by numerous references in the legislative history to the situation presented by appeals to the independent Occupational Safety and Health Review Commission from citations of the Secretary of Labor under

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[5] Your position appears to be premised on the assumption that an agency which both conducts and prosecutes an administrative adjudication has the power to review (and potentially to reverse) the findings of the "adjudicative officer" which trigger the statute's directive to pay a fee award However, as we read the terms of § 504(a)(1) in light of Congress' purpose, they preclude review of these findings at the administrative level. The fee award called for by § 504(a)(1) is mandatory unless certain findings are made by the adjudicative officer of the agency. And, the wording of § 504(a)(3) contains an explicit suggestion that the decision of the adjudicative officer on these issues was intended by Congress to be unreviewable at the administrative level· "The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency. " We recognize that Congress' failure to provide for agency review of a fee award may result in an agency's being unable to obtain judicial review of a fee award except in the context of an appeal on the merits of the underlying decision of the adversary adjudication This is because only the private party may appeal from a fee determination under § 504(a)(1) *See* § 504(c)(2) On the other hand, an interpretation of the Act to permit an agency the last word on whether its position in the underlying adjudication was or was not substantially justified would undermine the very purpose which Congress had in enacting the law This is underscored by the standard of judicial review of a failure to make an award provided in § 504(c)(2)· a court may modify the fee determination under § 504(a)(1) only if it finds that the failure to make an award was "an abuse of discretion " We have no doubt that applying this standard of judicial review to an agency's assessment of the reasonableness of its own conduct would result in few fee awards being made under § 504(a)(1). This is not to say that no aspect of the adjudicative officer's fee determination ought to be reviewable within the agency, it is simply to say that the agency has no authority to revise the adjudicative officer's findings on the two questions which under the Act are determinative of an award's being made: that an agency's position was not "substantially justified," and that no "special circumstances make an award unjust."

29 U.S.C. § 659. *See, e.g.*, 126 Cong. Rec. 27681–82 (1980) (statement of Sen. DeConcini); 126 Cong. Rec. 28653–54 (1980) (statement of Rep. Symms). In light of these references, we believe it would be unreasonable to conclude that Congress did not intend to authorize an award of fees in OSHA adjudications against the Secretary of Labor. We see no relevant basis on which to distinguish an award against the FAA in § 609 proceedings.

Moreover, the potential for administrative abuse inherent in the OSHA context, which Congress plainly intended to correct through the fee-shifting mechanism of § 504(a)(1), is present in the § 609 situation as well. The FAA may, by unilateral action unaccompanied by full-scale procedural protections, impose a significant burden on a private person's ability to carry on a business or earn a livelihood. The burden, once imposed, can only be lifted through that person's willingness to resort to what may be lengthy and expensive administrative appeal and, possibly, litigation. Thus, it may be "more practical to endure an injustice than to contest it." House Report at 9. We can think of no reason, consistent with the purpose of the Act, why the agency which imposed the burden should escape liability for attorney fees where its position is not substantially justified.

We conclude, therefore, that proceedings under § 609 were intended by Congress to be covered by the Act. Thus, in the event the FAA's position is not found to be substantially justified by the administrative law judge presiding over the adjudication, the prevailing party is entitled to an award of fees against the FAA.[6]

We recognize that our conclusion with respect to the Act's applicability to § 609 proceedings may not appear to be directly responsive to your concern that the Act not be interpreted "to permit one agency to make a fee award against another." In this regard, we would simply point out that the Act in this case does no more than supplement remedial authority which Congress has already conferred on the NTSB to review and, if necessary, reverse FAA orders under § 609 of the Act.

In addition, whether or not an award of fees will be made under § 504(a)(1) depends upon certain findings by the administrative law judge—findings which, under the terms of the Act would not in any event be administratively reviewable by the agency conducting the proceeding. *See* note 5, *supra*. The position of the FAA in § 609 proceedings is in this sense no different from the position of an agency which both conducts and prosecutes an administrative adjudication. In either case, an administrative law judge acting independently is charged with making the final administrative determination.

Finally, we do not believe our conclusion with respect to the applicability of the Act in § 609 proceedings is inconsistent with the position set forth, taken in context, in the Deputy Attorney General's letter of May 12, 1981, to the Administrative Conference of the United States. Those comments express concern over a construction of the Act which would impose on an agency, having no

[6] As stated in note 1, *supra*, the issue of the FAA's authority and responsibility to expend its funds to pay awards is discussed in our separate opinion to you of this date on "Funding of Attorney Fee Awards under the Equal Access to Justice Act."

prosecutorial or decisional authority in an administrative adjudication, responsibility for the payment of a fee award simply because, as an intervenor, it took a position adverse to the interests of a private party. While we have not directly studied that issue, we do not see any basis for differing with the Deputy Attorney General's position. However, we decide only that when the FAA takes an adverse action under § 609, it may be subjected to payment of an award under the Equal Access to Justice Act in a proceeding brought to review its action before the NTSB.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Funding of Attorney Fee Awards Under the Equal Access to Justice Act

Under the Equal Access to Justice Act, the authority and responsibility of an agency adjudicative officer or judge to make an award of attorney fees against the United States does not depend upon the availability of appropriated funds to pay the award. If no appropriated funds are available to pay an award, it remains an obligation of the United States until sufficient funds are appropriated.

Section 207 of the Equal Access to Justice Act precludes payment of a fee award against the United States from the judgment fund without some additional legislative action However, under the funding provision of the Act, an agency's unrestricted general appropriation is available to pay such awards.

Congress intended agencies to bear the major burden of paying fee awards under the Act from their own general appropriation, so as to encourage more responsible agency behavior, and an agency thus has only limited discretion to decline to pay such awards.

March 23, 1982

MEMORANDUM FOR THE GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

The Deputy Attorney General has asked me to respond to your request for an opinion on several issues relating to the funding provisions of the Equal Access to Justice Act, Pub. L. No. 96-481, Tit. II, 94 Stat. 2325 (the Act).[1] Briefly, you wish to know whether fees and expenses may be awarded under 5 U.S.C. § 504 (Supp. V 1981) and 28 U.S.C. § 2412(d) (Supp. V 1981), as added to the United States Code, respectively by §§ 203(a)(1) and 204(a) of the Act, and whether such awards may be paid, in the absence of an express appropriation by Congress for that purpose.[2]

At the outset, we would emphasize that the funding provisions of the Act are *sui generis* and ambiguous. Their legislative history, while somewhat helpful in illuminating their intended meaning, does not definitely resolve all the questions which their ambiguity creates. With this caveat, we conclude, for reasons set

[1] Section 203 of the Act (94 Stat. 2325) amends Title 5 of the United States Code by adding a new § 504. The funding provision of that section is 5 U S.C. § 504(d)(1). Section 204 of the Act amends 28 U.S.C § 2412. That section, as amended, contains three funding provisions, 28 U.S.C §§ 2412(c)(1), (c)(2), and (d)(4)(A) We understand that your request relates only to 5 U S C. § 504(d)(1) and 28 U S.C § 2412(d)(4)(A) as they are qualified by § 207 of the Act. This opinion will not discuss 28 U S.C. §§ 2412(c)(1) or (c)(2), neither of which are of concern to you.

[2] A second question posed in your November 17 memorandum, relating to the award of fees in adjudications under § 609 of the Federal Aviation Act of 1958, is separately addressed in an opinion of this date. [*See* p 197, *infra*.]

forth below, as follows: (1) the authority to make fee awards to a prevailing party under the Act does not depend upon there being funds available to pay those awards; (2) § 207 of the Act (94 Stat. 2330) prevents payment of awards from the judgment fund[3] without a specific advance appropriation; (3) awards *may* be paid by agencies from unrestricted appropriations; and (4) a reasonable amount from the unrestricted appropriations of an agency *must* be allocated to the payment of awards for fees and expenses.

I. Authority to Make Awards

Section 504(a)(1) of Title 5 provides for an award of fees in agency adjudications in the following terms:

> An agency that conducts an adversary adjudication *shall award*, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust. (Emphasis added.)

Section 2412(d)(1)(A) of Title 28 provides for fee awards in certain judicial proceedings involving the United States in similar mandatory terms:

> Except as otherwise specifically provided by statute, a court *shall award* to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. (Emphasis added.)

Under both of these sections, awards for fees and expenses, if sought, must be made to those who qualify. Uncertainty as to the source of funding for such awards in no way restricts the authority of agency adjudicative officers or judges, respectively, to make them. There is nothing in the language of these two sections, or elsewhere in the Act, which conditions the authority to make awards under it on Congress' making available money to pay them from one source or another, or, indeed, from any source. Even in the complete absence of appropriations, the law, unless amended or repealed, would require that the awards be made. *See generally New York Airways Inc.* v. *United States*, 369 F.2d 743

[3] By payment from the judgment fund, we mean payment from the Treasury in accordance with the procedures set forth in 28 U S C §§ 2414 and 2517 (1976 & Supp. V 1981), under the authority of the permanent, indefinite appropriation for judgments against the United States established by 31 U.S.C § 724a (Supp. V 1981). We use "judgment fund" as a shorthand rendition of that process and source throughout this opinion

(Ct. Cl. 1966).[4] Once made, they would remain obligations of the United States until satisfied.[5] They could, of course, remain unsatisfied forever if Congress never acted to authorize their payment, but history suggests that such obligations usually are paid.[6]

II. Authority to Pay Awards

We turn now to the provisions pertaining to payment of awards under the Act to determine whether and how these awards may be paid. As relevant here,[7] the funding provisions for awards in administrative and judicial actions are essentially identical:

> Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses

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[4] At the time of this writing we know of several fee awards which have been made under authority of the Act, though in a number of other cases courts have considered applications for fee awards. *See Florida Farm Workers Councils* v. *Donovan* (No. 81-1453, D C. Cir. Dec. 29, 1981); *Photo Data* v. *Sawyer*, 533 F.Supp 348 (D.D.C. 1982); *Berman* v. *Schweicker*, 531 F.Supp. 1149 (N D. Ill 1982); *Arvin* v. *United States*, No. 81-6476, (S.D. Fla Feb. 10, 1982); *United States* v. *Howard Pomp*, 538 F.Supp. 513 (M.D.Fla 1982); *Costantino* v. *United States*, 536 F.Supp. 60 (E.D Pa. 1981). *See also Alspach* v. *District Director*, 527 F.Supp. 225, 527 F.Supp. 225 (D Md 1981), *Matthews* v *United States*, 526 F.Supp 993 (M D.Ga 1981); *Wallis* v. *United States*, No 453-79c (Ct. Cl. Nov. 25, 1981). In none of these cases has the court questioned whether its authority to make an award might depend upon the availability of funds to pay it Nor, in resisting an award of fees in these cases, has this Department suggested that the validity of the award depends in any way upon the prior availability of funds to satisfy it.

[5] Once the award of fees and costs has become final in the sense that the deadline for an appeal has passed and the judicial proceedings have been terminated, Congress may not constitutionally eliminate the liability of the United States under the final judgment. *See McCullough* v *Virginia*, 172 U.S 102, 123–24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases"). *See also Pennsylvania* v *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856); (allowing Congress to overturn final judgment requiring removal of bridge as obstruction to navigation, but stating "if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress"); *Hodges* v. *Snyder*, 261 U.S 600, 603–04 (1923) ("a suit brought for the enforcement of a public right . . . even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, *as for special damages to the plaintiff or for his costs*, it may not be thus taken away") (emphasis added); *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811 (D.C. Cir. 1974); *Commissioners of Highways* v. *United States*, 466 F. Supp. 745, 764–65 (N.D. Ill. 1979) ("It is clear that the River and Harbor Act of 1958 could not . . . interfere with plaintiffs' rights under the condemnation decrees"); *Battaglia* v. *General Motors Corp.*, 169 F 2d 254, 259 (2d Cir. 1948) (Congress may eliminate or modify claims, "so long as the claims, if they were purely statutory, had not ripened into final judgment"). In our view, these cases compel the conclusion that once the award of fees and costs under the Act has become final, the prevailing party has a "vested right" to them, and Congress may not remove that right without violating the Fifth Amendment. This conclusion is not altered by the fact that, under § 203 of the Act, the order of fees and costs is rendered by an agency rather than a court. The rule prohibiting takings of "vested rights" depends on the finality of the order in favor of the litigant, not on any interference with the judicial function.

[6] We are informed by the General Accounting Office that the instances in this century in which Congress has failed or refused to make the appropriations necessary to pay in full an adjudicated claim against the United States can be counted on the fingers of one hand

[7] Other provisions of the Act waive sovereign immunity for purposes of common law and statutory exceptions to the "American rule" on fee-shifting, *see* 28 U S.C § 2412(b), and provide that fees awarded against the United States in such cases ordinarily will be paid out of the judgment fund. If an agency is found to have acted in bad faith, the fee award is to be paid by the agency from its own funds 28 U S C § 2412(c)(2). The provisions of the Act discussed in this opinion extend the government's liability to a fee assessment well beyond the limits imposed by the common law and other existing statutes, and are effective only for a three-year period

> shall be paid in the same manner as the payment of final judgments is made pursuant to section 2412 [and 2517] of title 28, United States Code.

5 U.S.C. § 504(d)(1). *See also* 28 U.S.C. § 2412(d)(4)(A). The language and structure of these provisions, particularly the words "may," "or otherwise," and "for such purpose" in the first sentence, and the existence of the second sentence, give rise to two legal questions:

> 1. Which funds appropriated to an agency *may* be used to pay awards for fees and expenses?
>
> 2. Which funds, if any, appropriated to an agency *must*, as a matter of law, be used to pay awards for fees and expenses?

Before discussing these questions, however, we will consider the effect of § 207 of the Act, which qualifies both funding provisions in the following terms (94 Stat. 2330):

> The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided for in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts.

A. Background

The funding provisions of the Act, as finally adopted, were developed by the House Committee on the Judiciary in response to a prior Senate version of the bill.

In 1979, the Senate passed its version of what ultimately became the Act. That bill, S. 265, 96th Cong., 1st Sess. (1979), contained funding provisions which were unambiguous. Fees and expenses were to be paid "by the particular agency over which the party prevail[ed] from any sums appropriated to such agency, except that no sums [were to be] appropriated to any such agency specifically for the purpose of paying fees and other expenses." *Id.* at § 2(5). The bill anticipated that "since no monies would be appropriated specifically to pay for awards of fees and expenses," that is, agency budgets would not be augmented for that purpose, agencies would be required to reprogram funds from other activities. S. Rep. No. 253, 96th Cong., 1st Sess. 18 (1979) [hereinafter cited as Senate Report]. "This fiscal responsibility [was] intended to make the individual agencies and department [sic] accountable for their actions." *Id.* at 21. It was also to "provide a quantitative measure of agency error which should encourage review of its practices and its regulations." *Id.* at 18.

Hearings were held on the Act, including the funding provisions, in the House before both the Committee on the Judiciary and the Committee on Small Business.[8] The Committee on Small Business reported out a bill, H.R. 6429,

[8] The Committee on the Judiciary held hearings on S. 265. Before the Committee on Small Business, S. 265 was incorporated into H R. 6429 as Title II of that bill.

96th Cong., 2d Sess. (1980), the funding provisions of which were substantively identical to those of S. 265. That Committee believed, as had the Senate Committee on the Judiciary, that placing the fiscal responsibility for payment of fees and expenses on the agencies would make them more accountable for their actions. H.R. Rep. No. 1005, 96th Cong., 2d Sess. (Pt. I) 11 (1980). The House Committee on the Judiciary, however, took the position that the Senate provision restricting the appropriation of funds for the payment of fees and expenses was "unduly punitive" and believed that it might result in "a forced appropriation." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980) [hereinafter cited as "House Report"]. Thus, to "insur[e] that the prevailing party will be awarded a fee if it meets the requirements in the bill," *id.*, the House Committee on the Judiciary softened the Senate provision, adopting the language eventually enacted.

The Act was never considered by the full House as an independent piece of legislation. Rather, it was added, in conference, to a bill to amend the Small Business Act, H.R. 5612, and first reached the House floor as a part of the conference report. During the House debate on the conference report, the Act was subjected to a point of order. The objection on the point of order, that the funding provisions of the Act would open the judgment fund to new burdens and thus would, in effect, be an appropriation on an authorization, was resolved by the addition of § 207. 126 Cong. Rec. 28638-42 (1980).

B. Section 207

Section 207 of the Act, quoted above, was clearly intended to qualify the second sentence of the funding provisions, "If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of [Title 28]." As indicated above, § 207 was added to the Act on the House floor in response to a point of order to the conference report.[9] The point of order, which at first was sustained, 126 Cong. Rec. 28638 (1980), was overruled only after the addition of § 207 to the Act. *Id.* at 28642. Contemporaneous discussion on the House floor shows that § 207 was specifically intended to ensure that such payments could

[9] The point of order, as summarized by the Speaker pro tempore, was

> that the conference report on the bill H.R. 5612 contains provisions of the Senate amendment constituting appropriations on a legislative bill in violation of clause 2, rule XX, which prohibits House conferees from agreeing to such provisions without prior authority of the House
>
> The provisions in title II [in] question authorize appropriations to pay court costs and fees levied against the United States, but also provide that if payment is not made out of such authorized and appropriated funds, payment will be made in the same manner as the payment of final judgments under sections 2414 and 2517 of title 28, United States Code. Judgments under those sections of existing law are paid directly from the Treasury pursuant to section 724a of title 31 of the United States Code, which states that there are appropriated out of the Treasury such sums as may be necessary for the payment of judgments, awards, and settlements under section 2414 and 2517 of title 28. Thus the provision in the Senate amendment contained in the conference report extends the purposes to which an existing permanent appropriation may be put and allows the withdrawal directly from the Treasury; without approval in advance by appropriation acts, of funds to carry out the provisions of title II of the Senate amendment.

126 Cong Rec. 28638 (1980).

not be made under the appropriations authority of 31 U.S.C. § 724a (Supp. V 1981), the source of authority for what is commonly known as the judgment fund. The effect of § 207 is, and was intended to be, that the promise of the second sentence may be fulfilled only by additional congressional action in the form of legislation. *See generally* 126 Cong. Rec. 28642 (1980) (remarks of Representative Smith). We believe the conclusion is inescapable that awards for fees and expenses not paid by agencies under the authority of the first sentence of the funding provisions may not be paid from the Treasury under the authority of the second unless Congress passes a law.[10]

C. The Funding Provisions

For the sake of convenience and for ready reference, we quote the funding provision again (§ 204(a), 94 Stat. 2329):

> Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with section 2414 and 2517 of this title.

The word "may" in the first sentence, at a minimum, authorizes an agency to pay awards for fees and expenses in some circumstances. The question is whether the phrase "for such purpose," modifying "funds available," restricts those circumstances to instances in which monies have been appropriated to the agency specifically to pay such awards. We think not. The linchpin of our analysis is the word "otherwise."

As reported by the Senate and the House Committee on Small Business, the funding provisions would have required that an agency "shall" pay awards "from any sums appropriated to such agency" and would have prohibited the appropriation of monies to an agency for that specific purpose. To have complied with those provisions, had they been enacted, an agency would have been required to allocate or reprogram monies for that purpose from its general appropriation. The Senate Committee on the Judiciary so recognized. Senate Report at 18. The House Committee on the Judiciary changed "shall" to "may," permitted appropriations to an agency, and provided for the payment of awards from funds made available for that purpose by appropriations, "or otherwise." That Committee explained: "Funds may be appropriated to cover the costs of fee awards or may otherwise be made available by the agency (*e.g.*, through reprogramming)." House Report at 16, 18–19. Thus, both Judiciary Committees and the House Committee on Small Business recognized and expressed the intent

[10] The law could take the form of a specific appropriation for that purpose or it could repeal or amend § 207 in some way to make 31 U S C § 724a a viable source

that funds not specifically appropriated for the payment of fee awards would be available to be reprogrammed (or allocated) for that purpose. This intent was, we believe, ultimately effectuated through specific inclusion in the funding provisions of the phrase "or otherwise," to affirm an agency's authority to allocate or reprogram general appropriations to pay awards for fees and expenses (*i.e.*, for "such purpose").[11]

The more difficult question is whether an agency is obligated, as opposed to authorized, to allocate or reprogram any of its unrestricted, general appropriation for the payment of fees and expenses awarded under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d) (Supp. V 1981).[12] The argument against any such obligation is primarily textual. The first sentence of the funding provisions provides that agencies "may" make payments from their own funds, in contrast to the mandatory "shall" of the Senate version. Read together with the second sentence, which offers the judgment fund as an alternate source of funds to pay awards, the provision might be viewed as indicative of a flexible system in which complete discretion has been vested in the agencies whether to pay awards from their own funds or to refer them for certification by the Comptroller General and payment from the Treasury. The textual argument is buttressed by reference to the broad principle that when Congress appropriates generally in so-called "lump sum" appropriations, it does so with full awareness that it is vesting in agencies complete discretion to allocate the unrestricted funds, including the discretion to "zero-budget" a particular authorized program. *Cf. McCary* v. *McNamara*, 390 F.2d 601 (3d Cir. 1968).

An equally plausible reading of the text of the funding provision is that the term "may" was intended merely to vest some, but not unlimited, discretion in the agencies to pass responsibility for the payment of some, but not all, awards on to the general Treasury. It would follow from this reading that an agency could be required to devote at least some of its otherwise available funds to the payment of fee awards under the Act. A review of the Act's legislative history shows this to be the correct reading.

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[11] It is a well settled principle of law that a lump sum appropriated for an agency's general programs and activities may be used by the agency for any otherwise authorized purpose, even if the legislative history of the appropriation statute prescribes specific priorities for allocating funds among authorized activities. *See, e.g., In re Newport News Shipbuilding and Drydock Co.*, 55 Comp. Gen. 812, 819–21 (1976); *In re LTV Aerospace Corp.*, 55 Comp. Gen. 307, 318–19 (1975). The absence of specific limitations or prohibitions in the terms of an appropriations statute implies that Congress did not intend to impose restraints upon an agency's flexibility in shifting funds within a particular lump sum account among otherwise authorized activities or programs—unless of course Congress has in some other law specified that funds from the appropriation in question should be spent (or not, as the case may be) in a particular manner. *See* Fisher, *Reprogramming of Funds by the Defense Department*, 36 Journal of Politics 77, 78 (1974). In an analogous situation, if an agency runs short of funds during the course of a fiscal year, the courts have recognized that an agency head's discretion to reprogram funds among authorized programs under a lump sum appropriation is limited only if a specific statutory directive requires the expenditure or distribution of funds in a particular manner. *See, e.g., City of Los Angeles* v. *Adams*, 556 F.2d 40, 49–50 (D.C. Cir. 1977):

> If Congress does not appropriate enough money to meet the needs of a class of beneficiaries prescribed by Congress, and if Congress is silent on how to handle this predicament, the law sensibly allows the administering agency to establish reasonable priorities and classifications.

The Supreme Court, in *Morton* v. *Ruiz*, 415 U.S. 199, 230–31 (1974), has affirmed an agency head's "power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him."

[12] It is clear, of course, that funds appropriated specifically to pay awards for fees and expenses would have to be spent by agencies for that purpose unless rescinded pursuant to the Impoundment Control Act of 1974, 31 U.S.C. § 1400 *et seq.*

In the first place, the substitution of "may" for "shall" can be explained in purely grammatical terms. The House Judiciary Committee's amendment of the Senate language had two intended effects: first, to authorize specific appropriations to agencies for fee awards; and, second, to permit the payment of awards from the judgment fund in at least some cases.[13] As a matter of both grammar and substance, some element of discretion had to be introduced into the wording of the funding provisions to achieve the latter effect.

Nothing affirmative in the legislative history indicates that either the House or the Senate intended or understood that the modifications made by the House Committee on the Judiciary in the funding provisions would vest unlimited discretion in agencies whether to use their funds to pay awards. The only indicators are to the contrary. Representative Kastenmeier, the prime mover behind the modifications, had a restricted view of the purpose for which discretion was vested. He explained on the House floor: "We have changed the funding for attorneys' fees to prevent the disassembling of an agency based on one lost case." 126 Cong. Rec. 28647 (1980). The view of the conferees was equally parsimonious:

> The conference substitute directs that funds for an award and [sic] fees and other expenses *to come first* from any funds appropriated to any agency . . . (emphasis added).

H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 24, 27 (1980). Thus, the only statements in the legislative history related to agency discretion indicate that Congress intended that the funding arrangement would ensure that the bulk of awards would come from agency funds. The discretion envisioned was to refer prevailing parties to the general Treasury only when making an award out of agency funds would be a very heavy financial blow to the agency (*i.e.*, cause its "disassembly").

The direct, although admittedly sketchy, evidence that Congress intended agencies to have only limited discretion not to pay awards from their own funds is supported circumstantially by one of the major expressed intentions of Congress in adopting the Act. This is the same intent that inspired the original Senate version of the funding provisions. It is an intent which is evident throughout the legislative history in both the House and the Senate, and which was best expressed by Senator Thurmond in his statement on the adoption of the conference report, a report described by Senator DeConcini as not in essence "at variance with the concept and premise of S. 265 as originally passed by the Senate." 126 Cong. Rec. 28103 (1980). Senator Thurmond observed:

> The second purpose of this legislation is to encourage the agency to be as careful as possible in the exercise of its regulatory powers and to be more responsive to citizen needs. The implicit assumption in the approach taken by this legislation is that affect-

[13] We note that the House Committee on the Judiciary's version was developed before § 207 was added to the Act

> ing the "pocketbook" of the agency is the most direct way to assure more responsible bureaucratic behavior.

Id., at 28106. There is no indication that the House modifications in the Senate funding provisions were intended to undermine this basic purpose of the Act. Rather, the House Report theorized that "fee shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority." House Report at 12.

We believe that this legislative history demonstrates Congress' belief that the payment of some awards would come from agency funds either specifically appropriated to the agencies or allocated to this program from lump sum appropriations for all an agency's general activities. Thus, we have little reason to doubt that Congress, in accepting the language reported by the House Committee or the Judiciary on this point, assumed that payment for at least some awards would be available from general lump sums appropriated to the various agencies against whom awards were entered.

Given this apparent intent, the question is whether the intent and the language of the funding provisions is sufficient to overcome the presumption that agencies are generally free to zero-budget authorized programs funded by a lump sum appropriation. Although the answer is not free from doubt, we believe the courts would most likely hold at least some fee awards to be payable from general funds appropriated to the agencies against whom awards were entered. We reach this conclusion for several reasons. First, a conclusion that all awards may be paid from other than an agency's own funds would undermine Congress' declared purpose to encourage agencies to act more responsibly or suffer the consequences. Second, we are aware of no situations in which agency flexibility to zero-budget authorized activities has been thought to include the power to zero-budget actual obligations of agencies which themselves come into existence through the operation of law. *Cf.* note 5, *supra*.

We do not believe that the existence of § 207 in the bill avoids this result. As we have shown, § 207 merely makes access to the so-called judgment fund contingent on a specific appropriation by Congress. Thus, § 207 does no more than shift to Congress consideration of the payment of fee awards which are, in the opinion of the agency involved, a major drain on the resources of the agency.[14]

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[14] The General Accounting Office has independently reached the same conclusions as this Office with respect to the availability of agency funds to pay awards under the Act. In a letter of May 15, 1981, to the Chairman of the Administrative Conference of the United States, Acting Comptroller General Socolar opined that payment of awards from agency funds under the Act would require neither a specific appropriation nor even a specific budget request by the agency. In support of this conclusion, he stated that "the purpose of the Act would be frustrated by an interpretation which would permit an agency to avoid payment merely by failing to include an appropriate item in its budget justifications." I have attached a copy of the Acting Comptroller General's letter for your convenience. We do not, of course, regard the Comptroller General's views as dispositive, but his views on issues intimately related to the budget/appropriation process are entitled to some respect due to his institutional expertise in this area.

We would add that an agency's determination of what constitutes a reasonable amount of funds to be allocated from lump sum appropriations to pay awards would be less vulnerable to challenge in the courts if a specific figure was presented to Congress in connection with submission of the agency's budget requests.

Payment of Expenses Associated with Travel by the President and Vice President

Funds appropriated for the official functioning of the offices of the President and the Vice President may be used for travel expenses only if the travel is reasonably related to an official purpose; and, official activities may be funded only from funds appropriated for such purposes. Thus appropriated funds should not be used to pay for political travel and political funds should not be used to pay for official travel.

Whether an event is official or political for purposes of paying its expenses must be determined on a case-by-case basis, and both the nature of the event and the nature of the individual involved should be considered.

Where both official and political activities occur on the same trip, the expenses of individuals on the trip for both political and official reasons can be apportioned between the government and a political committee on a basis which reflects the time spent on the respective activities. During the period of a presidential election campaign, Federal Election Commission regulations may require a different rule of allocation.

March 24, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum responds to your request for our advice about the payment of expenses associated with travel by the President or Vice President. We are to assume that travel by the President or Vice President may often include both official events, undertaken as part of the President's or Vice President's official roles as governmental leaders, and purely political events, undertaken for partisan purposes in order to advance the interests of the President's and Vice President's political party. This mixed character of much presidential and vice presidential travel follows naturally from their dual roles as governmental officials and leaders of their party. You have asked us to articulate the legal principles governing the allocation and payment of costs associated with such travel.

Several caveats must be noted at the outset. First, our opinion should not be read as a declaration that the generally applicable principles will necessarily lead to an inflexible result in a particular case. In fact, the principles are of such generality that they often will generate few determinate results. They thus must be viewed as general guides to decisionmaking. Second, the principles should be applied to a particular trip by the officials most familiar with the facts of the trip. Each case may present unique circumstances that will need to be taken into

account in determining, for instance, whether an event is "official" or "political" in character. As we will indicate, there is considerable room in this context for the careful use of informed discretion. Third, this opinion focuses on broadly applicable legal principles, not on the specific rules adopted by the Federal Election Commission for election activity. *See* 11 C.F.R. Chapter 1 (1981). If, in light of this opinion, particular questions arise, we will, of course, be glad to address them.

Furthermore, the principles discussed in this opinion may be fully understood only with an appreciation of the unique context presented by the peculiar functions and responsibilities of the President and Vice President in our system of government. They are the senior officials of the Executive Branch of government. Their official roles are necessarily political in the broad sense that they must formulate, explain, advocate, and defend policies. To the extent that the President and Vice President generate support for their policies and programs, they are also executing and fulfilling their official responsibilities. Even the most clearly partisan activity is not without some impact on the official activities of the President and Vice President.

By the same token, official success or failure by the President and Vice President has an inevitable and unavoidable impact on the standing of their political party, members of their party, and their party's candidates for public office. Thus, it is simply not possible to divide many of the actions of the President and Vice President into utterly official or purely political categories. To attempt to do so in most cases would ignore the nature of our political system and the structure of our government. Accordingly, efforts to establish such divisions must be approached with common sense and a good faith effort to apply the spirit of the principles we discuss in this memorandum, and they must be judged with considerable deference to the decisions of the persons directly involved in making the determinations.

With this background, our discussion will focus on three major questions. First, what are the basic legal principles to be applied, putting aside specialized restrictions formulated by the Federal Election Commission with regard to election activities? Second, how does one determine whether an event giving rise to an expense is "official" or "non-official" in character? Third, assuming that a trip involves events that are both official and non-official (or political) in character, may certain of the expenses for such a mixed trip be apportioned between the government, on the one hand, and a political committee, on the other hand? In the fourth section, we will discuss other considerations that bear on the issues discussed herein.

I. Two Basic Norms

When considering payment of expenses associated with presidential and vice presidential travel, two major principles governing the use of appropriated funds must be borne in mind. First, appropriated funds may be spent only for the purposes for which they have been appropriated. 31 U.S.C. § 628; 52 Comp.

Gen. 504 (1973); 50 Comp. Gen. 534 (1971). Thus, funds appropriated for the official functioning of the offices of the President and the Vice President may be used for travel expenses only if the travel is reasonably related to an official purpose. If, however, there is no reasonable connection between the expense incurred and the official purposes to be served by an appropriation—as, generally speaking, there would not be when an expense is incurred purely for partisan political purposes—official funds may not be used to pay the expense.

The second basic principle is that, in general, official activities should be paid for only from funds appropriated for such purposes, unless Congress has authorized the support of such activities by other means. Stated another way, although appropriated funds should not be used for non-official purposes, it is equally true that outside sources of funds may not be used to pay for official activities. This latter principle, which prevents the unauthorized augmentation of appropriations, has been recognized by the Comptroller General on numerous occasions.[1] A problem concerning an unauthorized augmentation of an appropriation does not arise when a trip is purely non-official in character and non-official funds are used to pay for it. Rather, the issue arises only where an official activity is supported by non-appropriated funds and where there is no authority for that to occur.

In short, appropriated funds should not be used to pay for political events, and absent authority to the contrary, political funds should not be used to pay for official events. The difficulties of applying these principles arise because both types of activities may occur on the same trip and because it is exceedingly difficult in many instances to determine what is official and what is political.

II. What Tests Should Be Used for Determining Whether an Expense Should Be Considered "Political" or "Official?"

Because officials will wish to ensure that appropriated funds are used only to pay for expenses associated with official events and are not used to pay for political expenses, it will be necessary to determine on a case-by-case basis whether an expense is official or political in character. As discussed generally above, there is unfortunately no single litmus test for making such judgments. Indeed, many events could be characterized properly as either political or official or both. Therefore, in making this determination the persons most familiar with the facts of a particular trip will have to assess all of the circumstances involved and apply a large measure of common sense. There are, however, two major variables concerning the source of the expense to be borne in mind: the nature of the event involved, and the nature of the individual involved. Either, or both, of these indicia may be useful in a particular case in determining whether a particular expense should be considered official or political.

With respect to the nature of the event giving rise to an expense, an earlier opinion of this Office, entitled "Political Trips" and transmitted to the Counsel to the President on March 15, 1977, stated the following guidelines:

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[1] *See, e g* , 23 Comp. Gen 694 (1944), 46 Comp. Gen. 689 (1967) *See also* 9 Comp Dec. 174 (1902), 17 Comp. Dec. 712 (1911)

> As a general rule, Presidential and Vice Presidential travel should be considered 'political' if its primary purpose involves their positions as leaders of their political party. Appearing at party functions, fundraising, and campaigning for specific candidates are the principal examples of travel which should be considered political. On the other hand, travel for inspections, meetings, non-partisan addresses, and the like ordinarily should not be considered 'political' travel even though they [sic] may have partisan consequences or concern questions on which opinion is politically divided. The President cannot perform his official duties effectively without the understanding, confidence, and support of the public. Travel and appearances by the President and Vice President to present, explain, and secure public support for the Administration's measures are therefore an inherent part of the President's and Vice President's official duties (pages 11–12).

We concur with the foregoing rules of thumb, which are based largely on a common sense understanding of the nature of political and official activities.[2]

While we would hope that the foregoing generalities may be useful guides for the future, they should not be viewed as inflexible. There clearly is much room for discretion in determining whether an event giving rise to an expense is political or official. At bottom, the question is a factual one that can only be answered by those most familiar with the particular facts of a given situation. Nonetheless, in general, if the purpose of an event on a trip is to promote the partisan aims of the President's or Vice President's party or candidates of that party, then expenses incurred in performing the event would generally be political in character. Should particular questions arise about specific events, we would be glad to provide more concrete advice concerning them.

The second variable that may, in some circumstances, determine the character of a particular expense incurred on a trip is the nature of the individual whose activity generates the expense. There are some individuals who, in particular situations, are on a trip for inherently official or political purposes. Expenses incurred by them should generally be viewed as either official or political depending on their particular role. For instance, there are some persons whose official duties require them to be with the President, whether or not the President himself is on official business.[3] This group includes the President's doctor, his military aide, and the Secret Service agents responsible for his protection.[4] A similar group would exist for the Vice President. Expenses incurred during travel with the President or Vice President by this group of individuals should be

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[2] Although we generally agree with this earlier opinion of this Office, we would note that much of its advice is of a prudential, not strictly legal, character In the present memorandum, we do not undertake to specify rules that are not legally mandated. Moreover, the earlier opinion itself takes pains to stress the flexibility that exists in determining whether, in a particular case, travel by the President is official or political (*see* page 7).

[3] This point is the same as stated in the March 15, 1977, opinion of this Office, entitled "Political Trips" (pages 9, 15–16).

[4] This list is not intended to be exhaustive The President may, in his discretion, determine that others are necessary members of his official party whenever he travels.

considered official regardless of the character of the event that may be involved in a given trip.

Similarly, on an otherwise entirely official trip, an individual may accompany the group for purely political reasons. As a rule, any expenses specifically incurred by such individuals should be considered political expenses, regardless of the events involved in the trip.

In short, as we noted at the outset of this section, there is no single test for determining whether an expense is political or official in character. Viewed generally, expenses of individuals whose official duties require them to travel with the President or Vice President should normally be considered official. Expenses of individuals who are on a trip for purely political reasons should normally be considered political. Expenses associated with individuals who are not necessarily serving in either a wholly official or wholly political capacity—such as the President or Vice President or other individuals in the White House who may, consistent with their official duties, perform political functions—should normally be judged to be official or political depending on the character of the event giving rise to the expense.

III. On a Mixed Trip Including Both Official and Political Activities, Can Certain Expenses Be Apportioned Between the Government and a Political Committee?

Based on what we have said thus far, the following conclusions may be stated. First, if all events during a trip are political in character, the only official expenses on the trip would be those associated specifically with the group of individuals whose official duties require them to accompany the President and Vice President. Second, if all events on a trip are official in character, the only political expenses would be those associated specifically with individuals who accompany the President and Vice President on the trip for purely political reasons. This means that on a trip that is entirely official, any expenses associated with the President or Vice President or others who are not necessarily on the trip for purely official or purely political reasons should be considered official. Conversely, on a trip that is entirely political, expenses associated with persons who are not necessarily on the trip for wholly official or wholly political reasons should be considered political.

A question remains, however, concerning expenses associated with individuals whose purpose for being on a trip is not necessarily only political or only official, when the trip itself is for both official and political purposes. Specifically, on a mixed trip involving a substantial official element and a substantial political element, can the expenses associated with the President or Vice President or others who are on the trip for both reasons be apportioned between the government and a political committee? There are several possible views on this question.

It might be argued, for example, that the performance of an official event during a trip could not have been accomplished without incurring certain expend-

itures and that, therefore, the entire cost of the trip should be treated as official and should be paid out of appropriated funds, with the sole exception being incremental expenses associated specifically with a political activity (*e.g.*, a hotel bill for an extra night's lodging necessitated entirely by a political event on the following day). This approach is grounded on the assumption that to permit any other apportionment of the cost of a trip to a political committee would allow the official budget to benefit from an unauthorized augmentation of appropriations. Since the expenses incurred were necessary to accomplish an official purpose, on this view they must be paid for in full with appropriated funds.

The opposite theory could also be advanced. That is, if there is any political activity on a trip, a political committee could theoretically be required to pay for the trip's entire cost (except for incremental expenses specifically attributable to an official event). This theory proceeds on the assumption that any other approach would allow the President's or Vice President's political activities to be subsidized by their official appropriations.

A third approach, which in effect combines the first two, is suggested by a prior opinion of this Office, transmitted to the Counsel to the President on September 17, 1980, and entitled "Reimbursement of Travel Expenses Incurred by Government Officials on Mixed Official and Campaign Trips." That opinion responded to a question about the operation of a Federal Election Commission (FEC) rule under which a campaign committee's share of the costs of a mixed official-political trip is the full cost of the trip from the point of origin through each campaign-related stop and back to the point of origin. 11 C.F.R. § 9004.F.[5] After the FEC adopted this rule, the White House Counsel's Office assumed that the expense to the government for such a trip would be the difference between the trip's actual cost and the amount reimbursed by the campaign committee. However, the Counsel's Office was concerned that such diminishment of the actual expense to the government could constitute an unauthorized augmentation of appropriations. For that reason, it sought an opinion of this Office.

The September 17, 1980, opinion concluded that, if the government were to pay only the difference between the actual cost of a trip and the amount reimbursed by the campaign committee under the FEC rule, there would be an unauthorized augmentation of appropriations (assuming no authority to accept contributions) so long as the government were allowed to "reap the benefit" of the enhanced payment of expenses by the campaign committee under the FEC rule. To cure this problem, the opinion stated that an accounting system should be devised to charge "the full allocated travel costs to *both* the Campaign Committee and the government agency," with a deposit of any excess funds in the Treasury (page 4, emphasis added).

While we express no view regarding the correctness of this third approach during the period of a presidential election campaign when the Federal Election

[5] For instance, if a trip from Washington, D C , to Chicago were taken for official purposes, and then a trip from Chicago to Denver were taken for campaign purposes (with a return from Denver to Washington, D C), under the FEC rule the campaign committee would have to make reimbursement for the cost of travel from Washington, D.C., to Denver and back to Washington, D C.

Commission's regulations would be applicable, we do not believe that the approach correctly reflects the requirements that apply outside the campaign period. We believe that the first two approaches are unreasonable solutions to the problem because each tilts the scales completely toward one of the two conflicting guiding principles and results either in an inappropriate augmentation of appropriated funds or the subsidization of political activity with appropriated funds. The approach of the September 17, 1980, Office of Legal Counsel opinion attempts to address these problems in, we believe, an unrealistic and unnecessary way by requiring one trip to be paid for twice—both with official funds *and* with political funds.

In our view, a fourth approach which attempts in good faith to apportion the costs of such a trip on the basis of a reasonable division between the time spent on political activities and the time spent on official activities is a more reasonable and a legal resolution of the underlying problems. For example, if 50 percent of a single day's events are political and 50 percent are official, approximately 50 percent of the costs associated with participants whose roles are not necessarily either official or political should be reimbursed by the political committee and 50 percent should be paid from appropriated funds, unless such an apportionment, under the particular circumstances, would on some basis be unreasonable or inequitable. We believe that such an approach faithfully accommodates both of the basic norms discussed in part I.

Thus, when there is a mixed trip involving the President or Vice President, the purpose of which is both substantially political and substantially official, expenses should be paid in the following manner: first, expenses for individuals who are necessarily official (Secret Service, etc.) should be paid for with appropriated funds; second, expenses for individuals who are necessarily political (campaign officials) should be reimbursed by a political committee; third, incremental expenses specifically attributable to an official event should be paid from appropriated funds, and incremental expenses specifically attributable to a political event should be paid from political funds; and finally, expenses for individuals whose official roles permit them to perform political activity should be reasonably and equitably apportioned so that a share reflecting the amount of a trip that is political in character should be paid by a political committee. If these general guidelines are followed, then the purposes of using appropriated funds for official purposes but not using such funds for political purposes will be achieved.

We must reaffirm the limited nature of our conclusion about apportionment. As we have indicated, some categories of expenses may have to be treated as entirely official or entirely political, and thus they would not be subject to apportionment. Apportionment would be appropriate only with respect to expenses associated with individuals whose official roles permit them to perform political functions, and only when those individuals are on a trip that itself is not entirely political or wholly official in nature.[6] In such circumstances, to accom-

[6] We are not suggesting any specific formula for apportionment, for several formulae may be equally reasonable

Continued

modate both of the guiding norms noted in part I, we believe that an apportionment of expenses between appropriated funds and the funds of a political committee which reflects the relationship between official and political activities may be made. We urge caution in applying such an approach, particularly in retaining records to substantiate any characterization of an event or trip as political or official that could be used in the future if, for instance, there should be an audit by the General Accounting Office.[7]

IV. Other Considerations

We would add one qualification to the preceding discussion. As noted in part I, official expenses, including expenses incurred during the President's and the Vice President's travel for official purposes, may not be paid for by funds other than those appropriated for official purposes unless there is authority to the contrary. An acceptable source of such authority would be a congressional authorization, in the form of a statute, for the President and the Vice President (or their respective offices) to accept gifts to defray their official expenses. This Office has concluded in the past that the White House Office and the Office of the Vice President do not have statutory authority to accept contributions or gifts. This legal premise provides the basis for the conclusion that the payment by a political committee of official travel expenses incurred by the President or Vice President would be an impermissible augmentation of the appropriations for these offices.

However, in the course of our research for this opinion, we reviewed a provision of law, 2 U.S.C. § 439a (1982), not considered in any of the prior opinions on this subject by this Office or by the Comptroller General, which appears to grant the President and Vice President gift authority, at least to the extent of authorizing them to accept contributions to defray their ordinary and necessary official expenses. Section 439a states in full:

> Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and *any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office, may be used by such* candidate or *individual,* as the case may be, *to*

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and some may be particularly well suited to particular trips For example, a formula may be predicated on the number of hours spent on each event, the number of hours on the entire trip (including travel time) devoted to official or political affairs, the number of events devoted to each, or if a trip is devoted to one type of event in a distant city and another type in a nearby city on the return flight, on the relative distances travelled to each While some general guidelines within these limits should be established for consistency in application, the overriding factor is the reasonableness of the apportionment in a specific situation. We would not exclude the possibility of creating an exception for de minimis involvement in official activity during a trip that would be treated as entirely political, and vice versa. We note that previous Administrations have made use of such a de minimis exception, as indicated in the background materials supplied to us by your office

[7] In two opinions to several Senators, dated October 6, 1980, and March 6, 1981, the Comptroller General discussed the apportionment of travel expenses for purposes of their payment by official and political funds under the Carter Administration (B–196862) Apportionment was not objected to by the Comptroller General. The Comptroller General expressly noted, as we have observed here, that there are "no guidelines of a legally binding nature [which] have been established by legislation, judicial decision, or otherwise" (page 2 of March 6, 1981, opinion). These opinions, coupled with prior practice by the White House, buttress our conclusion that a reasonable apportionment may be made in the circumstances we have described.

> *defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office*, may be contributed to any organization described in section 170(c) of . . . [the Internal Revenue Code of 1954], or may be used for any other lawful purpose, including transfers without limitation to any national, State, or local committee of any political party; except that, with respect to any individual who is not a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress on January 8, 1980, no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office. (Emphasis added.)

The foregoing provision authorizes "amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office" to be used by such individual "to defray any ordinary and necessary expenses incurred in connection with his or her duties. . . ." The term "Federal office" is defined separately as including the Offices of the President, the Vice President, and Members of Congress. 2 U.S.C. § 431(c). Accordingly, on its face, this provision would appear to authorize use by the President and Vice President of amounts contributed to such individuals for the purpose of supporting their activities as President or Vice President. This would include expenses incurred in the course of official travel.[8]

We have consulted the legislative history of 2 U.S.C. § 439a, first adopted as part of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1289, and have found nothing that would be inconsistent with such an interpretation. However, in the limited time available, we similarly have found nothing to indicate that Congress specifically considered the provision's application to the Office of the President or Vice President. The brief floor discussion of this provision[9] and of a similar provision in a predecessor bill[10] merely focused on its application to Members of Congress, who traditionally have been permitted to accept gifts to defray the expenses of their offices.[11] A regulation promulgated by the Federal Election Commission under this provision repeats the language of the statute. *See* 11 C.F.R. §§ 113.1 & 113.2. Thus, we are aware of no indication that Congress intended it to mean anything other than what it clearly says: that elected officials including the President and the Vice President may accept gifts to defray expenses incurred in connection with the performance of their duties.

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[8] Of course, any applicable conflict of interest provisions would have to be borne in mind if § 439a were to be used as authority for the receipt of contributions for the President's or Vice President's travel expenses.

[9] *See* 120 Cong. Rec. 35139 (1974).

[10] *See* 119 Cong. Rec. 26606–07 (1973).

[11] Congress amended the provision in 1980, Pub. L. No. 96–187, §§ 105(4), 113, 93 Stat. 1354, 1366 (1980), generally to prohibit a federal official from converting contributed funds for his or her personal use. A specific exemption to this provision also was added for individuals who were Senators and Representatives on January 8, 1980.

Nevertheless, we would caution against complete reliance on § 439a until further consideration has been given to the authority under that statute for political committees to make contributions, and until the matter has been coordinated with the Federal Election Commission. In this connection, the Federal Election Commission has authority to render advisory opinions to federal officeholders about "the application of a general rule of law stated in" the Federal Election Commission Act, of which § 439a is a part. *See* 2 U.S.C. § 437(b). To our knowledge, the Commission has not been called upon to and thus has not formally addressed the application of § 439a to gifts made to the President or the Vice President to defray the expenses of their offices.

Moreover, even if § 439a ultimately is to be relied upon to grant gift authority for the President and Vice President, we would advise that guidelines be established for the receipt of contributions under the provision. This will be necessary since the Standards of Conduct regulations applicable to agencies in the Executive Office of the President, 3 C.F.R. §§ 100.735–(1)–(32), were not drafted with the intent of regulating contributions to meet the official expenses of the President and Vice President. Those regulations as currently drafted might not be consistent with full implementation of § 439a if that were desired.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Employer's Rental of an Employee's Residence During His Participation in the President's Executive Exchange Program

An employer may rent an employee's house during his participation in the President's Executive Exchange Program on the same basis as any ordinary renter. However, 18 U.S.C. § 209 would prohibit an arrangement whereby the employer would rent without using the property or permit the employee to have continued access to the property, because this would have the effect of subsidizing the employee's government service.

March 25, 1982

MEMORANDUM OPINION FOR THE CHIEF COUNSEL, OFFICE OF GOVERNMENT ETHICS

This responds to your request for our formal concurrence in the Office of Personnel Management (OPM) June 20, 1980, opinion and the Office of Government Ethics (OGE) July 16, 1980, concurring opinion regarding 18 U.S.C. § 209(e). Those opinions addressed a proposal by Corporation A to arrange for the rental of an employee's residence while the employee participated in the President's Executive Exchange Program. The Executive Director of the President's Commission on Executive Exchange (PCEE) has sought our formal concurrence in these opinions.

The OPM memorandum concludes that "arrangements by a company to assist the participating exchange employee in the rental of his or her permanent residence" during the exchange year would, "depending upon the circumstances," be permissible. If a company rents an employee's residence "on terms similar to those that would obtain if the employee rented the residence directly to an individual tenant," OPM concludes that the rental will not offend § 209.

Your memorandum agrees with this conclusion, noting that:

> the individual circumstances of any case would control. For example, excessive rental payments by the employer or the payment by the employer of management fees for the rental property would be objectionable under 18 U.S.C. § 209. . . . But a rental where "the employee is left in no better position than he would be in if he rented the residence directly to an individual tenant" would not be objectionable.

We concur in this conclusion, with the following comments.

Both the OPM and the OGE memoranda rely on prior OLC opinions. The OPM memorandum quotes a 1978 OLC memorandum opinion for the President's Commission on White House Fellowships as follows:

> When the company arranges for the rent of the permanent residence, or rents the residence itself, the employee should be left in no better position than he would be in if he rented the residence directly to an individual tenant. For example, the employee should bear any rental or management fees entailed in the firm's renting the residence to an individual tenant; and *if the arrangement provides for the firm to rent the residence and leave it unoccupied,* the fair market rental should be reduced by a reasonable estimate of maintenance and other costs that foreseeably will not be incurred.

Memorandum Opinion for the Director, President's Commission on White House Fellowships, from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, 2 Op. O.L.C. 267, 269 (1978) (emphasis added). A footnote in that 1978 letter stated that "implicit" in our conclusion that a company could rent an employee's personal residence during a White House Fellowship was the understanding that "the employee was prepared to rent the house to a tenant who would reside there, so that the employer would not be paying the employee for a residence the employee intended to leave vacant. In the latter situation, the employer's payment of rent could disguise a supplementation of government salary." *Id.* note 1, at 269.

These statements may cause some confusion in assessing the permissibility of any particular rental. While the text suggests that it would be proper for a company to rent an employee's home and leave it empty, the footnote suggests that such an arrangement might serve as a disguised supplementation of salary, which would, of course, be impermissible.

To clarify this question, we believe it should be understood that an employer may *not* rent an employee's home during his or her exchange year merely to let the house sit empty. As both the OGE and OPM memoranda emphasize, and as prior OLC opinions have indicated, arrangements whereby an employer rents an employee's home during an exchange year are generally permissible insofar as the employee is left in no better position than he or she would have been in if an individual tenant were renting the residence. Thus, the terms of such rentals must be comparable to the terms of any open-market agreement that might be reached.

When a company pays rent to allow a rental property to remain vacant and unused, however, ordinary rental-market principles are not being applied. Since we are aware of no reason to enter into such an agreement except to provide an extra benefit to the employee, and none have been suggested, such an arrangement would have to be viewed as an impermissible supplementation of the employee's government salary.

Therefore, a company may not arrange to rent an employee's permanent residence during the exchange year if the home is to be left vacant, or, alter-

natively, if the employee is to be granted continued access to the residence. If, however, (1) a company rents, or arranges the rental of, an employee's home for a fair market rental, for the purpose of either using the residence itself or renting it to others during that year; (2) the employee and his or her family will not have use of the residence during the rental period; and (3) the employee bears any rental, management, or other fees and costs ordinarily borne by a lessor, so that the employee is "left in no better position than he would be in if he rented the residence directly to an individual tenant," we concur in your conclusion that § 209 is not offended. In essence, a company may arrange for rental of an employee's home during an exchange year on the same basis as any other renter, but may not enter into arrangements that would not ordinarily obtain on the open market or that would have the effect of "subsidizing" the employee by, for example, paying rent without using the property or permitting the employee to have continued access to the property.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Disclosure of Parolees' Names to Local Police

United States Parole Commission's proposed disclosure of information on parolees to local law enforcement authorities could be justified as a "routine use" under the Privacy Act. However, in a case where there is no reason to suspect the involvement of a particular individual in criminal activity, such blanket disclosure could be challenged as an unwarranted expansion of the "routine use" exception.

March 26, 1982

MEMORANDUM OPINION FOR THE DEPUTY ASSOCIATE ATTORNEY GENERAL

This responds to your request for our opinion whether the Privacy Act, 5 U.S.C. § 552a (1976), bars the United States Parole Commission from disclosing to local law enforcement authorities, on a routine basis, the names of parolees released into their communities. We believe that release of names and limited background information could be authorized as a "routine use" under the Privacy Act. We caution, however, that such blanket disclosures of information for law enforcement purposes, absent any reason to suspect the involvement of a particular individual in criminal activity, are not clearly contemplated by the Privacy Act, as explained in its legislative history.

Although we believe that the broad discretion afforded federal agencies to classify "routine uses" and the legitimate law enforcement purpose of the disclosures support our conclusion that blanket disclosures could be authorized as "routine uses," that conclusion could well be challenged in litigation as an unwarranted expansion of the "routine use" exception. Accordingly, the Parole Commission may want to proceed cautiously and to consider whether alternatives short of routine, blanket disclosures of the identity of all parolees released into a community will meet the legitimate law enforcement needs of local law enforcement authorities.

I. Background

At least since 1976, the Parole Commission has not routinely released parolees' names to local police when parolees are placed under supervision in a locality. Regulations promulgated in 1976 to implement the newly adopted

Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201–4218 (1976), provided that:

> Names of parolees under supervision will not be furnished to a police department of a community, except as required by law. All such notifications are to be regarded as confidential.[1]

In 1978 the regulation was amended by the addition of the language emphasized below to allow the Commission to authorize release of names on a case-by-case basis:

> Names of parolees under supervision will not be furnished to a police department of a community, except as required by law, *or as authorized by the United States Parole Commission*. All such notifications are to be regarded as confidential.

28 C.F.R. § 2.37(b) (1981).[2] Because of concerns that unnecessary release of such information could be counterproductive to reintegration of a parolee into the community, the Parole Commission stated that it would exercise that authority only "where clearly warranted by specific circumstances." *See* 43 Fed. Reg. 38823 (1978). Such circumstances could include, for example, a specific request by a local police department that is investigating a series of crimes in a community and has reason to believe that particular federal parolees may be involved.

The Commission is now considering whether to change its current policy and to authorize disclosure to appropriate local law enforcement authorities, without prior case-by-case approval, of the names of all parolees released into a community. This consideration has been prompted primarily by concerns of local law enforcement agencies that the release of parolees' names locally only under special circumstances and only upon request has been insufficient to assist them in apprehending federal parolees who commit crimes while on parole. The purpose of such disclosures, therefore, would be to assist local police generally in their law enforcement and investigative efforts.

Although the Commission has not yet considered what other information would be disclosed with the names of parolees, we understand that at a minimum certain identifying information such as physical characteristics and fingerprints

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[1] 28 C.F.R. 2.37 (1977). The Parole Commission's regulations prior to the Reorganization Act provided generally for confidentiality of parole records in accordance with several "principles." They provided, for example, that dates of sentence and commitment, parole eligibility dates, mandatory release dates and dates of termination of sentence would be disclosed "in individual cases upon proper inquiry by a party in interest", that the effective date set for parole would be disclosed by the Parole Board "whenever the public interest is deemed to require it", and that "other matters" would be held strictly in confidence and not disclosed to "unauthorized persons." *See* 38 Fed. Reg. 26652, 26657 (1973).

[2] It appears that this amendment may have been necessary to reflect the Commission's actual practice prior to 1978. The accompanying summary in the Federal Register notice of the final rule states that the regulation "makes a conforming expression of the Commission's policy as to disclosure of names of parolees to local police." 43 Fed. Reg. 38823 (1978).

At the same time, a new subsection (a) was added to the regulation and a new "routine use" published that provided for release of information to individuals who may be exposed to harm through contact with the parolee "if such disclosure is deemed by a Commissioner to be reasonably necessary to give notice that such danger exists." 28 C.F.R. § 2.37(a) (1981); 43 Fed. Reg. 38823 (1978). It is our understanding that the Commission is not considering revision of this policy. We therefore do not address it here.

and the nature of the crime for which the parolee was convicted would also be disclosed. This information would be drawn from the Parole Commission's Inmate and Supervision files, which include basic information on current inmates under the custody of the Attorney General, former inmates who are still under supervision as parolees, and mandatory releases. *See* 46 Fed. Reg. 60337 (1981).

II. Analysis

You have asked us whether the Privacy Act prohibits the Commission from adopting a policy of routine disclosure of parolees' names to local police for law enforcement purposes.[3] The Privacy Act prohibits any federal agency from disclosing, without the prior consent of the individual involved, information about that individual contained in a "system of records" maintained by that agency. 5 U.S.C. § 552a(b).[4] The Parole Commission's Inmate and Supervision files are such a system of records. *See* 46 Fed. Reg. 60337 (1981). Disclosure may be made without prior consent, *inter alia*, if the disclosure is for a "routine use" of the agency—*i.e.*, a use which is "compatible with the purpose for which [the record is] collected." 5 U.S.C. § 552a(b)(3) (1976).[5] The dispositive question, therefore, is whether disclosure of parolees' names to state and local law enforcement agencies may be published as a "routine use."

The legislative history of the Privacy Act and subsequent judicial interpretations of its scope do not provide much guidance as to the outer limits of the "routine use" exception. The intent of the exception, as expressed during debate on the bill, was to avoid prohibiting "necessary exchanges of information, providing its rulemaking procedures are followed." Congress apparently did want "to prohibit gratuitous, ad hoc, disseminations for private or otherwise irregular purposes." *See* 120 Cong. Rec. 36967 (1974) (remarks of Cong. Moorhead). Both Congress and the courts have recognized that considerable latitude should be afforded to the agencies that maintain records subject to the Privacy Act to define the "routine uses" of information in those records. *See id; see also Ash* v. *United States*, 608 F.2d 178, 179 (5th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980) (public disclosure of names, offenses, and punishment of seamen is "routine use"); *Harper* v. *United States*, 423 F. Supp. 192, 198 (D.S.C. 1976) ("The Privacy Act contemplates that agencies must disclose certain information regarding individuals as an ordinary consequence of performing their routine agency duties."). *Cf. Local 2047, AFGE* v. *Defense*

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[3] We note preliminarily that the Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201–4218, which provides for the general regulatory authority of the Parole Commission, does not prohibit the disclosure of parolees' names or other parolee information.

[4] The Act defines a "system of records" as a "group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552(a)(5) (1976)

[5] The Privacy Act also provides for disclosure of records without prior consent to a criminal or civil law enforcement agency within the United States, if the law enforcement activity of that agency is authorized by law and if the head of the agency has made a "written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought." 5 U.S.C. § 552a(b)(7) (1976). Because this subsection requires a request for specific information, it would not authorize the type of blanket disclosure of names contemplated by the Parole Commission.

General Supply Center, 573 F.2d 184, 186 (4th Cir. 1978) (agency's refusal to authorize disclosure of names of employees as a "routine use" not unreasonable).[6] The primary check that is provided on the agency's discretion is the requirement that all "routine uses" be published in the Federal Register for notice and comment. 5 U.S.C. § 552a(e)(4), (11).

It is clear that the purpose of a disclosure of information as a "routine use" need not be the same as the purpose for which the information was collected, but only "compatible with" that purpose. *See* Office of Management and Budget, Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28948, 28953 (1975). For example, a referral to the appropriate law enforcement agency of information showing an apparent violation of the law, for the purpose of investigation and prosecution, can be a "routine use," even though the information was collected for a purpose other than law enforcement. *See* 120 Cong. Rec. 36967 (1974) (remarks of Cong. Moorhead); *Burley* v. *DEA*, 443 F. Supp. 619, 623 (M.D. Tenn. 1977) (transfer of Department of Justice's investigative reports to state licensing agency for use in license revocation hearing is a "routine use"). In particular, the disclosure of certain information by the Parole Commission to other federal or state agencies has been held to be a "routine use," at least if that information indicates a violation or potential violation of law and is necessary for investigative or enforcement efforts by the receiving agency. *See United States* v. *Miller*, 643 F.2d 713, 715 (10th Cir. 1981) (release by parole officer of documents necessary to further a particular criminal investigation to Federal Bureau of Investigation (FBI) postal inspectors is a "routine use"); *SEC* v. *Dimensional Entertainment Corp.*, 518 F. Supp. 773, 777 (S.D.N.Y. 1981) (release of parole hearing transcript to Securities and Exchange Commission for use in injunctive proceedings is a "routine use").

The contemplated policy of disclosing all parolees' names, whether or not information maintained by the Parole Commission or by local police authorities indicates involvement of any particular parolee in a crime, goes one step beyond disclosure of information in response to a specific request or for use in a particular criminal investigation. Although the disclosures would be for law enforcement purposes, it is possible that a blanket disclosure policy would be challenged, for instance by a parolee who is arrested after release of his name by the Parole Commission, as "gratuitous" and outside the scope of the "routine use" exemption. We do not believe that blanket, routine disclosures for legitimate law enforcement purposes are so far removed from the purpose for which the information is maintained by the Parole Commission that they would be consid-

[6] We are unaware of any court decisions that have found an agency's designation of a particular type of disclosure as a "routine use" to be unreasonable or arbitrary. Some courts that have found Privacy Act violations in the disclosure of information without prior consent have suggested that there are limits to the scope of the "routine use" exception, but have rested their decisions on the failure of the agency in question to make the required Federal Register publication of the "routine use." *See, e.g., Parks* v. *IRS*, 618 F.2d 677, 681 (10th Cir. 1980) (use of personnel files for solicitation in savings bond drive); *Zeller* v. *United States*, 467 F. Supp. 487, 503 (E.D.N.Y. 1979) (release of ICC investigative reports to individual license applicants).

ered incompatible with the purpose and therefore not "routine uses."[7] If the disclosure policy were challenged in litigation, however, the defense of the "routine use" exemption would rest, at least in part, on a showing that the disclosures are in fact necessary and relevant to local law enforcement efforts and that the information is used by local law enforcement agencies solely as an investigative tool, and not for the purposes of harassment or intimidation of parolees in the community. Concerns about the demonstrated need for a blanket disclosure policy, or for the potential misuse of the information by local police authorities may therefore be quite relevant to whether the disclosures may appropriately be made as "routine uses" under the Privacy Act.

Disclosure of parolees' names will be accompanied by release of some identifying information from the Parole Commission's Inmate and Supervision files. Much of the information maintained in those files would in most cases be unnecessary or irrelevant to any possible law enforcement or investigative efforts by local police, and should be released, if at all, only on a case-by-case basis, based on demonstrated need for the information. This would include, for example: information concerning the inmate's assignments and progress while in prison such as records of the allowance, forfeiture, withholding and restoration of good time credits; records and reports of work and housing assignments; performance adjustment and progress reports; transfer orders; mail and visit records; personal property records; safety reports; interview requests; and general correspondence. *See* 46 Fed. Reg. 60338 (1981). In addition, records relating to an inmate's application for parole or appeals from previous denials of parole, and court petitions and documents would generally not contain information necessary for local law enforcement efforts.

Especially given that blanket disclosures of the type being considered may stretch the limits of the "routine use" exception, we believe that disclosures of information on parolees made to local law enforcement agencies pursuant to a blanket disclosure policy must be narrowly limited to information that, on its face, will clearly assist those agencies in their efforts to investigate criminal activity within their communities. In most cases this should include, for example, no more than minimal identifying information (name, aliases, address, physical characteristics, fingerprints) and a brief description of the nature of the parolee's previous offense. This would not preclude release of additional information on a particular parolee, if the local authorities have reason to believe that individual is involved in a crime and can demonstrate need for the information.

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[7] Other federal agencies have published "routine uses" that would appear to be broad enough to include the sort of disclosures under consideration by the Parole Commission here. *See, e.g.*, Bureau of Prisons, Inmate Central Records System, 46 Fed. Reg. 60291–92 (1981) ("routine uses" include "to provide information source to state and federal law enforcement officials for investigations, possible criminal prosecutions, civil court actions, or regulatory proceedings"); FBI Central Records System, *id.* at 60321 ("Information . may be disclosed as a routine use to any state or local government agency directly engaged in the criminal justice process . . . where access is directly related to a law enforcement function of the recipient agency, *e.g.*, in connection with a lawful criminal or intelligence investigation. . . ."). So far as we are aware, however, both of these agencies release information to local authorities only pursuant to a specific request, or if information maintained by the agencies indicates involvement in a criminal activity within the jurisdiction of local authorities

We do not believe, however, that the "routine use" exemption would cover release of any information beyond that minimally necessary for investigative efforts, absent a specific particularized need.

In order to implement a policy of blanket disclosure of parolees' names to local police, the Parole Commission would have to amend 28 C.F.R. § 2.37 (1981), which does not now explicitly authorize such disclosures,[8] and would have to publish in the Federal Register for notice and comment a new "routine use" covering such disclosures, in accordance with subsection (e)(11) of the Privacy Act, 5 U.S.C. § 552a(e)(11).

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

[8] Section 2.37 as currently in force allows disclosure of parolees' names "as authorized by" the Parole Commission It might be possible for the Parole Commission to "authorize" such disclosures within the language of § 2.37, without amending the current language However, we believe such a blanket authorization would be inconsistent with the expressed purpose of the current version of the regulation. *See* 43 Fed. Reg 38823 (1978) Therefore, we recommend that the regulation be specifically amended to provide for the new disclosure policy

Statutory Authority for Commodity Credit Corporation Export Credit Guarantee Programs

Certain programs of the Commodity Credit Corporation, guaranteeing export credit sales of American agricultural exports, are authorized by the Corporation's charter act

March 26, 1982

MEMORANDUM FOR THE GENERAL COUNSEL, DEPARTMENT OF AGRICULTURE

This memorandum responds to your request for our opinion regarding the statutory authority for the Commodity Credit Corporation's (CCC) Noncommercial Risk Assurance Program (GSM–101) and Export Credit Guarantee Program (GSM–102).[1] The question of statutory authority has arisen in the course of a determination by your Office whether guarantees issued pursuant to these programs are supported by the full faith and credit of the United States.[2] We find ample, clear statutory authority for these export guarantee programs. Your determination regarding full faith and credit may properly rely on this finding.

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[1] The Department of Agriculture's regulations governing these two programs appear at 7 C.F.R. §§ 1487–1487.15 and 7 C.F.R. §§ 1493–1493.15 (1981), respectively.

[2] Since 1973, it has been the policy of the Department of Justice to decline to issue formal opinions as to "full faith and credit" matters unless there is drawn into question a serious issue of law. *See* Elliot L. Richardson, Attorney General, Memorandum for Heads of the Executive Departments and Counsel to the President (Oct. 10, 1973). It has long been the position of the Attorney General, however, that:

> [T]here is no order of solemnity of valid general obligations of the United States and . . . no legal priority is afforded general obligations contracted pursuant to an express pledge of faith or credit over those not so accompanied. It is enough to create an obligation of the United States if an agency or officer is validly authorized to incur such an obligation on its behalf and validly exercises that power

41 Op. Att'y Gen. 403, 405 (1959). *See also* 42 Op. Att'y Gen. 417 (1969); 42 Op. Att'y Gen. 341, 344 (1967); 42 Op. Att'y Gen. 323 (1966); 42 Op. Att'y Gen. 305, 308 (1965), 42 Op. Att'y Gen. 21, 23–4 (1961). *See generally Perry* v. *United States*, 294 U.S. 330, 353–54 (1935); *Lynch* v. *United States*, 292 U.S. 571, 580 (1934).

In an opinion holding that the Small Business Administration had authority to guarantee the sale of certain debentures owned by it, the Attorney General stated.

> [T]he threshold question concerning the effect of the proposed SBA guaranties is not whether the statutory language expressly alludes to the "faith" or "credit" of the United States, but whether the statutory scheme authorizes the guaranties here proposed. If there is statutory authority for the guaranties, absent specific language to the contrary such guaranties would constitute obligations of the United States as fully backed by its faith and credit as would be the case were those terms actually used

Letter from John N. Mitchell, Attorney General, to Thomas S. Kleppe, Administrator, Small Business Administration, at 3–4 (Apr. 14, 1971). Similarly, in this case, a guarantee by the CCC will be backed by the full faith and credit of the United States if, and only if, the guarantee was issued pursuant to statutory authority.

I. The GSM–101 and GSM–102 Programs[3]

The purpose of the GSM–101 and GSM–102 programs is to promote United States exports of agricultural commodities and products by shifting some of the risks usually associated with export transactions from the American exporter to the CCC. These risks, which include embargoes on imports, freezing of foreign exchange, and similar acts of state, as well as revolutions, wars, economic collapse, and other noncommercial incidents, all operate as a barrier to United States agricultural exports.

The GSM–101 and GSM–102 programs are similar in structure and operation. Both programs seek to encourage U.S. agricultural exports at levels above those which would exist without the guarantees.[4] Under the programs, CCC promises to reimburse the exporter, or the financing institution that is the exporter's assignee, for a portion of the exporter's accounts receivable in the event of nonpayment by the importer's bank that issued the irrevocable letter of credit pertaining to the export sale. In return, the exporter or assignee must assign to CCC all rights in the defaulted payment.[5] The total amount that CCC will guarantee, and the portion of the accounts receivable for which CCC will reimburse the exporter or assignee, is determined by CCC in advance for each country. Typically, the Corporation guarantees 98 percent of the principal amount and 8 percent per annum interest.

II. Statutory Authority for the Programs[6]

15 U.S.C. § 714b[7] sets out the general powers of the CCC. These include the power to "determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid."

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[3] The following description of these programs is based on discussions with members of your Office, and upon a memorandum attached to your letter to me dated November 20, 1981.

[4] The major difference between the two programs is that GSM–101 is limited to protecting only against noncommercial risks, while GSM–102 covers all risks. *Compare* 7 C.F.R. §§ 1487.2(k) *and* 1487.4(a), *with* 7 C.F.R. § 1493.4(a). Under the GSM–102 program, CCC relieves exporters or assignees of commercial risks which may be difficult for the exporter or assignee to assess because of lack of familiarity with foreign legal systems or banking practices, or a lack of adequate information. CCC now relies exclusively on the GSM–102 program and has ceased issuing new GSM–101 risk assurance agreements.

[5] *See* 7 C.F.R. §§ 1487.2–4; 1487.9(d); 1493.2; 1493.4; 1493.8(b)(3)(iv).

[6] A question related to this one was previously addressed in a letter and memorandum from this Office to Claude Coffman, Deputy General Counsel, Department of Agriculture (Dec. 3, 1973). In that correspondence, Leon Ulman, Deputy Assistant Attorney General, expressed doubt regarding CCC's authority to sell "time drafts" which it intended to draw against certain bank obligations it possessed. The bank obligations were obtained under a CCC export credit sales program. Mr. Ulman stated that "although we want to cooperate, we are not yet persuaded that CCC has the requisite authority [to sell its drafts]." The memorandum emphasized that CCC lacked specific statutory authority to sell securities or assets, and opined that the "necessary and appropriate" powers clause found in its charter may not be used as authority to sell securities and pledge the full faith and credit of the United States. *Cf.* 15 U.S.C. § 714b(m).

The present question relates to programs materially different from the Agriculture Department's proposal in 1973 to sell "time drafts." The most decisive difference is that the programs at issue in the current matter do not involve any sale of assets owned by CCC, or any guarantees for such sale. There is, in other words, no issue regarding authority to sell government obligations backed by the full faith and credit of the Nation. Rather, the question here concerns CCC authority to guarantee export credit sales of American agricultural exports.

[7] It has been held that § 714b—among other grants of authority to the CCC—must be broadly interpreted. *See Hiatt Grain & Feed, Inc.* v. *Bergland*, 446 F. Supp. 457, 472–73 (D. Kan. 1978), *aff'd*, 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

15 U.S.C. § 714b(j). In addition, the CCC is vested with "such powers as may be necessary or appropriate for the exercise of the powers specifically vested in the Corporation, and all such incidental powers as are customary in corporations generally[.]" 15 U.S.C. § 714b(m). Finally, 15 U.S.C. § 714c provides:

> the Corporation is authorized to use its general powers only to—
>
> * * * * *
>
> (f) Export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities.

Commenting upon § 714c, the Senate Report on the CCC charter act states:

> It is believed that there should be available to American agriculture an agency with the flexible authority vested in the Corporation by this section. . . .
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> * * * * *
>
> Subsection (f) authorizes the Corporation to export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities. It is essential to the agricultural economy of the United States that it maintain and expand its markets abroad for agricultural commodities. This subsection empowers the Corporation to carry out operations to this end

S. Rep. No. 1022, 80th Cong., 2d Sess. 12–13, *reprinted in* 1948 U.S. Code Cong. Serv. 2138, 2151.

The Department of Agriculture interprets these statutes as providing sound authority for the GSM–101 and GSM–102 programs. *See* 43 Fed. Reg. 4033 (1978); 45 Fed. Reg. 64898 (1980). An agency's interpretation of a statute it is charged with implementing is entitled to substantial deference. *See generally Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Lenkin* v. *District of Columbia*, 461 F.2d 1215, 1227 (D.C. Cir. 1972).

Regardless of any deference due the Agriculture Department's interpretation, there is no doubt that the GSM–101 and GSM–102 programs are a valid exercise of the CCC's general power to "determine the character of and the necessity for its obligations . . . and the manner in which they shall be incurred[.]" 15 U.S.C. § 714b(j). That general power has been exercised in this instance for the purpose of promoting exports of United States agricultural commodities. *See* 7 C.F.R. §§ 1487.1(a), 1493.1(a). This purpose is explicitly authorized by 15 U.S.C. § 714c(f). We therefore find support for these programs in the plain meaning of these provisions. Furthermore, the broad language of the CCC charter act and its legislative history both indicate that a variety of programs may—indeed should—be developed by the CCC to assist in promoting American agricultural exports. GSM–101 and GSM–102 are just such programs, and therefore are within the ambit of authority provided the CCC in § 714.

THEODORE B. OLSON
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Installation of Slot Machines on U.S. Naval Base, Guantanamo Bay

Section 5 of the Anti-Slot Machine Act, 15 U.S.C. § 1175, prohibits the installation or operation of slot machines on any land where the United States government exercises exclusive or concurrent jurisdiction, including military bases outside the United States. This interpretation of the plain words of § 1175 finds support in its legislative history, which reveals that Congress intended it not only to assist the states in enforcing their anti-slot machine laws, but also to establish a uniform federal policy against the use of such gambling devices in areas under federal jurisdiction.

Under the terms of the lease agreement between the United States and Cuba, the U S. Naval Base at Guantanamo Bay constitutes land "acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof" within the meaning of 15 U S.C. § 1175. Accordingly, no slot machines may be installed or operated on that base.

March 29, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE

This memorandum responds to your request for our opinion as to whether § 5 of the Anti-Slot Machine Act, 15 U.S.C. § 1175 (1976), precludes the installation or operation of slot machines at the United States Naval Base at Guantanamo Bay, Cuba. You suggest that the language of § 1175 would appear to prohibit slot machines on the base, but that the underlying congressional intent, as revealed by the legislative history of the provision, was not to exclude slot machines from any foreign military bases, including Guantanamo Bay. For the reasons outlined below, we believe that the language and underlying purpose of § 1175 does preclude the installation or use of slot machines on any federal land where the federal government exercises exclusive or concurrent jurisdiction, including the base at Guantanamo Bay, despite the fact that it is located outside the United States. Accordingly, we conclude that § 1175 would prohibit the installation or use of slot machines at the base.

I. The Language of Section 1175

Section 1175, Title 15, makes it unlawful to

> manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in

> section 1151 of title 18 or *within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18.*

(Emphasis added.) Section 7, Title 18, defines the "special maritime and territorial jurisdiction of the United States" to include

> (3) *Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof,* or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(Emphasis added.) The plain language of the statutes therefore appears to extend the prohibition to military installations under the jurisdiction of the United States.

The base at Guantanamo Bay, as you point out in your letter, operates under an unusual international agreement with the Republic of Cuba which authorizes the United States to exercise complete jurisdiction and control. The Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, 23 Feb. 1903, art. III, T.S. No. 418 (Agreement) states in relevant part:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement *the United States shall exercise complete jurisdiction and control over and within said areas* with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

(Emphasis added.) Under this Agreement, the United States executed a Lease for Areas for Naval or Coaling Stations, 2 July 1903, United States–Cuba, T.S. No. 426.[1] Thus, under the terms of the Agreement, the Guantanamo Base would constitute land "acquired for the use of the United States, and under the exclusive

[1] Article IV of that lease provides:

> Fugitives from justice charged with crimes or misdemeanors amenable to Cuban law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities. On the other hand *the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities*

(Emphasis added)

or concurrent jurisdiction thereof."[2] Accordingly, as this Office has previously found, it would appear to come within § 7's definition of land "within the special maritime and territorial jurisdiction of the United States." Since § 1175 covers land within such jurisdiction, slot machines would seem to be precluded from the base under the language of this provision. Nevertheless, because "[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect," *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981), it is necessary to examine the legislative history of § 1175 to determine whether Congress passed it with the intent of excluding slot machines from all land under concurrent or exclusive federal jurisdiction.

II. The Legislative History of Section 1175

The legislative history of § 1175 does not indicate that Congress ever specifically addressed the question whether its terms were intended to embrace property outside the United States but under United States jurisdiction. Since the jurisdictional status of the U.S. Naval Base at Guantanamo Bay is unusual, Congress may have overlooked the possible application of § 1175 to land outside the United States.[3] A brief review of the underlying purposes of the provision, however, suggests that Congress intended exactly what § 1175 says: to exclude slot machines from *all* land on which the federal government exercises exclusive or concurrent jurisdiction, without making any exception merely because the land was outside the territorial United States.

Section 1175 was passed as part of the Anti-Slot Machine Act, 64 Stat. 1135 (1951), whose primary, though not exclusive, purpose was to assist the states in enforcing their anti-slot machine laws. According to the House Report, the use of slot machines had two untoward consequences:

> (1) . . . Nation-wide syndicates appear to derive substantial revenues from the operation of slot machines and similar gambling

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[2] The fact that the land at Guantanamo Bay is leased rather than owned by the United States does not indicate it was not "acquired" for the use of the United States within the meaning of § 7(3) of Title 18. As the United States Court of Appeals for the Fourth Circuit observed in finding that an embassy leased by the United States was within the "exclusive or concurrent jurisdiction of the United States," "fee simple 'ownership' of the property by the United States is not a prerequisite to such jurisdiction." *United States* v. *Erdos*, 474 F.2d 157, 159 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973). The court noted further:

> [Section 7(3) of Title 18] is not framed in the language of conveyancing. The test, as to property within or without the United States, i[s] one of practical usage and dominion exercised over the embassy or other federal establishment by the United States government.

Id. Cf. United States v. *Schuster*, 220 F. Supp. 61 (E.D. Va. 1963) (leased property for U.S. naval base in Virginia constitutes land "purchased or otherwise acquired by the United States" within the meaning of 18 U.S.C. § 7(3)).

[3] As you note in your request, the House and Senate reports on the Act did comment that § 5 covered "parts of the United States where the Federal Government is primarily responsible for the enforcement of the criminal laws," S. Rep. No. 1482, 81st Cong., 2d Sess. 2 (1950); and "those parts of the United States which are under the jurisdiction of the Federal Government." H. Rep. No. 2769, 81st Cong., 2d Sess. 2 (1950). There is no indication from these references to the "United States," however, that Congress ever even considered the possible application of § 1175 to land outside the United States, let alone that it specifically intended to exclude § 1175's coverage from such territory, and the Members of Congress who spoke on the floor recognized no such geographic limitation. *See* 96 Cong. Rec. 13644 (1950) (remarks of Rep. Rogers) (the law covers "those places where the Government has jurisdiction"); 96 Cong. Rec. 13646 (1950) (remarks of Rep. Wolverton) (law prohibits "gambling devices within Federal Territorial jurisdiction").

devices, and appear to put these revenues into other illegal enterprises with the resulting increase in crimes committed and corruption of public officials, all of which endanger our society; and

(2) slot machines and similar gambling devices appear to offer an opportunity for a particularly vicious form of gambling which "does not give the sucker (many of whom incidentally are juveniles) a decent break."

H. Rep. No. 2769, 81st Cong., 2d Sess. 5–6 (1950). Thus, in § 2 of the Act, Congress prohibited the interstate shipment of slot machines to any state which had a law prohibiting their use. 15 U.S.C. § 1172. In addition, under § 5, it prohibited the manufacture, use, sale, or possession of slot machines on any land under the maritime and territorial jurisdiction of the United States. According to the Senate Report, the prohibitions on transportation of slot machines would

> support the basic policy of the States, which outlaws slot machines and similar gambling devices, by prohibiting the interstate shipment of such machines except into States where their use is legal. By way of additional support, foreign import or export of these machines is prohibited and their manufacture, possession, and *use is forbidden in those parts of the United States where the Federal Government is primarily responsible for enforcement of the criminal laws, such as the District of Columbia.*

S. Rep. No. 1482, 81st Cong., 2d Sess. 1–2 (1950) (emphasis added).[4]

If the *only* purpose of the Anti-Slot Machine Act had been to assist the states in the enforcement of their restrictions on the use of slot machines, one could argue with some force, as you have in your letter, that a prohibition on the use of slot machines in an overseas base such as Guantanamo Bay would not directly further the purposes of the Act. Although the use of slot machines at an overseas base might have some remote relationship to violations in the states, it would not be as likely to undermine the states' enforcement of anti-slot machine laws as the use on federal land within the United States.[5] We need not resolve whether this indirect effect would have led Congress to exclude slot machines from Guantanamo Bay, however, because the legislative history of the Act clearly reveals that Congress had a related but distinct purpose in passing § 1175. Because of

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[4] The House Report expressed a similar understanding:

> The primary purpose of this legislation is to support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such States. In addition the legislation . prohibits the manufacture, sale and use of slot machines and similar devices in those parts of the United States which are under the jurisdiction of the Federal Government.

H. Rep. No. 2769, 81st Cong., 2d Sess 2 (1950).

[5] The recommendations of the Attorney General's Conference on Organized Crime, which were excerpted in the Senate Report on the bill, specifically referred to the "troublesome problems concerning slot machines in, or emanating from, certain areas where the Federal Government exercises exclusive criminal jurisdiction." S Rep. No. 1482, 81st Cong., 2d Sess 2 (1950).

Congress' concern about the use of slot machines, and its desire to establish a uniform federal policy, it intended to prohibit slot machines from *all* land over which the federal government had jurisdiction, regardless of whether this prohibition would have an effect on the states' enforcement of the anti-slot machine laws. This separate purpose is revealed in the congressional comments on three provisions of § 1175.

First, as suggested above, § 5 of the Act prohibited the possession or use of slot machines on federal land in *all* of the states, *even where the land was located in a state that permitted slot machines*. The presence of slot machines on this federal land would not undermine the policies of these states, although it could conceivably have some indirect impact on the ability of anti-slot machine states to exclude their interstate transport. The Senate Report justified this restriction on the ground that a federal policy against slot machines on federal land should be uniform.

> With regard to Federal reservations within the States, while it is generally true that the laws of the States would govern for those areas (*see* 18 U.S.C. 13), nevertheless it will be useful to have an unmistakable Federal policy in regard to these areas; and it would seem that *Federal policy in regard to gambling devices ought to be uniform even in those few States which might regard as legal some or all of the forbidden operations.*

S. Rep. No. 1482, 81st Cong., 2d Sess. 4–5 (1950) (emphasis added). Similarly, Senator Johnson, the Chairman of the Committee on Interstate and Foreign Commerce, which had reported the bill, explained on the floor that the prohibition on possession of slot machines on federal property reflected not only a desire to assist the states, but also a congressional device to outlaw such machines because their use was undesirable.

> [A]s to Federal property, the bill does prohibit the possession or use of slot machines. Frankly, I do not see how the Congress can prohibit the interstate shipment of devices which everybody acknowledges as "one-armed bandits" which do not give the customer an even break, and at the same time permit and encourage their operation on Federal territory. *If such machines are bad, they are bad, and we have no business exempting Federal property from the bill and thus make every Army post or officer's club a gambling oasis.*

96 Cong. Rec. 15108 (1950) (emphasis added).

Congressional debate on the possession and use of slot machines on American ships further reveals a congressional intent to exclude slot machines from all "land" under federal jurisdiction. Although the original House draft of the Act had only covered land under the "exclusive or concurrent jurisdiction" of the United States, the House amended § 5 to cover land under the special maritime jurisdiction, so as to assure slot machines were prohibited from American ships.

See 96 Cong. Rec. 13650 (remarks of Rep. Heselton). In explaining the Committee amendment on the floor, Representative Heselton justified the prohibition based not on its effect on state laws, but on the need for a uniform federal policy against use of such gambling devices under federal jurisdiction.

> [I]t was my opinion and I think it was the opinion of the members of the committee that if we were going to do anything with this bill insofar as transportation is concerned, it was highly illogical for us to tolerate and exempt an operation under the American flag, where this Congress has jurisdiction and responsibility. We prohibit the use of these one-armed bandits in the District and in the Territories and possessions, with the exception of Alaska and Hawaii, so far as their legislation may exempt themselves. Then we were asked to ignore the one other place which is considered American soil, and subject to the laws of the United States, and that is American shipping. *If it is bad in one instance it is bad in all. We should not go halfway in this effort.*

96 Cong. Rec. 13651 (1950) (emphasis added).

Finally, Congress' intent to prohibit all slot machines in areas within federal jurisdiction is evidenced by its rejection of an amendment which would have specifically exempted social clubs on military bases from the prohibition on slot machines. Representative Sutton proposed the amendment because he believed that use of slot machines in this controlled environment did not create the same potential for abuse as civilian uses. He stated:

> [This amendment] is not in contradiction to the purposes of the bill at all. When the bill was written they provided on page 5 a prohibition against the use or possession of slot machines in all phases on land reserved or acquired for the use of the United States, which includes, of course, Army camps, Navy camps, and Marine camps. It is common knowledge to anyone who has in any way been connected with the Armed Forces that your clubs are operated by the money received from slot machines.
>
> In view of the questions that have been raised about gamblers going in and taking their haul out of the rental fee, I want to say this: Under this amendment these machines have to be owned by the enlisted men's club, the noncom clubs, and the officers' clubs before they would be permissible. Then they are only used for amusement purposes and to equip the club where they, the enlisted men and officers, spend their spare time. I am just as opposed to gambling as anyone, but if a soldier can get his mind off of the horrors of war and still have what little money he may lose used for his own enjoyment to equip the club, the matter is somewhat reconciled.

96 Cong. Rec. 13651 (1950). Opposition to this amendment was successfully led by Representative Christopher, who argued as follows immediately before the House voted the amendment down:

> We would be in a very indefensible position here if we were to say it is wrong to have a slot machine in a restaurant, it is wrong to have a slot machine in a hotel, it is wrong to have a slot machine even in a beer joint, but it is perfectly all right to have one in the PX or in the officers' club or where our boys meet together evenings. It is all right for them but it is wrong for everybody else. I could not face the mothers in my district if I supported such an amendment—absolutely I could not do it.

96 Cong. Rec. 13653 (1950).

Thus, the congressional debates on the application of § 1175 in these other contexts reveal that, although the predominant purpose of the Act may have been to assist in the enforcement of anti-slot machine laws of the states, Congress was disturbed by the use of slot machines in any area under its jurisdictional authority and intended to prohibit machines from all land over which the federal government exercised exclusive or concurrent jurisdiction, regardless of the effect on the operation of state laws. Accordingly, we believe that Congress intended, as the language of § 1175 indicates, to preclude the installation or use of slot machines on any land under exclusive United States jurisdiction, and that this prohibition extends to the U.S. Naval Base at Guantanamo Bay because of the lease terms which grant the United States "complete jurisdiction and control over" that property.[6]

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[6] In your request, you note that most other foreign military bases are not within the "exclusive or concurrent" jurisdiction of the United States, because, under the agreements between the host country and the United States for these bases, "our status is that of either lessee or licensee." Because we have not been asked about the use of slot machines on other bases, and because the slot machine prohibition is dependent upon the terms of these agreements with the host countries, we express no opinion as to whether the use or possession of slot machines would be prohibited.

Application for Approval of a Joint Operating Arrangement Under the Newspaper Preservation Act

The Attorney General is not required as a matter of law to disapprove an application for a joint operating arrangement under the Newspaper Preservation Act because the allegedly failing participant in the proposed arrangement has not been offered for sale, and no good faith efforts have been made to find a purchaser ready, willing, and able to operate it independently.

May 7, 1982

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In connection with your consideration of the application by the Seattle Times Company and the Hearst Corporation for approval of a Joint Newspaper Operating Arrangement pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801–04 (1976), you have requested that this Office advise you whether approval must, on a *per se* basis, be denied if the allegedly failing participant in the proposed arrangement has not been offered for sale or if good-faith efforts to find a purchaser ready, willing, and able to operate it independently have not been made. We conclude that no such *per se* rule pertains.

I. Background

On March 27, 1981, pursuant to the Newspaper Preservation Act (Act), 15 U.S.C. §§ 1801–04 (1976), the Seattle Times Company, as owner of the Seattle Times, and the Hearst Corporation, as owner of the Seattle Post-Intelligencer, (hereinafter Applicants) applied to the Attorney General for approval of a joint newspaper operating arrangement.[1] The Assistant Attorney General in charge of the Antitrust Division, acting under 28 C.F.R. § 48.7 (1980) and after a review of documents and information submitted in support of the Application, recommended that a hearing be held under 28 C.F.R. § 48.10 to resolve material issues of fact. Such a hearing was ordered. Attorney General Order No. 953–81, 46 Fed. Reg. 41230. Petitions for intervention were entertained and granted under

[1] The Act provides, *inter alia*, a limited antitrust exemption for such arrangements entered into subsequent to July 24, 1970, with the prior written consent of the Attorney General. 15 U.S.C. § 1803(b). Approval of the Attorney General is dependent upon his determination that "[n]ot more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper and that approval of such arrangement would effectuate the policy and purpose of [the Act]" *Id.* "Failing newspaper" is a defined term under the Act, 15 U.S.C. § 1802(5), and the Act contains a congressional declaration of policy. 15 U.S C. § 1801.

28 C.F.R. § 48.11, Attorney General Order No. 959–81, 46 Fed. Reg. 49228, and a hearing was held. The Administrative Law Judge who conducted the hearing has issued his Recommended Decision, including findings of fact and conclusions of law, pursuant to 28 C.F.R. § 48.10(d). Intervenors and the Antitrust Division (hereinafter Opponents) have filed exceptions to the Recommended Decision, and Applicants have filed a response. 28 C.F.R. § 48.10(e). The Application is now ripe for Attorney General consideration and decision under 28 C.F.R. § 48.14.

It is conceded that the Seattle Times is not a failing newspaper under the definition of the Act, 15 U.S.C. § 1802(5). Applicants contend that the Seattle Post-Intelligencer does fall within the statutory definition. The burden of proving this fact is on the Applicants. 28 C.F.R. § 48.10(4). The Administrative Law Judge concluded, as a matter of fact and law, that Applicants have satisfied this burden. Recommended Decision at 103. Opponents contend as a matter of law that, because Hearst has not offered the Post-Intelligencer for sale and has not made a good-faith effort to find a ready, willing, and able purchaser, Applicants have failed to carry their burden of demonstrating that the Seattle Post-Intelligencer is failing.

You have asked us to consider Opponents' position and advise you concerning it. Our analysis is set forth below.[2]

II. Analysis

The Opponents urge that the definition of "failing newspaper" under the Act contains a *per se* "salability" rule. This rule, they say, requires denial of an application for approval of a joint newspaper operating arrangement if the allegedly failing participant has not been offered for sale or if good-faith efforts have not been made to find a purchaser (other than a competing newspaper) ready, willing, and able to operate it independently. Based on findings 156–158 of the Administrative Law Judge, this rule, the Opponents contend, mandates denial of the present application.

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[2] We note that Opponents, particularly the Antitrust Division, urge, in addition, that the Administrative Law Judge committed an error of law in failing to admit and fully to consider their proffered evidence on incremental analysis. While we agree with your prior ruling, expressed in Attorney General Order No. 962–81 (unpublished) of November 9, 1981, that "the terms of the Newspaper Preservation Act certainly do not preclude all inquiry into financial relationships between parent corporations and their newspaper subsidiaries," we also agree with the conclusion of the Administrative Law Judge that the inclusion of the phrase "regardless of its ownership or affiliations" in the definition of "failing newspaper" precludes application of incremental analysis, as urged by Opponents, in making the determination whether a newspaper is "failing" under the Act. The legislative history of the Act makes clear that financial interrelationships may be investigated for the purposes of determining whether a parent corporation has "create[d] [a] 'failing newspaper' by artificial bookkeeping entries " S Rep No 535, 91st Cong., 1st. Sess. 5 (1969). However, the legislative history makes equally clear, *passim*, that, aside from the issue of creative bookkeeping, "whether a newspaper is failing should be determined on the basis of the operation in the particular city rather than on the basis of the sweep of the newspaper owner's business interests." *Id. See also, e.g.*, 116 Cong. Rec 23147 (question of Rep. Eckhardt and response by Rep. Kastenmeier); 116 Cong. Rec. 2006 (statement of Sen. Hruska) Incremental analysis, however packaged, would require investigation of the economic position of the Post-Intelligencer not as an independent entity but as a contributor to the overall Hearst corporate structure. Moreover, it would require that expenses of the Post-Intelligencer found legitimate by the Administrative Law Judge be disregarded and thus effectively absorbed by the remainder of the Hearst chain. This would be a form of subsidy and, as the legislative history makes clear, the Act is intended to eliminate any requirement that owners, particularly newspaper chains, subsidize their failing newspapers from external resources

It is clear that the rule urged by Opponents does not appear either in the plain language of the Act generally or in its definition of "failing newspaper" specifically. That definition states that

> The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

15 U.S.C. § 1802(5).

Nor does this rule appear in the regulations issued by the Attorney General to implement the Act. *See* 28 C.F.R. Part 48. Opponents contend, nevertheless, that the legislative history of the Act demonstrates that the rule urged was within the contemplation of Congress when the definition of "failing newspaper" was framed. This, however, does not seem to be the case. To the contrary, those references in the legislative history specific to a sales requirement indicate that Congress intended that the definition of "failing newspaper" would contain no such *per se* rule.

Examination of the legislative history[3] of the definition of "failing newspaper" must be approached with two considerations in mind. The first is that the definition underwent a metamorphosis during the legislative process; the second is that statements made concerning the characteristics of failing newspapers refer, alternately, depending on the context, either to such newspapers when considered under the "failing company" doctrine established by the Supreme Court in *International Shoe Co.* v. *FTC*, 280 U.S. 291 (1930), and applied to newspapers in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), or to such newspapers viewed under the less stringent definition to be enacted. Both of these considerations bear on Opponents' legislative history argument.

Opponents have pointed to a number of statements, made during hearings, made on the floor of the House and Senate, and contained in the committee

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[3] The legislative history of the Act is extensive. It consists of four sets of hearings, a House and a Senate report, and floor debates in both Houses. Although the two bodies initially passed varying versions of the Act, there is no conference report. The Senate adopted the House version without necessity for a conference. 116 Cong. Rec. 24435.

The first version of what eventually became the Act was S. 1312, 90th Cong., 1st Sess. (1967). Hearings were held on this bill, known as the Failing Newspaper Act, in July and August of 1967 and in February, March, and April of 1968. *See Hearings on S. 1312, the Failing Newspaper Act, Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary* (Parts 1–7), 90th Cong., 1st and 2d Sess. (1967–68) (hereinafter *Senate Hearings (90th)*). Although the bill was favorably reported by the subcommittee, it was not acted upon by the full Senate Judiciary Committee. The House also held hearings on a number of predecessors of the Act during the 90th Congress. *See Hearings on H.R. 19123 and Related Bills to Exempt from the Antitrust Laws Certain Joint Newspaper Operating Arrangements, Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968) (hereinafter House Hearings (90th)). H.R. 19123 was not reported, and the House did not act on it. During the 91st Congress, after the Supreme Court's decision in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), additional hearings were held in both the House and the Senate. *See Hearings on S. 1520, the Newspaper Preservation Act, Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) (hereinafter Senate Hearings (91st)) and *Hearings on H.R. 279 and Related Bills to Exempt from the Antitrust Laws Certain Joint Newspaper Operating Arrangements, Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) (hereinafter *House Hearings (91st)*). S. 1520, as amended, was reported favorably by the Senate Committee on the Judiciary in S. Rep. No. 535, 91st Cong., 1st Sess. (1969) (hereinafter *Senate Report*) as was H.R. 279, as amended, by the House Committee on the Judiciary in H.R. Rep. No. 1193, 91st Cong., 2d Sess. (1970) (hereinafter *House Report*).

reports[4] which suggest that Congress believed that one of the essential characteristics of a failing newspaper is that no one (except a competitor) wants to buy it. *E.g.*, 116 Cong. Rec. 1786 ("There is no market for independent ownership of a failing newspaper. . . .") (statement of Sen. Inouye). They argue from this that the willingness of "outsiders" to consider purchasing the Post-Intelligencer (Finding 157) is strong evidence that that newspaper is not "failing" within the congressional contemplation of the Act's definition. This argument, however, ignores the second consideration. When viewed in context, it is equally likely that the statements cited by Opponents refer to the unwillingness of outsiders to purchase newspapers that meet the Supreme Court's "failing company" test as it is that they refer to their unwillingness to purchase newspapers that might satisfy the Act's definition.[5] This ambiguity is in sharp contrast to those instances in the legislative history in which a requirement, under the proposed definition, to seek an alternate purchaser was discussed directly. In each such case the unequivocally expressed view was that no such requirement would exist.

In a letter addressed to Senator Eastland as Chairman of the Senate Committee on the Judiciary, which is included in the Senate Report, the Chairman of the Federal Trade Commission, an opponent of the Act, observed that under it "[N]ewspapers in economic distress may seek an exempt joint arrangement without search for an available purchaser who could truly continue an independent newspaper operation." Senate Report at 10. A similar objection was raised by Donald F. Turner, then Assistant Attorney General in charge of the Antitrust Division. It was his view that

> [A] more vital issue is at stake, and I stress this. Under present law, a company may not invoke the "failing company" defense if there are purchasers available who are not direct competitors . . . yet, this bill contains no such requirement.

Senate Hearings (Part 7) (90th) at 3110–11. His successor, Assistant Attorney General McLaren, evinced a similar concern. He believed that

> S. 1520 would establish a special definition for and a special failing company defense for newspapers. This definition falls short of the requirements adopted by the court in the Tucson newspaper case [*Citizen Publishing Co.* v. *United States, supra*]. There the court disallowed the failing company defense on the finding that the allegedly failing newspaper was "not on the verge of going out of business" and it had not been established that there were no alternative purchasers. Even assuming justification for preserving a failing newspaper through a price-fixing and profit-pooling arrangement, certainly this could not be justified . . . if there were a purchaser available who would continue independent operations.

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[4] *See* Intervenor's Exceptions at 6–7, Antitrust Division's Exceptions at 12–13

[5] *E.g.*, Senate Report at 4.

Senate Hearings (91st) at 296–97. Mr. McLaren expressed the same concern in the House hearings. *House Hearings* (91st) at 360. Nongovernment opponents of the Act held similar views. *E.g., House Hearings* (91st) at 419 ("H.R. 279, however, contains no requirement that an allegedly failing newspaper must seek a purchaser other than a competitor") (statement of Thomas E. Harris, Associate General Counsel, AFL–CIO). Nor were opponents of the Act the only ones to make these observations. Arthur B. Hanson, General Counsel, American Newspaper Publisher Association, a principal architect of and lobbyist for S. 1312, described that bill's intended effect on the alternate purchaser requirement as follows:

> In merger cases under section 7 of the Clayton Act, some courts have added to the requirement of proof of a "failing company" evidence of the absence of a purchaser alternative to the one seeking to acquire the stock or assets of the failing company. This limitation is not applicable to S. 1312 . . . any other newspaper would be free to become a party to the joint arrangement or to acquire ownership of the failing newspaper. . . . Under the bill there would be no obligation on the part of the failing newspaper to accept an offer from a source other than a competitor.

Senate Hearings (90th) at 58.[6]

An additional and persuasive indication that Congress did not believe that the Act's definition of "failing newspaper" would contain the *per se* rule advanced by Opponents is that Senator Brooke found it necessary to propose virtually the identical rule as an amendment to S. 1520. His amendment would, *inter alia,* have imposed, as a prerequisite to qualification as a failing newspaper, the requirement that "active efforts made in good faith by the managers thereof to obtain a purchaser of such newspaper publication who is willing and able to continue it in operations as a separate and independent newspaper publication have been unsuccessful." 115 Cong. Rec. 10625.[7] It seems unlikely that Senator Brooke would have offered such an amendment had there been general consensus that such a requirement was already contained in the definition of "failing newspaper." Indeed, the Brooke amendment was considered to so have the potential to work such a change that even after it had been withdrawn it was opposed as "most objectionable" by one of the principal lobbyists in favor of the Act. *Senate Hearings* (91st) at 321 (Statement of Mr. Levin).

The legislative history detailed above admittedly pertains to definitions of "failing newspaper" different from that which was finally enacted. As Opponents point out, modifications to the definition made by the House Judiciary Committee were intended to make it more stringent than the definition as

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[6] S 1312, the predecessor of S. 1520, the Senate version of the Act, *see* note 3, *supra,* would have provided an antitrust exemption for mergers involving failing newspapers as well as for joint newspaper operating arrangements. S 1312, 90th Cong , 1st Sess. §§ 3(2) and (3), 4.

[7] A similar proposal had been put forward by a representative of the American Newspaper Guild early in the Senate hearings *Senate Hearings* (90th) (Part 1) at 219 (Statement of Mr Farson)

originally proposed and as passed by the Senate.[8] 116 Cong. Rec. 23154–55 (Statement of Rep. Railsback). In view of this, it could be argued that the final, more stringent definition incorporated the *per se* rule advanced by Opponents, even though the statements cited above indicate that the earlier versions under consideration would not have. We regard this as a dubious conclusion. In our view, it is not supported by anything specific in the legislative history, and it seems unlikely that such a sweeping (but specific) change of intent would have incorporated *sub silencio*. This is particularly so since the Act, as a whole, as is recognized by Opponents, was clearly intended to ameliorate, both as to existing and future joint newspaper operating arrangements, the Supreme Court's decision in *Citizen Publishing Co.* v. *United States, supra,* that the traditional "failing company" doctrine applied in full force to such arrangements. One of the major features of that doctrine found objectionable by the proponents of the Act when applied to joint newspaper operating agreements was its strict "alternate purchaser" requirement. We doubt that Congress would have intended to impose any new *per se* requirement in this regard, even a less stringent one, without saying so.

Opponents argue that certain statements made in the Senate Report and during the House and Senate debates relating the language "in probable danger of financial failure" (contained in the final definition of "failing newspaper") to the Bank Merger Act of 1966, 12 U.S.C. § 1828 (c) (1976) and to the case of *United States* v. *Third National Bank,* 390 U.S. 171 (1968), interpreting that Act, are specific indicators of a congressional intent to incorporate their *per se* rule into the final definition. We do not agree. First, as the Administrative Law Judge points out (Recommended Decision at 91), the House Report contains no reference to either the Bank Merger Act of 1966 or to the *Third National Bank* case.[9] This is significant because the House Judiciary Committee was the source of the final version of the definition. More important than this omission, however, is the inevitable conclusion to be drawn from a full tracing of the references in the legislative history to the Bank Merger Act of 1966 and to the *Third National Bank* decision.

Reference was first made to the Bank Merger Act of 1966 and to the *Third National Bank* case *before* the phrase "in probable danger of financial failure" was added to the definition of "failing newspaper."[10] *House Hearings* (90th) at

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[8] In S. 1312 and H R. 19123, *see* note 3 *supra,* and in S 1520 and H R. 279, as originally introduced, the definition of "failing newspaper" read "the term 'failing newspaper' means a newspaper publication which, regardless of its ownership or affiliations, appears unlikely to remain or become a financially sound publication." The Senate subcommittee considering S 1520 amended the definition by adding in the disjunctive the phrase "is in probable danger of financial failure or" before "appears unlikely to . . . " *Senate Hearings* (91st) at 7 In the House Judiciary Committee, the phrase "appears unlikely to remain or become a financially sound publication" was deleted from the definition. 116 Cong. Rec. 23154–55 (Statement of Rep Railsback) That standard, considered to be more lenient, was, however, retained with respect to judging joint newspaper operating arrangements already in effect. 15 U S.C. § 1803(a); *House Report* at 10. As a result, the Act's definition of "failing newspaper" is relevant only in the case of joint newspaper operating arrangements entered into after July 25, 1970, which require Attorney General approval *Compare* 15 U S.C § 1803(a) *with* 15 U.S.C § 1803(b).

[9] The Administrative Law Judge is also correct in his observation that the Bank Merger Act of 1966 does not, itself, contain the quoted phrase or an approximation of it.

[10] *See* fn 8, *supra,* for a discussion of the development of the definition of "failing newspaper"

74. More extensive references to that Act and that case were made after the definition had been modified in the Senate subcommittee to include the phrase "in probable danger of financial failure" in the disjunctive along with the phrase "appears unlikely to remain or become a financially sound publication." Significantly, most references to the Bank Merger Act of 1966 and to the *Third National Bank* case were made while the proposed legislation contained both the "in probable danger" and the "unlikely to remain or become" language. In most of these references each phrase, not simply "in probable danger of financial failure," is tied to the Bank Merger Act of 1966 and the *Third National Bank* case. *E.g.*, *Senate Hearings* (91st) at 7–8, 319; *House Hearings* (91st) at 13, 96.

It seems clear from the legislative history (apart from the references to the Bank Merger Act of 1966 and the *Third National Bank* case) outlined above that the unanimous interpretation of the definition of "failing newspaper," while it contained only the phrase "appears unlikely to remain or become a financially sound publication" (and while parallels were already being drawn between that definition and that act and case), was that it did not include the *per se* rule argued for by Opponents. By introducing the phrase "in probable danger of financial failure" in the disjunctive and relating both it *and* the phrase "appears unlikely to remain or become a financially sound publication" to the Bank Merger Act of 1966 and the *Third National Bank* case, the Senate subcommittee intended "to broaden the scope of the definition and not to narrow it." *Senate Hearings* (91st) at 8. Given this progression and these understandings, it hardly seems likely that references to the Bank Merger Act of 1966 and to the *Third National Bank* case were intended to serve to incorporate a *per se* rule concerning salability derived from either into the language "in probable danger of financial failure." Rather, it is our view that, taken as a whole, the references in the legislative history to the Bank Merger Act of 1966 and the Supreme Court's interpretation of it in *Third National Bank* indicate a general rather than a specific congressional intent. This is that the loss of newspapers (like the loss of banks) is of such serious detriment to the public that the risks entailed in applying the normal "failing company" doctrine to them cannot be tolerated. *See United States* v. *Third National Bank*, 390 U.S. at 187.

Even if Congress had intended to import the entire holding of *Third National Bank* into the Act's definition of "failing newspaper," Opponents' position could not be sustained on a *per se* basis. In *Third National Bank* the Supreme Court required the investigation of the possibility of a sale as one means of establishing the "unavailability of alternate solutions to the [management] woes of the Nashville Bank and Trust Co." *United States* v. *Third National Bank*, 390 U.S. at 190–191. It went on to hold that

> The burden of showing that an anticompetitive bank merger would be in the public interest because of the benefits it would bring to the convenience and needs of the community to be served rests on the merging banks. *Houston Bank*, *supra*. A showing that one bank needed more lively and efficient management, absent a

> showing that the alternative means for securing such management without a merger would present unusually severe difficulties, cannot be considered to satisfy that burden.

Id. at 192. Thus it would appear that the requirements of the *Third National Bank* case, as applied to an allegedly failing newspaper, could be satisfied by proof that the introduction of new management (whether or not under a new owner) would not improve the situation. The Administrative Law Judge seems to have made such a finding (Finding 109).[11]

Conclusion

The legislative history of the Act does not support the proposition that Congress intended that the definition of "failing newspaper" contain a *per se* rule requiring that before a newspaper may qualify as such it must have been offered for sale and good-faith efforts must have been made to find a purchaser ready, willing, and able to operate it as an independent publication.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[11] We note that Intervenors have disputed this finding Intervenors' Exceptions at 12 *et seq.* Another of the Administrative Law Judge's conclusions (Finding 158) ("The Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.") can be read as inconsistent with it. The factual issue will have to be resolved on the basis of the entire record before the Attorney General 28 C FR. § 48.14(a).*

*NOTE: The Attorney General approved the joint operating arrangement on June 15, 1982. In subsequent litigation challenging it, the district court held that alternatives to a joint operating arrangement were relevant to a determination whether a newspaper qualifies for an antitrust exemption under the Newspaper Preservation Act, and that such alternatives had not been adequately explored by the parties to the agreement in this case. 549 F. Supp. 985 (W D Wash. 1982) The court of appeals agreed as to the legal standard, but reversed on the merits, holding that the Times Company and Hearst had sufficiently negated the possibility that any such alternatives were available. 704 F.2d 467 (9th Cir. 1983) The Supreme Court denied certiorari on October 11, 1983. 464 U S 892 (1983). Ed.

Exchange Authority for Kaloko Honokohau National Historical Park

The Department of the Interior is authorized to acquire privately held land for the Kaloko Honokohau National Historical Park by exchanging it for surplus federal land of equivalent value within the State of Hawaii. Its exchange authority does not, however, extend to excess as well as surplus federal land, nor to land outside the State of Hawaii.

The power to dispose of property of the United States is committed under the Constitution to Congress, and the Executive's disposition of federal land in any particular case must be undertaken in accordance with whatever rules Congress has established for this purpose. In this case, the Department of the Interior's specific exchange authority in connection with the Park is presumptively limited by the otherwise applicable general legal restrictions on federal land exchange transactions.

May 20, 1982

MEMORANDUM OPINION FOR THE
UNDERSECRETARY OF THE INTERIOR

This responds to your request for the Department's legal opinion on two issues relating to your authority to acquire land for the Kaloko Honokohau National Historical Park in Hawaii. Both issues involve Interior's authority under the 1980 provision in its appropriations act to acquire what is now privately owned land by exchanging it for federal land of equivalent value. The first question is whether both "surplus" and "excess" federal real properties are available for such an exchange under the 1980 law. The second question is whether federal land in other states may be exchanged for the privately held Hawaiian land in question.

The General Services Administration (GSA), in an opinion of its General Counsel dated August 25, 1981, takes the position that only intrastate exchanges of surplus real property are authorized. The Assistant Solicitor of the Interior and counsel for the private property owners disagree, taking the position that the 1980 law authorizes interstate exchanges of both surplus and excess property.[1] For reasons stated below, we believe that the result reached by the GSA is correct,

[1] *See* Aug. 14, 1981, Memorandum to the Assistant Secretary for Fish and Wildlife and Parks, and the letter of Sept. 14, 1981, from Carla A Hills to Stephen Thayer, Assistant to the Administrator of GSA The legal opinions cited are confined to the issue raised by the proposed exchange of land in different states, and do not discuss the question whether both "surplus" and "excess" property may be exchanged. We gather that disagreement with respect to the latter question arose sometime after these opinions were written, and we have not been made aware of the arguments advanced in support of either position

and that the only land authorized for exchange by the 1980 law is federal surplus land within the State of Hawaii.

I. Legislative Background

The Kaloko Honokohau National Historical Park was established by the National Parks and Recreation Act of 1978 (1978 Act), Pub. L. No. 95–625, 92 Stat. 3499, "to provide a center for the preservation, interpretation, and perpetuation of traditional native Hawaiian activities and culture . . . ." *See* § 505(a) of the 1978 Act, 16 U.S.C. § 396d(a) (Supp. II 1978). Authority to acquire land for the Park was given to the Secretary of the Interior in § 505(b) of the 1978 Act:

> Except for any lands owned by the State of Hawaii or its subdivisions, which may be acquired only by donation, the Secretary is authorized to acquire the lands described above by donation, exchange, or purchase through the use of donated or appropriated funds, notwithstanding any prior restriction of law.

16 U.S.C. § 396d(b) (Supp. II 1978).

Since the Park's establishment, Congress has failed to appropriate any funds to acquire privately held land for the Park. Nor, apparently, has it been possible otherwise to acquire the particular property in question.

In 1980, additional legislation was passed to augment the Secretary's authority to acquire land under the 1978 Act. This legislation, enacted as a floor amendment to your Department's appropriation act for fiscal 1981, Pub. L. No. 96–514, 94 Stat. 2960, reads in its entirety as follows:

> Notwithstanding any other provision of law, the Secretary is authorized and shall seek to acquire the lands described in Section 505(a) of the Act of November 10, 1978 (92 Stat. 3467) by first acquiring Federal surplus lands of equivalent value from the General Services Administration and then exchanging such surplus lands for the lands described in Section 505(a) of that Act with the land owners. Exchanges shall be on the basis of equal value, and any party to the exchange may pay or accept cash in order to equalize the value of the property exchanged.

II. Whether Excess Property as Well as Surplus Property Is Available for Exchange

With respect to your first question, we find no support in the terms of the 1980 appropriation act or its legislative history for an argument that "excess" as well as "surplus" real property should be available for an exchange transaction. By its terms, the 1980 provision refers only to "federal surplus lands" held by the General Services Administration. Under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471–514, the law pursuant to which the

GSA holds and administers federal property, the terms "surplus" and "excess" denote two quite distinct categories of property.[2] Property determined by one agency to be in "excess" of its needs can be sold or otherwise disposed of outside the federal government as "surplus" only when and if the Administrator of General Services determines that no other executive agency needs it. *See* 40 U.S.C. § 483(a)(1) and 41 C.F.R. § 101–47.201–1.

When the 1980 legislation speaks of the acquisition of "surplus" property from the GSA, we believe it reasonable to assume that Congress intended that term to have its ordinary meaning under the Property Act. *See* 2A Sutherland Statutes and Statutory Construction § 47.27 (4th ed. 1973). *See also Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (two statutes dealing with the same subject must be read to give effect to each other if possible "while preserving their sense and purpose"). This assumption is confirmed by the legislative history of the 1980 provision. In explaining the legislation he had introduced, Senator Hatfield stated that "[a]ll this does is to give, in effect, authorization to the GSA and the Forest Service [sic] under existing rules, regulations, and laws" to attempt to acquire the private property through an exchange transaction. 126 Cong. Rec. 29665 (1980).[3]

III. Whether Interstate Land Exchanges Are Authorized by the 1980 Provision

As a general matter, the power to dispose of property of the United States is committed to Congress by Article IV, section 3, clause 2 of the Constitution. This power of Congress is "exclusive," and "only through its exercise in some form can rights in lands belonging to the United States be acquired." *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 404–05 (1917). It follows that Congress may "prescribe the conditions upon which others may obtain rights in them." *Id.* at 505. Accordingly, the Secretary's authority under both the 1978 and 1980 statutes to dispose of federal lands by exchanging them for privately owned lands for the Park must be exercised in accordance with whatever particular rules Congress has established. One set of rules applicable generally to land exchange transactions in the National Park System is set forth in 16 U.S.C. § 460*l*–22(b):

> The Secretary of the Interior is authorized to accept title to any non-Federal property or interest therein within a unit of the National Park System or miscellaneous area under his administration, and in exchange therefor he may convey to the grantor of

[2] "Excess property" is defined in § 3(e) of the Property Act as "any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof." 40 U S C. § 472(e) "Surplus property" is defined in § 3(g) as "any excess property not required for the needs and the discharge of the responsibilities of *all* Federal agencies, as determined by the Administrator [of General Services]." 40 U S C § 472(g) (emphasis added).

[3] When Congress has made an exception to general practice under the Property Act with respect to the administration and disposition of excess property, it has been explicit *See, e g* , 40 U S.C. § 483(a)(2) (GSA must transfer to the Secretary of the Interior any excess real property located within an Indian reservation, to be held in trust for the use and benefit of the tribe, without regard to whether any other Federal agency needs or wants to acquire it for its own use).

> such property or interest any Federally owned property or interest therein under his jurisdiction which he determines is suitable for exchange or other disposal *and which is located in the same State as the non-Federal property to be acquired* . . . . The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal, the values shall be equalized by the payment of cash to the grantor from funds appropriated for the acquisition of land for the area, or to the Secretary as the circumstances require. (Emphasis supplied.)

Section 460*l*–22(b) was enacted as § 5(b) of the Land and Water Conservation Fund Amendments of 1968, Pub. L. No. 90–401, 82 Stat. 356. By its terms, it applies to all land exchange transactions in "the National Park System or miscellaneous area[s] under [the Secretary's] jurisdiction." Its legislative history indicates that Congress intended to impose "consistent" limiting conditions on the Secretary's authority to acquire private land for national parks by exchange, confining the land available for such exchanges to "federally owned tracts under the jurisdiction of the Department of the Interior in the same State, or States, as the national park unit." S. Rep. No. 1071, 90th Cong., 2d Sess. 8–9 (1968). In 1970 the general applicability of § 460*l*–22(b) to all land exchange transactions in the National Park System (unless "in conflict with any . . . specific provision") was affirmed by § 2(b) of Pub. L. No. 91–383, 84 Stat. 826, codified at 16 U.S.C. § 1c(b). *See* H.R. Rep. No. 1265, 91st Cong., 2d Sess. 8 (1970) (letter from Secretary of the Interior Hickel).[4]

Your Department does not contend, nor do we think it reasonably could, that the general limitations on the Secretary's land exchange authority contained in § 460*l*–22(b) are not applicable to exchanges under § 505(b) of the 1978 Act. We agree, then, that under the 1978 Act standing alone the Secretary would have been authorized to acquire privately owned land for the Park by exchange only when the federal property to be exchanged is (1) "under his jurisdiction" and (2) "located in the same State as the non-Federal property to be acquired." The question thus arises whether the 1980 enactment modified the Secretary's exchange authority under the 1978 Act.

Your Department interprets the 1980 enactment to authorize the Secretary to acquire from GSA federally owned land in other states in order to exchange it for the privately owned land in Hawaii. That is, you believe the 1980 provision carves out an exception to the intrastate restriction which otherwise governs all land exchanges transactions in the national park system. Your position in this regard appears to be based on a broad reading of the 1980 provision's

[4] When Congress has made an exception to the intrastate restriction of § 460*l*–22(b), it has been quite specific *See, e.g.*, 16 U S.C § 459*c*–2(c) (Secretary may acquire land for Point Reyes National Seashore by exchanging property under his jurisdiction "within California and adjacent States"); 16 U.S C. § 459*f*–1(b) (Assateague National Seashore; land in Maryland or Virginia may be exchanged); 16 U.S C. § 460*o*–1(a) (Delaware Water Gap National Recreation Area; only land in Pennsylvania, New Jersey or New York may be exchanged), 16 U.S.C. § 460*l*–1(a) (Bighorn Canyon National Recreation Area; land in Montana or Wyoming may be exchanged); 16 U.S.C § 460*u*–1(a) (Indiana Dunes National Seashore, land in Indiana or Illinois may be exchanged)

introductory phrase, "[n]otwithstanding any other provision of law." *See* Assistant Solicitor Watts' memorandum of Aug. 14, 1981. We cannot agree that the phrase accomplishes so much.

At the outset, it is not clear from the text of the 1980 provision whether the introductory "notwithstanding" phrase modifies the specific directive in this provision to acquire surplus land from GSA for the purpose of exchange, or whether it modifies the Secretary's statutory exchange authority itself. If the former reading were correct, the phrase would not supersede more generally applicable legal conditions governing an exchange transaction, such as § 460*l*–22(b). If the latter reading were correct, then the introductory phrase would have to be read to repeal *every* statutory restriction on or regulation of the Secretary's power to acquire the land in question. *See, e.g.*, 40 U.S.C. § 255 or 42 U.S.C. § 4651. This latter reading would, in rendering all such restrictions and regulations legally ineffective, repeal by implication all such restrictions and regulations.

Repeals by implication are not favored, *see Watt* v. *Alaska, supra*, 451 U.S. at 267. We would be, therefore, reluctant to give such a broad reach to this ambiguous provision in the 1980 enactment without clearer textual expression of legislative intent. *See also TVA* v. *Hill*, 437 U.S. 153, 189–90 (1978) (exceptions to a generally applicable statute will not be implied from subsequent legislation, particularly where the subsequent legislation is an appropriations act). In addition, as pointed out in notes 3 and 4 *supra*, this particular problem of statutory construction arises in a context in which Congress has historically legislated with care and specificity when authorizing exceptions to the general congressionally established rules governing acquisition and disposal of property by the Executive. Accordingly, we would normally give the "notwithstanding" phrase the narrower of the two readings absent other persuasive evidence of congressional intent to the contrary.

The brief legislative history of the 1980 law, found at 126 Cong. Rec. 29665 (1980), confirms, rather than contradicts, our reading of the 1980 enactment. Senator Hatfield described the difficulty created by Congress' failure to appropriate funds to purchase the privately held Hawaiian land for the Park, and explained his proposed legislative solution in the following terms:

> Mr. President, this is one of those very interesting situations where we are trying to correct an inequity that exists at this time. The Congress of the United States authorized the establishment of a park in Hawaii and this park was to be developed out of a large parcel of private ownership. The only problem is that the Government has not had the appropriations to make this purchase, and it has now been appraised at about $60 million.
>
> The owners of this property are people of modest income, of increasing age. In fact, I believe the owner is now near 70.
>
> They realize that, for the first time, if they should die their heirs would be thrust into a very untenable position of having to pay

> inheritance tax on estate ownership, including this $60 million appraised value land.
>
> They have asked for relief in this situation. The GSA and the Forest Service [sic] have agreed that there is land in Hawaii that they could easily exchange and thereby create a fluid landholding as against this one buyer market situation they face.
>
> All this does is to give, in effect, authorization to the GSA and the Forest Service [sic] under existing rules, regulations, and laws to proceed to redress this particular hardship that has been placed upon these innocent people.

This passage reveals no intention to remove the otherwise applicable intrastate restriction of 16 U.S.C. § 460*l*–22(b). Indeed, Senator Hatfield seems to have assumed that the transaction to be facilitated by his legislation would involve only federal surplus land located in Hawaii ("The GSA and the Forest Service [sic] have agreed that there is land in Hawaii that they could easily exchange. . . ."). This, coupled with his final reference to "existing rules, regulations, and laws" which we have already quoted above, convinces us that the 1980 legislation was not intended to carve out an exception to § 460*l*–22(b) so as to permit intrastate land exchanges.

The most plausible explanation for the introductory "notwithstanding" phrase is found in what has been described to us by the Assistant Solicitor as the GSA's pre-1980 reluctance to make available surplus property for the purposes of exchange except in accordance with the strict conditions imposed by its own regulations.[5] The 1980 legislation was, we conclude, intended to encourage the GSA to make available surplus property for the exchange by providing the specific legal authority which the GSA apparently felt was insufficient under the 1978 law. It was not, however, intended to remove legal restrictions which would otherwise be applicable to the exchange itself.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[5] *See* 41 C.F.R. § 101–47 301–1(c) ("surplus real property shall be disposed of by exchange for privately owned property only for property management considerations such as boundary realignment or provision of access or in those situations in which the acquisition is authorized by law, the requesting Federal agency has received approval from the Office of Management and Budget and clearance from its congressional oversight committees to acquire by exchange, and the transaction offers substantial economic or unique program advantages not otherwise obtainable by any other method of acquisition.").

Delegation of Cabinet Members' Functions as Ex Officio Members of the Board of Directors of the Solar Energy and Energy Conservation Bank

Under settled principles of administrative law, Cabinet members serving as *ex officio* members of the Board of Directors of the Solar Energy and Energy Conservation Bank may delegate their directorial functions to subordinates, even though the legislation establishing the Bank does not expressly authorize such delegation.

May 21, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

This responds to your request for our opinion whether *ex officio* members of the Board of Directors of the Solar Energy and Energy Conservation Bank (Bank) are authorized to delegate their functions to Substitute Directors, or whether actions taken by such Substitute Directors pursuant to this delegation are invalid absent subsequent ratification by the statutorily named Directors. For the reasons stated below, we believe that the *ex officio* members may delegate their functions and, accordingly, that the actions taken by their duly appointed delegees are valid.

The Bank was created by Title V of the Energy Security Act of 1980, Pub. L. No. 96–294, 94 Stat. 611, 719, 12 U.S.C. § 3601 (Act) to provide financial encouragement for the installation and use of energy conservation devices and solar energy systems. *See* 12 U.S.C. § 3601 (Supp. V 1981) and H.R. Rep. No. 1104, 98th Cong., 2d Sess. 278–291 (1980) (Conference Report). Established "in the Department of Housing and Urban Development," the Bank has "the same powers as those powers given to the Government National Mortgage Association by [12 U.S.C. § 1723a(a)]." 12 U.S.C. § 3603(a).[1] The General Accounting Office is responsible for auditing the financial transactions of the Bank. 12 U.S.C. § 3603(b).

The Bank is governed by a Board consisting of five *ex officio* Directors: the Secretaries of Housing and Urban Development, Energy, Treasury, Agriculture, and Commerce. The Secretary of HUD chairs the Board, and three Board

[1] These powers include the power to enter into and perform contracts with federal and state agencies and private persons; to sue and be sued "in its corporate name"; to lease, purchase and dispose of property; to conduct its business "without regard to any qualification or similar statute" in any state, and to prescribe rules and regulations for the conduct of its business. 12 U.S.C. § 1723a(a)

members constitute a quorum. *See* 12 U.S.C. § 3604(a), (b) and (c). The President of the Bank is a presidential appointee and serves as Secretary of the Board. *See* 12 U.S.C. §§ 3604(a) and 3605(a). The Board is responsible for establishing the policy and carrying out the functions of the Bank, and it is authorized and directed to issue such regulations as it deems necessary to this end. 12 U.S.C. §§ 3603(e) and 3618. Among other things, the Board is directed to determine levels of financial assistance for various energy projects, 12 U.S.C. § 3608, designate financial institutions for participation in the Bank's programs, 12 U.S.C. § 3611, and establish criteria for approving eligible solar technology and conservation measures. 12 U.S.C. §§ 3612 and 3613. In addition, the Board appoints members of the Bank's two advisory committees and directs the President and other Bank officers in the management of the Bank's affairs. 12 U.S.C. § 3605(c).

In September of 1980 the Board of Directors of the Bank met and adopted by-laws, including a provision permitting the designation of "Substitute Directors" by each of the statutorily named Directors. *See* 24 C.F.R. § 1895.1 (1980) (Section 3.02). Each Substitute Director is to be designated "under the established delegation provisions" of the particular Cabinet agency involved, except that each must occupy a position at least equivalent to that of Assistant Secretary. In the absence of the designating Director, the Substitute Director "will be deemed to be a member of the Board and will have all the powers and duties of the designating Director." We understand from your request that, pursuant to this by-law provision and the applicable delegation authorities of the five Cabinet agencies,[2] Substitute Directors were named, have met on several occasions to conduct the statutory business of the Bank, and have taken a number of actions in the name of the Bank that have not been adopted or confirmed by the statutorily named Directors. The question you have asked us to address is whether the *ex officio* members were authorized to delegate their directorial functions and, accordingly, whether these actions by the Substitute Directors are valid.

The terms of the Act do not provide for delegation of the directorial functions of the *ex officio* Board members. It is clear, however, as a "general proposition" of administrative law, that "merely vesting a duty in [a Cabinet officer] . . . evinces no intention whatsoever to preclude delegation to other officers in the [Cabinet officer's agency] . . . ." *United States* v. *Giordano*, 416 U.S. 505, 513 (1974).[3] *See also* 1 Davis, Administrative Law Treatise, § 3:17 (2d ed. 1978);

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[2] *See* 42 U.S.C § 3535(d) (Supp. V 1981) (HUD); 42 U.S C. § 7252 (Supp V 1981) (Energy); 31 U.S.C. § 1007 (1976) (Treasury); Section 4 of Reorganization Plan No. 2 of 1953, 67 Stat. 633 (Agriculture), Section 2 of Reorganization Plan No. 5 of 1950, 64 Stat 1263 (Commerce) The HUD delegation provision is typically worded.

> The Secretary may delegate any of his functions, powers, and duties to such officers and employees of the Department as he may designate, may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers, and duties.

42 U.S.C. § 3535(d) (Supp. V 1981)

[3] *Giordano* involved a statutory provision that vested the authority to approve wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 in "the Attorney General or any Assistant Attorney General specially designated by the Attorney General." 416 U S at 514. The government argued that delegation to the Attorney General's Executive Assistant was permissible under the Department of Justice's general delegation

FTC v. *Gibson*, 460 F.2d 605 (5th Cir. 1972) (FTC may delegate to field officer power to issue subpoena); *Wirtz* v. *Atlantic States Construction Co.*, 357 F.2d 442 (5th Cir. 1966) (Secretary of Labor may delegate to regional attorneys authority to institute suit under the Fair Labor Standards Act of 1938). To be sure, the legality of a particular administrative delegation is primarily a function of legislative intent. *See, e.g.*, *Hall* v. *Marshall*, 476 F. Supp. 262, 272 (E.D. Penn. 1979). Nevertheless, as summarized in Sutherland's treatise on statutory construction,

> Where the statute is silent on the question of redelegation and the delegation was to a single executive head, it is almost universally held that the legislature, understanding the impossibility of personal performance, impliedly authorized the delegation of authority to subordinates.

1 C. Sands, Sutherland Statutory Construction, § 4.14 (4th ed. 1972).

The practical necessities underlying this administrative law principle are equally applicable where *ex officio* functions are involved. Indeed, they may be especially applicable. It can be fairly assumed that when Congress selects particular government officials for *ex officio* service, it is because their official duties bear a reasonable relationship to the functions of the body to which they are attached *ex officio*. In so designating political officials who serve individually only for the length of time they remain in their official posts, Congress expects both to take advantage of their agency's specialized knowledge and experience, and to ensure its continuous availability. It is reasonable to conclude in these circumstances that Congress expects the agency head to operate as he would normally in running his agency, and thus to conform to the accepted administrative practice of delegating authority to subordinates for the performance of many of his official duties. An opposite conclusion would often lead to frustration of the legislation establishing the body in question, as well perhaps as other laws, since a rigid requirement that a Cabinet member give his personal attention to every one of his many official functions would be impossible of fulfillment.[4]

In this case, nothing in the legislative history of the Bank's organic act suggests that Congress intended to depart from settled administrative law practice with

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statute, 28 U S.C § 510 The Court disagreed. While finding no "precise language forbidding delegation," the Court held that the 1968 statute, "fairly read, was intended to limit the power to the Attorney General himself and to any Assistant Attorney General he might designate." *Id* The Court's opinion includes an extensive discussion of the 1968 statute's legislative history, in which it notes in particular Congress' concern that the individual responsible for authorizing wiretaps be responsive to the political process In reaching this conclusion, however, the Court noted, as a general "unexceptionable" proposition, that functions vested in the Attorney General may be delegated unless the matter of delegation has been otherwise "expressly addressed" *Id.*

[4] Congress has sometimes made specific provision for the delegation of *ex officio* functions of Cabinet members and other high government officials serving on boards and advisory groups *See, e.g.*, 40 U S C. § 872 (*ex officio* members of Pennsylvania Avenue Redevelopment Corporation Board of Directors may designate alternates); 45 U S C § 711 (same, United States Railway Association); 16 U.S C § 468 (same, National Trust for Historic Preservation). But for every express provision permitting delegation of directorial functions in statutes creating government corporations, there are several whose boards include Cabinet members serving *ex officio* which contain no express delegation provisions. *See, e g.*, 15 U.S.C. § 714g(a) (Commodity Credit Corporation), 16 U.S.C. § 19(f) (National Park Foundation); 45 U.S.C. § 543(a) (National Railroad Passenger Corporation), 42 U S C. § 8103 (Neighborhood Reinvestment Corporation), 29 U S C. § 1302(c) (Pension Benefit Guaranty Corporation)

respect to the delegation of *ex officio* board members' authority. Indeed the statutory scheme lends support to the presumption favoring delegation. As in most instances where Congress selects particular government officials for *ex officio* service, the choice of the five Cabinet members in this case was based not on individual personal attributes, but on the contribution Congress believed each one's agency could make to the Bank's operations. *See, e.g.*, Conference Report at 278 ("The Conferees expect the Board will rely on DOE and HUD to determine the reliability, safety, and performance of such new energy conserving improvements. . . ."). We think it reasonable to conclude, therefore, that the general delegation authority available to each of these five Cabinet members is sufficient to accomplish the delegation of functions provided in the Board's by-Laws.[5]

The district court for the District of Columbia has sustained a delegation of *ex officio* authority in a case similar to this one. In *D.C. Federation of Civil Associations* v. *Airis*, 275 F. Supp. 533 (D.D.C. 1967), the court held that *ex officio* members of the National Capital Planning Commission properly appointed alternates to vote and otherwise act in their behalf, in spite of the absence of any specific statutory authorization for the delegation.[6] In so holding, it noted that

> obviously, the *ex officio* members of the Commission are not expected to and cannot devote their entire time to its work. On the contrary, their services as members of the Commission are only one feature of their numerous activities. It has become the usage for the *ex officio* members to appoint alternates to act in their behalf.

275 F. Supp. at 539.

The general rule of private corporate law prohibiting delegation of a Director's voting authority has no relevance in this context. Even if the Bank more closely resembled a private corporation in its structure and functions,[7] the law applicable to it would remain that contained in its own organic statute and in general principles of administrative and constitutional law applicable to similar government entities. *See Rainwater* v. *United States*, 356 U.S. 590 (1958). *See also D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring). Like the Commodity Credit Corporation, whose status under the False Claims Act was at issue in the *Rainwater* case, the Bank is "simply an administrative device established by Congress for the purpose of carrying out [energy] programs with public funds." 356 U.S. at 592. Unlike the Commodity Credit Corporation, it does not even have "a corporate name . . . to distinguish it

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[5] Indeed, this delegation probably would be permissible even without the formal adoption by the Board of the "Substitute Director" by-law

[6] The court did not say whether any of the statutorily appointed officials involved—who included the Chief of Engineers of the Army, the Director of the National Park Service, the Federal Highway Administrator, and the Chairmen of the House and Senate District Committees—were otherwise authorized by law to delegate their functions, as are the Cabinet members in this case. *See* note 2, *supra*.

[7] While the Bank's authorities are described in the legislative history as "corporate powers," it is not subject to the Government Corporation Control Act, 31 U.S.C §§ 841–870 (Supp. V 1981). *See* list of wholly owned government corporations in 31 U S.C § 846 (Supp. V 1981), and of mixed-ownership corporations in 31 U S.C § 856 (Supp. V 1981).

from the ordinary government agency." *Id.* Nor is there any suggestion in the Act or its legislative history that Congress intended the Bank to be subject to principles of private corporation law.

Based on applicable administrative law principles permitting delegation by agency heads of *ex officio* functions in the absence of legislative directives to the contrary, we conclude that the directorial functions were properly delegated in this case and that actions taken by the Substitute Directors were not tainted by any improper delegation.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Debt Obligations of the National Credit Union Administration

Debt obligations of the National Credit Union Administration, lawfully incurred on behalf of the Central Liquidity Facility, pursuant to 12 U S.C § 1795f(a), represent obligations of the United States backed by its full faith and credit.

There is a presumption, historically reflected in opinions of the Attorney General, that federal agency obligations are supported by the full faith and credit of the United States, unless the statute authorizing such obligations expressly provides otherwise. This presumption extends to obligations incurred by an agency on behalf of a non-federal entity.

While principles of restraint and respect for the Comptroller General as an agent of Congress ordinarily require that his opinions be accorded substantial weight by the Attorney General, in this case the Comptroller General failed properly to apply the legal principles governing full faith and credit which are delineated in the opinions of the Attorney General.

Opinions of the Attorney General on matters of law are, as a matter of course, to be followed by all officers of the Executive Branch.

May 24, 1982

MEMORANDUM OPINION FOR THE PRESIDENT, CENTRAL LIQUIDITY FACILITY, NATIONAL CREDIT UNION ADMINISTRATION

This responds to your request for an opinion concerning debt obligations to be issued by the National Credit Union Administration (NCUA) on behalf of the Central Liquidity Facility (CLF or Facility) pursuant to 12 U.S.C. § 1795f(a) (1982). The NCUA is considering issuing these obligations for the CLF in order to fund the latter's lending activities. Previous to this request, you received an opinion from the Comptroller General of the United States[1] regarding NCUA's authority to issue these debt securities. That opinion stated that the NCUA has authority to issue debt securities on behalf of the CLF, but that these securities would not constitute obligations of the United States supported by its full faith and credit. Because the Comptroller General's opinion may impair the CLF's ability to perform its lending function, you have asked us to review the full faith and credit questions,[2] and to address additional questions that have arisen as a

[1] Comp. Gen. Dec., File: B–204227 (Oct. 21, 1981) (hereinafter Comp. Gen Dec.).

[2] Since 1973, it has been the policy of the Department of Justice to decline to issue formal opinions on full faith and credit matters unless there is drawn into question a genuine issue of law. *See* Elliot L. Richardson, Attorney General, Memorandum for Heads of the Executive Departments and Counsel to the President (Oct 10, 1973). In this case we find both a substantial issue of law, and a misapplication by the Comptroller General of a series of opinions of the Attorney General which treat the obligations of the United States Therefore we have decided to address the full faith and credit issue you present.

result of the Comptroller General's opinion.[3]

We find—contrary to the Comptroller General's opinion[4]—that lawful debt obligations of the NCUA incurred on behalf of the CLF represent obligations of the United States backed by its full faith and credit.

I.

The Central Liquidity Facility was established in 1978 by the National Credit Union Central Liquidity Facility Act (CLF Act), Pub. L. No. 95–630, Title XVIII, *codified at* 12 U.S.C. § 1795 (1982). The CLF's function is to provide for the "liquidity needs" of member credit unions.[5] The CLF "exist[s] within" the National Credit Union Administration[6] and is managed by the NCUA Board. 12 U.S.C. § 1795b. Credit unions may become "members" of the CLF by subscribing to, and holding, CLF capital stock. 12 U.S.C. §§ 1795c, 1795d. Member credit unions are entitled to apply for credit advances, 12 U.S.C. § 1795e(a)(1), but they have no control over, or management responsibilities for, the CLF.

The Facility's lending activity is funded through its capital stock and through borrowing. To date, all borrowing for the CLF has been from the Federal Financing Bank, a corporate instrumentality within the Department of the Treasury.[7] Recently, however, the CLF was requested by the Office of Management and Budget to develop plans to borrow in the private capital markets.[8] The CLF lacks the power to borrow from any source, but the CLF Act provides clear authority for the NCUA Board to incur obligations on its behalf.

> The Board on behalf of the Facility shall have the ability to—
>
> * * * * *
>
> (4) borrow from—(A) any source, provided that the total face

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[3] These questions concern the CLF's possible exposure to liabilities arising from other NCUA activities. For example, you ask our concurrence in your General Counsel's determination that hypothetical claimants against the National Credit Union Share Insurance Fund might look only to the assets of the Fund for satisfaction of their claims. We believe our resolution of the full faith and credit issue makes it unnecessary to address these additional questions

[4] Principles of restraint and respect for the authority of the Comptroller General as an agent of Congress require that his opinions be accorded substantial weight by the Attorney General *See, e g.*, 41 Op. Att'y Gen. 507, 512 (1960); 41 Op Att'y Gen. 463, 473 (1960). However, disagreements sometimes do occur, *see, e.g.*, 41 Op. Att'y Gen. 507 (1960); 37 Op Att'y Gen 559 (1934), 37 Op. Att'y Gen. 562 (1934), and in this case we believe the Comptroller General failed properly to apply the presumption governing full faith and credit matters which is delineated in the opinions of the Attorney General. These opinions are, as a matter of course, to be followed by all officers of the Executive Branch *See* 37 Op Att'y Gen. 562, 563 (1934); 20 Op Att'y Gen. 648 (1893) *See generally* 28 U S.C. § 512; *Smith* v *Jackson*, 241 Fed 747, 773 (5th Cir. 1917), *aff'd*, 246 U.S. 388 (1918).

[5] The statutory definition of "liquidity needs" was designed to restrict the CLF to lending only for the purpose of providing traditional credit unions—as distinct from corporate central credit unions—with credit to meet emergency outflows resulting from management difficulties, local economic downturns, seasonal credit needs, or regional economic decline. *See* 12 U.S C. § 1795a(1), 124 Cong Rec 38842 (1978) (remarks of Rep St Germain). The CLF is prohibited from providing credit the purpose of which is "to expand credit union portfolios." 12 U.S.C § 1795e(a)(1)

[6] The NCUA is "established in the executive branch" as "an independent agency," 12 U.S.C. § 1752a(a), and is managed by a three-member Board "appointed by the President, by and with the advice and consent of the Senate." 12 U S.C § 1752a(b).

[7] *See generally* 12 U.S.C §§ 2281–2296 (1982).

[8] This information was contained in your opinion request. *See also Department of Housing and Urban Development—Independent Agencies Appropriations for 1982, Hearings Before a Subcommittee of the House Committee on Appropriations*, 97th Cong., 1st Sess. 311–12 (Feb. 5, 1981) (testimony of Lawrence Connell, Chairman, NCUA) (expressing wish to end reliance on borrowing from Federal Financing Bank).

> value of these obligations shall not exceed twelve times a subscribed capital stock and surplus of the Facility[.]

12 U.S.C. § 1795f(a). The issue to be resolved is whether this language provides full faith and credit backing for NCUA obligations incurred on behalf of the Facility.

II.

It has long been the position of the Attorney General that when Congress authorizes a federal agency or officer to incur obligations, those obligations are supported by the full faith and credit of the United States, unless the authorizing statute specifically provides otherwise.

> [T]here is no order of solemnity of valid general obligations of the United States and . . . no legal priority is afforded general obligations contracted pursuant to an express pledge of faith or credit over those not so accompanied. It is enough to create an obligation of the United States if an agency or officer is validly authorized to incur such obligation on its behalf and validly exercises that power.

41 Op. Att'y Gen. 403, 405 (1959). *See also* 42 Op. Att'y Gen. 341, 344 (1967); 41 Op. Att'y Gen. 424, 430 (1959). *See generally Perry* v. *United States*, 294 U.S. 330, 353–54 (1935); *Lynch* v. *United States*, 292 U.S. 571, 580 (1934). Thus,

> a guaranty by a Government agency contracted pursuant to a congressional grant of authority for constitutional purposes is an obligation fully binding on the United States despite the absence of statutory language expressly pledging its "faith" or "credit" to the redemption of the guaranty and despite the possibility that a future appropriation might be necessary to carry out such redemption.

42 Op. Att'y Gen. 21, 23–24 (1961). *See also* 42 Op. Att'y Gen. 429, 432 (1971); 42 Op. Att'y Gen. 327 (1966); 42 Op. Att'y Gen. 305, 308 (1965); 42 Op. Att'y Gen. 183, 184 (1963).

The presumption that federal agency obligations are supported by the full faith and credit of the United States absent statutory language to the contrary was explicitly declared by the Attorney General in an opinion holding that the Small Business Administration had authority to guarantee the sale of certain debentures owned by it:

> [T]he threshold question concerning the effect of proposed SBA guaranties is not whether the statutory language expressly alludes to the "faith" or "credit" of the United States, but whether the statutory scheme authorizes the guaranties here proposed. If there

> is statutory authority for the guaranties, *absent specific language to the contrary* such guaranties would constitute obligations of the United States as fully backed by its faith and credit as would be the case were those terms actually used.

(Emphasis added.) Letter from John N. Mitchell, Attorney General, to Thomas S. Kleppe, Administrator, Small Business Administration, at 3–4 (April 14, 1971) (hereafter "Kleppe letter"). *See also* 42 Op. Att'y Gen. 327, 328 (1966) (presumption applies not only to guarantees, but to any other "contractual liabilities" an agency is authorized to incur); 41 Op. Att'y Gen. 363, 369 (1958).

The presumption favoring full faith and credit support for federal agency obligations rests on a solid foundation of reason and equity. When a federal agency enters the marketplace and lawfully incurs debts, the public which becomes its creditor has a right to expect that, unless notified to the contrary, the agency's obligations will be supported by the government which created it and which considers it a constituent part. Requiring investors to guess the wishes of Congress in this area would be to require them to guess about the key feature of this type of investment: the security of government debt obligations. Furthermore, the government's interest in obtaining advantageous credit terms is promoted when the public justifiably assumes that, unless Congress has clearly provided otherwise, federal agency obligations are obligations of the United States government, not merely those of a single agency supported by its limited assets or periodic appropriations. For these reasons, we believe that when Congress authorizes federal agencies to incur obligations without placing specific restrictions on their backing, it does so in accordance with the presumption established in the opinions of the Attorney General.[9]

The borrowing authority at issue here, 12 U.S.C. § 1795f(a), nowhere expressly limits recourse for NCUA obligations to the resources of the CLF, the NCUA, or the two of them; nor can any such limitation reasonably be inferred. We therefore find that debt obligations of the NCUA incurred on behalf of the CLF pursuant to this provision are supported by the full faith and credit of the United States.

III.

Our conclusion is based not only upon application of the full faith and credit presumption to the particular terms of the NCUA's borrowing provision; it is bolstered by the structure and language of that section as a whole. Examination of § 1795f(a) reveals that when Congress wished to place restrictions on Board obligations, it did so explicitly. Although not conclusive, we believe the maxim

[9] Evidence that Congress groups all lawful obligations of federal agencies together with obligations explicitly backed by the full faith and credit of the United States, and not with obligations incurred pursuant to statutes which expressly prohibit any guarantee by the United States, is found in 12 U.S.C. § 2286(a). That section provides that the Secretary of the Treasury must approve the method, source, timing, and financing terms of all "obligations issued or sold by any Federal agency; except that the approval of the Secretary of the Treasury shall not be required with respect to (A) obligations issued or sold pursuant to an Act of Congress which expressly prohibits any guarantee of such obligations by the United States. . . ."

expressio unius est exclusio alterius is applicable here.[10] First, Congress showed an intention to limit the obligations which the Board could incur on behalf of the Facility by limiting the *value* of those obligations to twelve times the stock and surplus of the Facility.[11] 12 U.S.C. § 1795f(a)(4). Notably, however, the *backing* for such obligations is not similarly limited.

More significant is the congressionally mandated limitation on guarantees which the Board may provide for financial obligations of member credit unions 12 U.S.C. § 1795f(a)(5) provides:

> The Board on behalf of the Facility shall have the ability to—
> (5) guarantee performance of the terms of any financial obligation of a member *but only when such obligation bears a clear and conspicuous notice on its face that only the resources of the Facility underlie such guarantee*[.]

(Emphasis supplied.) Had Congress intended similarly to limit NCUA debt obligations, we believe it would have included similar language in § 1795f(a)(4).

Finally, we believe a comparison between this provision and similar provisions governing the Federal Home Loan Bank system (FHLB) sheds light on this problem. The statute governing the FHLB is instructive because the CLF was created to serve the liquidity needs of credit unions in the same manner that the FHLBs serve savings and loan institutions.[12] Federal Home Loan Banks are authorized to "issue debentures, bonds, or other obligations upon such terms and conditions as the [FHLB] board may approve[.]" 12 U.S.C. § 1431(a) (1982). However, the FHLB statute goes on explicitly to limit the backing for FHLB obligations: "All obligations of Federal Home Loan Banks shall plainly state that such obligations are not obligations of the United States and are not guaranteed by the United States." 12 U.S.C. § 1435. Although in many ways Congress modeled the CLF's powers and functions after those of the FHLB,[13] it omitted from the CLF Act any provision similar to 12 U.S.C. § 1435. We therefore hesitate to infer a restriction on the backing of NCUA obligations where the statute is completely silent on the matter.

IV.

As already noted above, the Comptroller General concluded that NCUA obligations incurred on behalf of the CLF would not be backed by the full faith

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[10] *See generally TVA* v. *Hill*, 437 U.S. 153, 188 (1978), *Nat'l Railroad Passenger Corp* v *Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Nashville Milk Co.* v. *Carnation Co.*, 355 U S 373, 376 (1958); *Duke* v. *Univ. of Texas*, 663 F.2d 522, 526 (5th Cir 1981) (all cases applying maxim); 2A, C Sands, *Statutes and Statutory Construction* § 47 23 (4th ed. 1973).

[11] This restriction may have been included not only to make the Facility's size more reasonable in relation to the credit union industry's assets, but also to limit the exposure of the government in the event of default *Cf. Community Credit Needs, Hearings Before Subcomm. on Financial Institutions Supervision, Regulation and Insurance, of the House Committee on Banking, Finance and Urban Affairs*, 95th Cong , 2d Sess. 208 (testimony of Phillip Jackson, Fed. Reserve Bd.) (hereinafter Community Credit Needs Hearings).

[12] *See id.* at 319, 329, 424; 124 Cong Rec 2421 (1978) (remarks of Rep. St Germain), 124 Cong Rec 30904 (1978) (remarks of Sen. Proxmire)

[13] *Id.*

and credit of the United States. This conclusion was based upon a careful and thorough search through the legislative history of 12 U.S.C. § 1795f(a) to find some hint of congressional intentions. We believe, however, that this search was largely unnecessary, and reached an incorrect conclusion.

The Comptroller General's opinion began by recognizing "the presumption of full faith and credit which, at least initially, is accorded to a Government agency. . . ."[14] The opinion also cited and expressed agreement with the holdings of the various Attorney General opinions which delineate this presumption.[15] The Comptroller General believed, however, that this presumption was inapplicable because "the agency involved [*i.e.*, the NCUA] is acting not on its own behalf but on behalf of a mixed-ownership Government corporation, albeit one established within the parent agency." Finding this to be a "critical distinction," the opinion stated that the full faith and credit presumption "does not necessarily apply to a mixed-ownership Government corporation."[16]

We find that the Comptroller General misapplied the presumption articulated in the Attorney General opinions favoring full faith and credit. Assuming *arguendo* that the presumption "does not necessarily apply to a mixed-ownership Government corporation," this does not preclude its application here, because the CLF does not incur obligations. It is the NCUA which incurs the obligations under 12 U.S.C. § 1795f(a), and the NCUA is an independent agency within the Executive Branch.[17] We do not understand the Comptroller General to contest the application of the presumption to independent agencies within the Executive Branch. *See, e.g.*, 41 Op. Att'y Gen. 403 (1959)[18] (ICC guarantee constitutes an obligation of the United States even though the statutory authority for guarantee does not contain language pledging faith or credit of the United States, and notwithstanding lack of an existing appropriation).

Moreover, once it is determined that a federal agency has authority to incur obligations, it is immaterial to the full faith and credit question that the obligation may be incurred "on behalf of" some other body or person.[19] Numerous Attorney General opinions treat government obligations incurred "on behalf of" non-federal entities. That fact has never played any part in a determination of the full faith and credit issue.[20] The presumption recognized by the Comptroller

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[14] Comp. Gen. Dec., *supra* note 1, at 4.

[15] *Id.*

[16] The CLF appears as a "mixed-ownership Government corporation" in 31 U.S.C. § 9101(2)(G) (1982).

[17] *See* note 6, *supra*.

[18] Cited in Comp. Gen. Dec., *supra* note 1, at 4.

[19] At most, this fact may be relevant in determining whether a particular obligation of an agency is lawful, not whether it is backed by the full faith and credit of the United States.

[20] *See, e.g.*, 42 Op. Att'y Gen. 429 (1971) (Export-Import Bank guarantee of Private Export Funding Corp. obligations); 42 Op. Att'y Gen. 341, 344 (1967) ("[In] a series of opinions of the Attorneys General . . . it was held that a Federal agency's guaranty or equivalent support of certain debt obligations *of a local Government agency or private person to the holders thereof* would be backed by the full faith and credit of the United States") (emphasis supplied), 42 Op. Att'y Gen. 305, 308 (1965) ("the United States may become liable upon its undertaking to buttress *another's obligation* whether or not the governing statute uses language specifically confirming such liability") (emphasis supplied); 42 Op. Att'y Gen. 183 (1963) (AID guarantees to U.S. citizens and enterprises in respect of investments made in foreign countries), 42 Op. Att'y Gen. 21 (1961) (Development Loan Fund guarantees to private investors with respect to loans "contributing to the economic progress" of foreign nations), 41 Op. Att'y Gen. 424 (1959) (guarantee of housing mortgages for military personnel).

General favoring full faith and credit "absent specific language to the contrary"[21] should therefore have been applied to the obligations of the NCUA under 12 U.S.C. § 1795f(a).

It was unnecessary for the Comptroller General to attempt to divine congressional intent through an exhaustive examination of the legislative history of 12 U.S.C. § 1795f, because the policies underlying the presumption would be frustrated if liability for federal agency obligations could be limited simply by reference to obscure statements made in subcommittee hearings or the like.[22] For this reason many determinations of full faith and credit matters by the Attorney General have been made without reference to legislative history.[23]

However, because the Comptroller General found the legislative history of 12 U.S.C. § 1795f(a) to be controlling, we have carefully reviewed that history and found it to be, at best, inconclusive. The legislative history nowhere reveals any clear statement one way or the other regarding congressional intent concerning full faith and credit for NCUA obligations. The following two sections discuss the Comptroller General's legislative history argument and post-enactment evidence.

A. The Deletion of Language Providing for NCUA Authority to Borrow "With or Without the Guarantee of the United States."

The initial version of the title establishing the CLF was approved by the Senate on October 12, 1978, when it passed its own version of H.R. 14279,[24] the bill which ultimately became Pub. L. No. 95–630. As initially passed by the Senate, the CLF borrowing provision read as follows:[25]

> The Administrator on behalf of the Facility shall have the authority to—
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> * * * * *
>
> (4) Borrow from—(A) any source *with or without the guarantee of the United States as to principal and interest*. The total face value of those obligations guaranteed by the United States shall not exceed twenty times the subscribed capital stock and surplus of the Facility[.]

Thus just three days before the CLF statute was sent to the President for signature the Senate had approved language explicitly providing government guarantees for NCUA borrowing.[26]

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[21] Kleppe letter, *supra* p 5

[22] We are not faced with a question raised by a statute whose terms do not limit full faith and credit, but whose legislative history explicitly and plainly evinces a congressional intention to do so *See* text immediately *infra*.

[23] *See, e.g* , 42 Op Att'y Gen. 429 (1971); 42 Op. Att'y Gen. 417 (1969); 42 Op. Att'y Gen. 327 (1966); 42 Op. Att'y Gen. 305 (1965); 41 Op. Att'y Gen 403 (1959); 41 Op. Att'y Gen 363 (1958). *See also* 42 Op Att'y Gen 323 (1966) (finding *unpersuasive* certain legislative history opposing application of full faith and credit; *see* note 36 *infra*). *Cf.* 42 Op. Att'y Gen. 183 (1963); 42 Op Att'y Gen 21 (1961); 41 Op. Att'y Gen 424 (1959)

[24] 95th Cong., 2d Sess. (1978). *See* 124 Cong. Rec. 36120, 36134–36 (Oct. 12, 1978).

[25] 124 Cong. Rec. 36135 (Oct. 12, 1978) (emphasis supplied).

[26] As the Comptroller General notes, this initial version of the CLF borrowing provision was identical to that contained in a number of bills to establish the CLF that had been considered by both Houses of Congress. *See, e g* , S 3499, 95th Cong., 2d Sess (1978); H R. 11310, 95th Cong., 2d Sess (1978) These bills unambiguously authorized a government guarantee for NCUA debts incurred on behalf of the Facility. As the Senate Report accompanying S. 3499 explained, "[u]p to 20 times the paidin capital may be borrowed utilizing a Federal government guarantee " S. Rep. No 1273, 95th Cong., 2d Sess. 6 (1978).

Action in the House was more ambiguous. On October 14, 1978, the House concurred in the Senate's amendments to H.R. 14279, but substituted a House Banking subcommittee's language regarding the establishment of the Central Liquidity Facility.[27] The House debate on October 14th did not explain the purpose of this substitution. On the following day the House substitute was concurred in by the Senate,[28] and it was this language which became law when signed by the President on November 10, 1978.

The House language adopted on October 14, 1978, originated as Title III of H.R. 14044, 95th Cong., 2d Sess. (1978). Although reported out of the Subcommittee on Financial Institutions Supervision, Regulation and Insurance on September 22, 1978, the House Banking Committee did not complete consideration of this bill before adjournment, and no committee report explaining the CLF provisions was written. On November 9, 1978, over three weeks after final congressional action had occurred, Subcommittee Chairman St Germain inserted into the Congressional Record language which he said "would have been included in the House report on this significant title."[29] This would-be report on H.R. 14044 provides no evidence of any intention to deny full faith and credit support to the debt obligations of the NCUA.[30]

The Comptroller General insists, however, that an investigation into the origins of H.R. 14044 reveals an intention by the House to deny full faith and credit to NCUA obligations. In introducing H.R. 14044, Rep. St Germain provided the following explanation of the CLF provisions in the bill.

> Title III [of H.R. 14044] establishes a central liquidity facility for credit unions and is almost identical to H.R. 11310 [95th Cong., 2d Sess. (1978)]. The changes [from H.R. 11310] reflect suggestions made by National Credit Union Administrator Lawrence Connell, Gov. Phillip Jackson of the Board of Governors of the Federal Reserve System and others during subcommittee hearings. The changes are:
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> * * * * *
>
> Sixth. *Revised borrowing authority* to limit the total amount of such borrowing to twelve times capital stock and surplus of the facility. *The 12 would apply whether the borrowings have a Government guarantee or not.* This is comparable to the borrowing authority for other Federal Government entities.[31]

124 Cong. Rec. 28805 (1978) (emphasis supplied).[32]

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[27] 124 Cong Rec 38287, 38311–13 (1978)

[28] 124 Cong. Rec S 19146 (Oct 15, 1978)

[29] 124 Cong Rec 38842–43 (1978)

[30] The only remark relevant to NCUA's borrowing authority states, "Finally, the Administrator is authorized to issue debt obligations on behalf of the facility, in a total face value not exceeding 12 times the subscribed capital stock and surplus of the facility." 124 Cong. Rec. 38843 (1978)

[31] Rep. St Germain was probably referring to a comparable requirement that FHLB borrowing be limited to 12 times its capital and reserves. 12 C.F.R § 506 1.

[32] The Comptroller General acknowledges that "at first glance" Rep St Germain's remarks might suggest that under the revised language CLF borrowings *would be covered* by a government guarantee We agree

In order fully to understand the meaning of the underlined sentence, we must refer to the original provisions of H.R. 11310, which permitted the Administrator, on behalf of the Facility, to borrow from

> any source *with or without the guarantee of the United States* as to principal and interest. The total face value of *those obligations guaranteed by the United States* shall not exceed 20 times the subscribed capital stock and surplus of the Facility[.][33]

(Emphasis added.) H.R. 14044 altered H.R. 11310 in two respects: (1) it restricted the total amount of NCUA borrowing authority to twelve times the capital stock and surplus of the Facility; and (2) it specified that this lower limit would apply, in Rep. St Germain's words, "whether the borrowings have a Government guarantee or not." Rep. St Germain's comments do not reveal any intention to eliminate government guarantees, but merely to limit the maximum amount the NCUA could borrow by issuing government guaranteed obligations.

The Comptroller General disagrees, and finds that Rep. St Germain's changes in H.R. 14044 reflect suggestions made by Phillip Jackson, a member of the Federal Reserve Board of Governors, in hearings before the Congressman's subcommittee. In his testimony, Mr. Jackson proposed two amendments to H.R. 11310:[34]

> The [Federal Reserve] Board has discussed a few modifications and clarifications to the proposed legislation with the National Credit Union Administration. During those discussions, the Administrator of the NCUA indicated that he agrees that these changes would improve the bill. One amendment would clarify that the private borrowings of the facility would not have the U.S. Government's guarantee. Another would reduce the borrowing leverage on capital to ten times capital, which would make the facility's size more reasonable in relation to industry assets.

There are three reasons why we believe the Comptroller General's reliance upon Mr. Jackson's suggestions is misplaced. First, statements made in congressional hearings by witnesses are generally accorded little weight in construing statutes.[35] This is especially so in this instance, where the witness's remarks about full faith and credit were cursory and failed to address the substantial body of precedent in this area found in the opinions of the Attorney General.[36]

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[33] H.R. 11310, § 307, *reprinted in* Community Credit Needs Hearings, *supra* note 11, at 364, 371–72 (emphasis supplied).

[34] *See* Community Credit Needs Hearings, *supra* note 11, at 208

[35] *See McCaughn* v. *Hershey Chocolate Co* , 283 U S. 488, 493–94 (1931); *Austasia Intermodal Lines, Ltd* v *FMC*, 580 F.2d 642, 645 (D C. Cir 1978); *March* v. *United States*, 506 F 2d 1306, 1314 & n.30 (D C. Cir 1974); *United States* v *Fairfield Gloves*, 558 F.2d 1023, 1027 (C C.P A 1977)

[36] In 42 Op Att'y Gen 323 (1966), the Attorney General held that guarantees by the Federal National Mortgage Association of certain "participation certificates" gave rise to general obligations of the United States. The opinion recognized that contrary statements were to be found in the legislative history asserting that the Mortgage Association's guarantees were not backed by the full faith and credit of the United States The Attorney General discounted these statements, in part because the full faith and credit opinions of the Attorney General "were not brought to the attention of the witnesses and committee members during the cited hearings, [and] it appears that the persons making the statements I have referred to did not take them into account." *Id.* at 324

Second, Mr. Jackson's remarks were partially inaccurate, and his suggestions were not all incorporated into H.R. 14044, the bill that was eventually adopted. For example, contrary to Mr. Jackson's declaration that the NCUA endorsed his suggestions,[37] the NCUA Administrator specifically objected to Jackson's proposals, noting that "[Jackson's proposal] significantly reduces the CLF's lending capacity and NCUA cannot accept it. . . ."[38] In addition, Mr. Jackson's recommendation to reduce the borrowing leverage of the CLF to ten times capital was at best only partially reflected in H.R. 14044, where the limit was revised to 12 times capital. Under these circumstances, Mr. Jackson's testimony cannot be said to have had a determinative effect on the outcome of the CLF provisions.

We note, finally, that *no* Member of Congress and *no* committee report confirms Mr. Jackson's views regarding full faith and credit backing for NCUA obligations. In fact the only evidence that Mr. Jackson had any effect whatever on the outcome is found in Rep. St Germain's statement that H.R. 14044 reflects "suggestions made by National Credit Union Administrator Lawrence Connell, Gov. Phillip Jackson of the Board of Governors of the Federal Reserve System and others during subcommittee hearings."[39] The most reasonable interpretation of this remark—and of the changes made in H.R. 11310 resulting in H.R. 14044—is that the drafters took account of both Mr. Jackson's and Mr. Connell's suggestions and limited the borrowing authority and limited similarly the liability of the United States to 12 times capital. We find no indication that the drafters of H.R. 14044 intended to remove completely the government's backing for NCUA obligations.[40]

B. Post-enactment Remark in Senate Appropriations Committee Report.

In addition to reviewing the legislative history of § 1795f(a), the Comptroller General cites the following brief remark from a Senate Appropriations Committee report written subsequent to enactment of the CLF Act:

> The principal source of funds for the lending operations [of the CLF] are the stock subscriptions by credit unions and the sale of obligations by the facility. These obligations are not guaranteed by the U.S. Government as to either principal or interest.[41]

This post-enactment remark lacks any support or accompanying analysis, and it was written by a committee which had no responsibility for drafting the Act it

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[37] *See* note 34, *supra*

[38] Community Credit Needs Hearings, *supra* note 11, at 345.

[39] 124 Cong. Rec 28805 (1978).

[40] Furthermore, as a general matter

> [we] must exercise caution before drawing inferences regarding legislative intent from changes made in committee without explanation Although a succession of draft bills may point toward a clear legislative purpose, amendments to a bill's language are frequently latent with ambiguity: they may either evidence a substantive change in legislative design or simply a better means for expressing a provision in the original bill.

Western Coal Traffic League v *United States*, 677 F.2d 915, 924, *cert. denied*, 459 U.S. 1086 (1982) (citations omitted).

[41] S. Rep No 258, 96th Cong., 1st Sess. 63 (1979).

was describing. Such post-enactment statements are not entitled to substantial weight. *See Mathews* v. *Weber*, 423 U.S. 261, 272 n.7 (1976); *Dawson* v. *Myers*, 622 F.2d 1304, 1312 (9th Cir. 1980), *vacated on other grounds*, 101 S. Ct. 1961 (1981).

We therefore conclude that obligations of the NCUA incurred on behalf of the Central Liquidity Facility pursuant to 12 U.S.C. § 1795f(a) are supported by the full faith and credit of the United States.

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Office of Legal Counsel

Immunity of Veterans Administration Medical Facilities from Alabama State Utility License Tax

The utility license tax imposed by the State of Alabama on public utilities operating within that State, whose economic burden is passed on by the utilities to their customers by order of the state public utility commission, is constitutionally valid as applied to federal agencies, since its legal incidence falls on the utilities and not on their customers.

In determining whether the legal incidence of a state tax was intended by the legislature to fall upon the federal government, and is thus prohibited under the Supremacy Clause, a tax scheme as a whole and the context in which it operates, as well as the terms of the taxing statute, must be considered.

The fact that the terms of the taxing statute do not require the tax to be passed on to customers, and do not provide a mechanism for doing so, is indicative of the legislature's intent that the incidence of the license tax remain on the utilities.

May 26, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, VETERANS ADMINISTRATION

This responds to your request for the opinion of this Office regarding the immunity of certain Veterans Administration facilities operating in the State of Alabama from the Alabama utility license tax imposed on public utilities by § 40–21–53 of the Code of Alabama, 1975, *as amended* (hereafter § 53). By operation of a 1969 order of the Alabama Public Service Commission, a percentage of this tax is reflected automatically in customer billings, including those sent by the Alabama Power Company to the Veterans Administration Medical Centers which are the subject of your inquiry.

As you are aware, the Supremacy Clause of the United States Constitution, Article VI, clause 2, has been construed to prohibit the states from taxing directly the properties, functions, agencies, or instrumentalities of the federal government (hereafter federal agencies) in the absence of congressional consent, *Mayo* v. *United States,* 319 U.S. 441 (1943); *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), as well as from imposing taxes the "legal incidence" of which falls on the federal government. *United States* v. *New Mexico,* 455 U.S. 720 (1982); *Alabama* v. *King & Boozer,* 314 U.S. 1 (1941); *James* v. *Dravo Contracting Co.,* 302 U.S. 134 (1937). *See United States* v. *County of Fresno,* 429 U.S. 452 (1977); *United States* v. *Mississippi Tax Comm'n,* 421 U.S. 599 (1975). Evaluating the constitutionality of any particular state tax in light of these

prohibitions necessarily requires consideration of the many factors bearing on the critical question of whether the incidence of the disputed tax falls upon an agency of the United States or whether it falls upon a third party doing business with the United States. *See United States* v. *New Mexico, supra; United States* v. *City of Leavenworth*, 443 F. Supp. 274, 281 (D. Kan. 1977). *See also United States* v. *Allegheny County*, 322 U.S. 174, 186 (1944) ("The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine. . . .").

For the reasons set forth in detail below, we believe that the utility license tax imposed by § 53 of the Public Utilities chapter of the Alabama Revenue Code is a tax on the utility companies, the economic burden of which may be—but is not required by statute to be—passed on to their customers; the tax is therefore constitutionally permissible as applied to customers which are federal agencies.

I. Background

Section 53 imposes a license tax on public utilities operating within the state in an amount equal to 2.2 percent of each dollar of the utilities' gross receipts from the preceding year, with certain exceptions.[1] Section 53 requires payments of the tax to include a statement by the owner, president, or other officer of the utility company reflecting the names of the utility's owners and operators, as well as its principal place of business, together with a sworn statement of the amount of the utility's gross receipts for the preceding year.

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[1] Section 40–21–53 of the Code of Alabama, 1975, as amended in 1981, provides in pertinent part.

> § 40–21–53. Electric, hydroelectric, gas, or any other public utility—Generally—Credit on electric bills for certain persons—Amount.
>
> (a) *Each person, firm or corporation . . operating an electric or hydroelectric public utility . shall pay to the state a license tax equal to two and two-tenths percent on each $1.00 of gross receipts of such public utility for the preceding year*, except, that gross receipts from the sale of electricity for resale by such electric or hydroelectric public utilities and gross receipts from the sale of electricity to the persons identified in subsection (b) of this section shall be deducted in computing the amount of tax due hereunder. . . Such license tax shall be paid to the department of revenue by check made payable to the treasurer and shall be paid quarterly. . . . Payment shall be accompanied by a statement made by the president or other officer of the public utility or by the owner thereof, giving the name of the person, firm or corporation owning and operating such public utility and the principal place of business thereof, together with a statement under oath of the amount of gross receipts of such public utility for the preceding year The books of every person, firm or corporation operating such utility shall be at all times open to the inspection of the department of revenue Any person failing to make such sworn statement or willfully making a false statement of the gross receipts of such public utility shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not exceeding $500.00 and shall also forfeit to the state three times the amount of the license for such public utility. .
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> (b)(1) On or after October 1, 1981 any person who is 62 years of age or older or totally and permanently disabled and such person is head of a household and does not share his or her residence with more than one other adult person who is less than 62 years of age and who receives electricity at such residence from a utility which is subject to the 2.2 percent license tax levied in subsection (a) of this section shall be entitled to qualify, in accordance with the provisions of [the Department of Pensions and Security] for a credit on his or her monthly electric bill in the amount of the exemption from the 2.2 percent license tax with respect to sales of electricity to such person provided in subsection (a) of this section Eligibility for this credit applies only to the extent and amount that it is billed to the customers as a normal requirement under its rates.

(Emphasis added)

Your present inquiry arises in the context of a dispute between the Alabama Power Company and the Alabama District Office of the Veterans Administration regarding the immunity of the several Veterans Administration Medical Centers (VAMCs) located throughout the State from the § 53 state utility license tax. This tax is imposed on the Alabama Power Company in the amount of 2.2 percent of the utility's gross receipts from the preceding year, 1.8 percent of which is included as a separate line item in the VAMCs' utility bills. The District Counsel for the Veterans Administration takes the position that the medical centers are immune from paying that portion of their utility bills which reflects the license tax assessed against the utility company, arguing that the tax, as applied to the VAMCs, constitutes an infringement of Article VI, clause 2 because it is a direct tax on a federal agency. The Alabama Power Company takes the contrary position, arguing that the license tax imposed by § 53 is applicable *only* to the utility companies, is not required by statute to be passed on to the companies' customers and, as such, may be included in the billings sent to customers, including federal agencies, without infringing the United States' constitutional immunity.

To support its position that the § 53 license tax is an impermissible tax on a federal agency, the District Counsel for the Veterans Administration relies heavily on an April 28, 1969, order of the Alabama Public Service Commission. That order provides as follows:

> Bills shall be increased to offset the applicable proportionate part of any taxes, assessments, licenses, franchise fees or rentals which may hereafter be imposed upon the Company by any Government Authority at rates higher than those in effect December 31, 1967 and which are assessed on the basis of meters, customers, the price of or revenues from electric energy sold or the volume of energy generated, purchased for resale or sold.

The Alabama Power Company construes this order as merely providing a "convenient mechanism for the Company to recover its direct cost of operation,"[2] rather than as transferring the legal incidence of the license tax from the utility company to its customers.

Prior to the Commission's promulgation of the 1969 order, the license tax on public utilities was 0.4 percent. *See* Code of Alabama, 1940, T.51, § 178. The enactment of § 53 in 1971 raised the tax to the present 2.2 percent. Thus, the 1.8 percent increment increase in the license tax is reflected separately on the customers' bills as a result of the Public Service Commission's order. For more than two years, the VAMCs have withheld this amount from their electricity bill payments upon the advice of the District Counsel for the Veterans Administration that any increase in taxes after the 1969 order would constitute a direct tax on the agencies. Since the time of your inquiry to this Office, the Comptroller General

[2] Letter from Counsel to the Alabama Power Company to District Counsel to the Veterans Administration (Aug. 3, 1981) at p. 2.

was requested by the Deputy Administrator of the General Services Administration to consider this matter, and, on February 22, 1982, rendered a decision concluding that the legal incidence of the license tax is on the utility company, and that the VAMCs should reimburse the Alabama Power Company for payments attributed to the tax increase which heretofore have been withheld. *See* Dec. Comp. Gen. B–204517, "Veterans Administration Medical Centers—Payment of Alabama Public Utility License Tax" (February 22, 1982). We turn now to our consideration of this matter.

II. State Taxation of Federal Entities

The federal government's immunity from taxation by the States derives from the Supreme Court's declaration in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that such immunity is inherent in the Supremacy Clause of the Constitution:

> [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

McCulloch, *supra*, at 436. *See Weston* v. *City Council*, 27 U.S. (2 Pet.) 449 (1829). Since the decision in *McCulloch*, *supra*, the Supreme Court has "adhered to the rule that States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government." *United States* v. *County of Fresno*, 429 U.S. 452, 459 (1977) (footnote omitted). Notwithstanding the clarity of this formulation, the determination of where the legal incidence of any particular tax falls necessarily requires close analysis of the taxing statute "in the light of all relevant circumstances," and is rarely made without some difficulty.[3]

In *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937), the Court distinguished between the legal incidence and the economic incidence of a state tax affecting the federal government. The Court held that a nondiscriminatory West Virginia occupation tax on the gross receipts of a private contractor doing business with the federal government was constitutionally valid, even though the tax might have increased the cost of the contract to the federal government. Such a tax, the Court stated, would "unquestionably increase[] the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the [federal] Government." 302 U.S. at 160.

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[3] *See, e.g., United States* v. *Maryland*, 471 F. Supp. 1030, 1037 (D. Md. 1979) (emphasis added)

> In determining where the legal incidence of a tax falls, a court must consider the taxing statute in the light of all relevant circumstances. *United States* v. *City of Detroit*, 355 U.S. 466, 469 (1957). *The inquiry is a legalistic one, and the result often turns on the interpretation to be given a statute.* Small differences in the language of the statutes or in the facts of two different cases can therefore result in decisions which might appear inconsistent in the absence of close analysis.

Nevertheless, to the extent that the state tax imposed on the contractor "affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct." *Id.*, citing *Trinity-farm Construction Co.* v. *Grosjean*, 291 U.S. 466 (1934). The principles articulated in *Dravo* were reaffirmed in *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939), in which the Court sustained a nondiscriminatory state tax on the income of a federal employee:

> [A] non-discriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which [a government entity] had undertaken to perform, or to cast an economic burden upon [it], more than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials.

306 U.S. at 484 (footnote omitted).

The *Dravo* principle was further refined in *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941), and its companion case, *Curry* v. *United States*, 314 U.S. 14 (1941), in which the Court upheld state taxes[4] imposed upon contractors performing "cost-plus-fixed-fee" contracts with the federal government. Even though the taxes levied against the contractors were included in the "costs" assessed against the federal government, the Court held that the economic impact of the tax was not, standing alone, a sufficient basis for invalidation as an unconstitutional taxing by the State of the federal government or its agents.[5] The United States was not a purchaser within the contemplation of the Alabama sales or use tax statutes and, therefore, was not legally obligated to pay the tax. *See also Gurley* v. *Rhoden*, 421 U.S. 200, 204 (1975) (holding that the economic burden of taxes on the vendor is traditionally shifted to vendee in the form of increased prices for service in the amounts of the taxes, but that such a shift is not indicative of a shift in legal incidence, particularly if the statute does not require the vendor to pass the tax on to the purchaser-consumer).[6]

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[4] The disputed tax in *King & Boozer, supra*, was a sales tax on lumber sold by King & Boozer (K&B) for use by contractors constructing an army camp for the United States. Although the tax was chargeable to K&B as the seller, K&B was required by the language of the statute to collect the tax from the purchaser—in this case, the government contractor. In *Curry, supra*, the dispute involved a use tax imposed upon materials brought into the state for use by a contractor.

[5] *Compare Kern-Limerick* v. *Scurlock*, 347 U.S. 110 (1954), holding that an Arkansas gross receipts tax on a contractor performing a "cost-plus-fixed-fee" contract with the federal government was an unconstitutional infringement of the federal government's immunity where the contract expressly provided that (1) its contractors were purchasing agents for the government, (2) the purchase was made by the government, (3) the government was obligated to the vendor for the purchase price; (4) the contractor would handle all payments on behalf of the government, and (5) title to all materials and supplies purchased vested in the government directly from the vendor. The Court noted that "it [was] clear that the Government [was] the disclosed purchaser and that no liability of the purchasing agent to the seller [arose] from the transaction." 347 U.S. at 120–21. *But cf. United States* v. *New Mexico*, 455 U.S. 720, 724–25 (1982) (discussing the limitations of the *Kern-Limerick, supra*, analysis).

[6] Indeed, in later years the Court found insignificant the fact that property which provided the basis for an assessment of a state use tax was property *owned* by the federal government, so long as the uses or improvements which were subject to the tax were "being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." *United States* v *County of Fresno*, 429 U.S. 452, 462 (1977). Such use or improvement by a private citizen for his own private ends, or in connection with commercial activities carried

The Court's most recent consideration of the issues raised by state taxation of federal government contractors involved a use tax and a gross receipts tax levied on three contractors with "cost-plus-fixed-fee" contracts with the Department of Energy. *United States* v. *New Mexico,* 455 U.S. 720 (1982). The contracts provided that: (1) title to all tangible personal property purchased by the contractors would pass directly from the vendor to the Government; (2) the contractors would place orders with third party suppliers in their own names, identifying themselves as the buyers; and (3) the contractors would use an "advanced funding" procedure to meet contracting costs.[7] The United States unsuccessfully challenged the contractors' liability for the New Mexico taxes, alleging, essentially, that the contractors were "procurement agents" for the federal government and were, therefore, immune from taxation by the State.[8] After reviewing its precedents and outlining the limits on the immunity doctrine,[9] the Court concluded:

> What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. . . .
>
> Thus, a finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually "stand in the Government's shoes." *City of Detroit* v. *Murray Corp.*, 355 U.S. at 503 (opinion of Frankfurter, J.).

455 U.S. at 735–736. The Court relied heavily on its earlier decision in *United States* v. *Boyd, supra,* in which it rejected "out-of-hand" the Government's claim

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on for profit, constitutes a "separate and distinct taxable activity." *United States* v *Boyd,* 378 U S. 39, 44 (1964). *See also City of Detroit* v *Murray Corp* , 355 U.S. 489 (1958), *United States* v. *Township of Muskegon,* 355 U S 484 (1958); *United States* v. *City of Detroit,* 355 U.S 466 (1958) The rule to be derived from these decisions is that the "economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State " *County of Fresno, supra,* 429 U S at 462 (footnote omitted).

[7] The "advanced-funding" mechanism allowed the contractors to pay their creditors and employees with drafts drawn on a special bank account in which United States Treasury funds were deposited. Thus, only federal funds were expended when the contractors made purchases. Moreover, if the government failed to provide funding, the contractors were excused from performance of the contract and the government was held liable for all properly incurred claims. 455 U.S. at 725–26.

[8] The United States sought a declaratory judgment that advanced funds were not taxable gross receipts to the contractors; that the receipts of vendors selling property to the Government through the contractors were not taxable by the States; and that the use of government-owned property by the contractors was not subject to the use tax *See* 455 U S. at 732–33.

[9] *See* 455 U.S at 734–35, where the Court discussed at length its decisions in *Alabama* v. *King & Boozer, supra* ("immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy"); *James* v *Dravo Contracting Co., supra* ("immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government"); and *United States* v *Boyd, supra* ("(i)n . a situation [where] the [private] contractor's use of [Government-owned] property [to provide the United States with] goods or services [is] in connection with commercial activities carried on for profit [, such use constitutes] a separate and distinct taxable activity. . Indeed, immunity cannot be conferred simply because the tax is paid with Government funds . [even] where the contractor made expenditures under an advanced funding arrangement similar to the one involved here")

that its advanced-funded contractors were " 'so assimilated by the Government as to become one of its constituent parts.' " *Id.*, quoting *Boyd, supra*, 378 U.S. at 47, quoting *United States* v. *Township of Muskegon*, 355 U.S. 484, 486 (1958).[10]

Thus, the Court in *United States* v. *New Mexico, supra*, rejected a claim of constitutional immunity on facts which were even more compelling than those in *Boyd, King & Boozer*, and *Dravo*. The Court reasoned that the extreme difficulties which are involved in determining the allocation of power between coexisting sovereignties *requires* such a narrow construction of the constitutional immunity, and concluded that

> [i]f the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs. . . . But absent congressional action, we have emphasized that the States' power to tax can be denied only under the clearest constitutional mandate.

455 U.S. at 737–38 (citations omitted).

The Court in *United States* v. *Mexico, supra*, set forth in the clearest possible terms the narrowness of the limitations that it would construe the Supremacy Clause to impose on the ability of states to tax federal contractors—even when the tax is paid with federal funds; however, the Court left undisturbed its prior decisions finding the immunity appropriate "when the [state] levy falls [directly] on the United States itself." 455 U.S. at 735. Thus, in contrast to taxes which merely pose an *economic* burden to the federal government, *see, e.g., United States* v. *New Mexico, supra*, taxes which fall directly on federal agencies continue to support claims of immunity by those agencies. As the following cases demonstrate, taxes which are *required* by the terms of the statute to be passed on to the purchaser or customer become legal obligations of the customer, and, to the extent that such "legal incidence" bears on the federal government, are unconstitutional as applied.

In *First Agricultural National Bank* v. *Massachusetts State Tax Comm'n*, 392 U.S. 339 (1968), the Court invalidated a Massachusetts sales tax levied upon vendors of tangible personal property; this tax was required to be "add[ed] to the sales price and . . . collect[ed] from the purchaser . . . [as] a debt from the purchaser to the vendor, . . . recoverable at law in the same manner as other debts," *id.* at 347, when applied to national banks.[11] Similarly, a regulation of the

[10] In further defining the limits of "agencies" of the federal government for purposes of the immunity doctrine, the Court recalled language in earlier opinions requiring that would-be federal entities be "virtually . . . arm[s] of the Government," *Department of Employment* v. *United States*, 385 U S 355, 359–60 (1966); "integral parts of [a governmental department]," and "arms of the Government deemed by it essential for the performance of governmental functions," *Standard Oil Co* v *Johnson*, 316 U S 481, 485 (1942) *United States* v. *New Mexico, supra* at 733–38

[11] The Court stated.

> It would appear to be indisputable that a sales tax which *by its terms* must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser . . . There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling.

392 U.S. at 347–48 (citations omitted) (emphasis added)

Mississippi State Commission requiring out-of-state distillers and suppliers to collect from military installations within the State a sales tax on liquor sold to the installations was held invalid as a tax upon instrumentalities of the United States. *United States* v. *Mississippi State Tax Comm'n*, 421 U.S. 599 (1975). The Court viewed the language of the regulation requiring that all direct orders of alcoholic beverages from out-of-state distillers by military facilities bear a wholesale mark-up price, that the price be paid directly to the distiller, and that the distiller remit the wholesale markup to the Tax Commission, as particularly indicative of the Commission's clear intention that the out-of-state distillers and suppliers pass on the markup to the military purchasers. In addition, the Court pointed to a letter from the Director of the Alcoholic Beverage Control Division of the Commission informing distillers

> that the wholesale markup "must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base," warning that any distiller who sells alcoholic beverages to the military without "collecting said fee directly from said Military organization shall be in violation of the Alcoholic Beverage Control laws and regulations issued pursuant thereto," and subject to the penalties provided, including delisting.

421 U.S. at 609. However, even in the absence of so clear a statement of the Tax Commission's intent, the Court noted that it was "obvious" that "economic realities compelled the distillers to pass on the economic burden of the markup." 421 U.S. at 609–10 n.8. Referring to its decision in *First Agricultural National Bank, supra,* the Court concluded that *"where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser."* 421 U.S. at 608 (emphasis added).

The Ninth Circuit recently expanded upon the Court's suggestion in *Mississippi State Tax Comm'n, supra,* that the legal incidence of a particular tax is determined upon consideration of the taxation scheme as a whole—including the economic realities compelled by the circumstances as well as the literal terms of the statute. In *United States* v. *California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981), *aff'd mem.*, 456 U.S. 901 (1982), the court of appeals held a California sales tax unconstitutional when applied to leases of tangible personal property to the United States, because the legal incidence of the tax fell on the United States, even though the taxing statute provided that the parties to the sales agreement could reach an agreement among themselves as to who would pay the sales tax.[12] Two other components of the taxing statute which were essential to the

[12] Section 1656.1 of the California Civil Code provides in pertinent part

> § 1656.1 Sales tax reimbursement to retailer; addition to sales price; rebuttable presumptions; schedule
>
> (a) Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale It shall

court's conclusion were § 6051 of the California Revenue and Taxation Code, which imposes a sales tax on the seller's gross receipts,[13] and § 6012, which provides that the amount of the tax is deducted from the seller's gross receipts if the seller establishes that he collected the sales tax from the buyer.[14] Thus, although the language of the taxing statute was facially neutral, the court determined that the seller maximizes his profit only if he separately states and collects the tax from the buyer—thereby creating a strong economic incentive to impose the tax on the buyer.[15]

In reaching this conclusion, the court was guided by the analytical principle, reaffirmed in *Mississippi State Tax Comm'n, supra,* and *First Agricultural National Bank, supra,* that the legal incidence of a tax falls on the party whom the legislature intends will pay the tax. The court reasoned:

> A determination of legal incidence is not, however, an inquiry into who is legally obligated to remit the collected tax to the state. That is, the legal incidence of a tax does not necessarily fall on the party who acts as conduit by forwarding collected taxes to the state. . . . The concept of legal incidence must also be

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be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if.

(1) The agreement of sale expressly provides for such addition of sales tax reimbursement;

(2) Sales tax reimbursement is shown on the sales check or other proof of sale; or

(3) The retailer posts in his premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

(b) It shall be presumed that the property, the gross receipts from the sale of which is subject to the sales tax, is sold at a price which includes tax reimbursement if the retailer posts in his premises, or includes on a price tag or in an advertisement (whichever is applicable) one of the following notices.

(1) "All prices of taxable items include sales tax reimbursement computed to the nearest mill."

(2) "The price of this item includes sales tax reimbursement computed to the nearest mill"

* * * * *

(d) The presumptions created by this section are rebuttable presumptions.

[13] Section 6051 provides in pertinent part:

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at . . [a specified rate] of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state. . .

[14] Section 6012 provides in pertinent part:

(c)(8) For purposes of the sales tax, if the retailers establish to the satisfaction of the board that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed Section 1656 1 of the Civil Code shall apply in determining whether or not the retailers have absorbed the sales tax

[15] The court explained the workings of the California sales tax scheme as follows.

The seeming neutrality of section 1656 1 is rendered illusory . . by the interaction of California Revenue and Taxation Code sections 6012 and 6051 As noted above, the sales tax is levied on the seller's gross receipts, Cal Rev and Tax. Code § 6051 (West Supp. 1980), which are measured by the total [sale] price. If the [seller] requires the [buyer] to pay the tax, the amount of the tax is deducted from the [seller's] gross receipts. If the [seller] pays the tax himself—absorbs the tax—and passes the economic burden of the tax on to the [buyer] as an increase in the [sale] price, the amount of the tax paid by the [seller] is not deducted from his gross receipts. Since the sales tax is levied on the basis of the [seller's] gross receipts, the [seller] must remit a larger sum of money to the state as taxes if he absorbs the tax himself than if he collects the tax from the [buyer].

650 F.2d at 1131 (citation omitted).

> distinguished from the notion of economic burden. The constitution only prohibits the state from levying a tax on the United States; it does not prohibit the state from enacting a taxing scheme whose effect is to increase prices paid by the United States.
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> * * * * *
>
> In determining who the legislature intends will pay the tax, the entire state taxation scheme and the context in which it operates as well as the express words of the taxing statute must be considered.
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> * * * * *
>
> Despite the facial neutrality of Section 1656.1, the strong economic incentive created by Section 6012 all but compels the lessor to collect the tax from the lessee. In sum, the California sales tax scheme manifests a legislative intent that the lessee pay the sales tax. It places the legal incidence of the tax on the United States and, therefore, violates the United States' constitutional immunity from state taxation.

650 F.2d at 1131–32 (citations omitted).

In addition to presenting a cogent model for "legal incidence" analysis, the *California State Board of Equalization* decision is significant for its treatment of the legislature's statement of its intent. Section 1651.1 was enacted with the precise, stated purpose of remedying the constitutional infringements posed by previous sales tax schemes.[16] The Legislative Notes to the new act clearly state that § 1651.1

> provides for changes in the California Sales and Use Tax Law to make it clear that for both federal and state tax purposes the incidence of the California sales tax is upon the retailer for the privilege of selling tangible personal property at retail and is not upon the purchaser.
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> * * * * *
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> Although the California sales tax law has uniformly been construed by the California Legislature, courts, and administrative agencies as imposing an excise tax upon the retailer and as imposing no legal obligation upon a purchaser, the law does not prevent the parties from contracting between themselves for

[16] Section 19 of Cal Stat. 1978, c. 1211, pp 3925–26 provides some background to the new legislation.

> The Legislature in adopting the Sales Tax Act in 1933 intended that the incidence of the sales tax be on the retailer. In Section 8 of Chapter 681 of the Statutes of 1941, the following statement appears: " . . the Legislature hereby declares and reaffirms that the sales tax is not imposed on any purchaser of tangible personal property in this state, but is for the privilege of engaging in the business of selling such property." Notwithstanding such legislative intent and decisions of California courts holding that the incidence of the California sales tax is upon the retailer and not upon the purchaser, the United States Supreme Court in *Diamond National Corp.* v. *State Board of Equalization* [425 U.S 268 (1976)], and the Court of Appeals for the Ninth Circuit in *United States of America* v *State Board of Equalization*, 536 F.2d 294 [(1976) (per curiam)], held that for federal purposes the incidence of the California sales tax is on the purchaser.

> collection by the retailer of reimbursement for the sales tax from his customer in order to obtain the benefit of a lower sales tax measure or income tax deduction of the sales tax reimbursement by the purchaser or for any other purpose. . . . Ascertainment of this intention is necessary to a determination of a proper measure of sales tax and for other purposes. Accordingly, the purpose of the Legislature in adding Section 1656.1 to the Civil Code is to create a rebuttable presumption as to the intention of the parties for use in the absence of evidence of other intention by those who have occasion to use this information.

1978 Cal. Stat., §§ 19, 22, c. 1211, pp. 3925, 3926. *See also* 650 F.2d at 1128. Notwithstanding these statements of legislative intent, the Ninth Circuit found that the sales tax was intended by the legislature to be a tax on the buyer. Thus, this decision makes clear that the federal courts are not bound by state legislative and judicial determinations of the legal incidence of a particular state tax with respect to the United States or its agencies. *See Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976). "For the purpose of determining whether a tax affects a federally immune institution, the test for incidence must be a federal one." *United States* v. *State Board of Equalization*, 450 F. Supp. 1030, 1035 (N.D. Cal. 1978), citing *First Agricultural National Bank* v. *Massachusetts State Tax Comm'n, supra*, 392 U.S. at 347.

Against this general background, two recent district court decisions bear directly on your inquiry whether the legal incidence of the Alabama utility license tax falls, as a matter of law, on the vendor or the vendee of Alabama Power Company's utility services. The first case, *United States* v. *City of Leavenworth*, 443 F. Supp. 274 (D. Kan. 1977), *app. dismissed by stipulation of parties*, No. 79–1088 (10th Cir.), involved a 3 percent franchise fee imposed by the City in 1963 upon all utility companies, including Kansas Power & Light, which provide electricity to the Fort Leavenworth military installation and the United States Penitentiary, operated respectively by the United States Department of the Army and the Federal Bureau of Prisons. Prior to the City's imposition of the fee, the Kansas State Corporation Commission had authorized public utilities to pass on as "hidden costs" to all customers within the boundaries of their respective service areas the financial burden occasioned by the franchise fees of particular cities. When the City imposed the franchise fee on the utilities' gross revenues from the sale of electricity, the Commission sought to remedy the discriminatory effects of the existing regulatory policy by which all utility customers in the State were required to contribute equally to the fee, without regard to whether their city had chosen to impose a franchise fee. To this end, the Commission ordered in 1966 that all future franchise fees be directly charged on a *pro rata* basis to only such utility customers as lived within the municipal boundaries of the city exacting the fee, and that each customer's bill reflect as a separate item his *pro rata* share of any pertinent franchise fee. The controversy in *Leavenworth, supra*, arose when the City annexed the property on which Fort Leavenworth and

the federal penitentiary are located, thereby occasioning a 3 percent franchise fee addition to their Kansas Power & Light electricity bills. The Bureau of Prisons and the Department of the Army refused to pay the 3 percent fee on the ground that it was an impermissible tax upon the federal government.

The issue before the court in *Leavenworth, supra,* was whether the incidence of the City's franchise fee fell upon agencies of the United States, or whether it fell upon a third party doing business with the United States, Kansas Power & Light. In concluding that the fee did not fall directly upon the federal agencies, but rather upon the utility company, the court stated:

> [T]he Supreme Court has "squarely rejected" the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment. *First Agricultural National Bank* v. *Tax Commission,* 392 U.S. 339 (1968); *United States* v. *Mississippi Tax Commission,* 421 U.S. 599 (1974). Further, the decision as to where the legal incidence of a tax falls is not determined by who bears the ultimate economic burden thereof. *E.g., Gurley* v. *Rhoden,* 421 U.S. 200 (1975). These factors however, together with considerations as to (1) the legislative history of the tax and the intent of the taxing authority; (2) the rights and obligations of the parties to the transaction on which the tax is imposed; and (3) whether the economic burden of the tax, if imposed on a non-governmental agency, is required to be passed on to the United States, must be weighed into the court's determination.

443 F. Supp. at 281–82. Applying these factors, the *Leavenworth* court found that the City franchise fee was laid upon the privilege extended to utilities to use public property in the City for business purposes and to sell electricity to municipal residents, and that, as such, legal liability for payment of the exaction fell upon Kansas Power & Light. The court observed that the ordinance imposing the fee "contain[ed] no provisions for collection directly from the United States, nor [did] it purport to authorize any procedures whereby penalties for nonpayment—such as liens or encumbrances upon government property—[could] be sought against the United States property or its treasury." *Id.* at 282. The court found insignificant the fact that the economic burden of the fee was passed on to the federal agencies by the terms of their sales contracts with the utility, "[n]or does the fact that the United States may be required under Kansas State Corporation Commission orders to reimburse Kansas Power & Light for a *pro rata* share of the franchise fee alter the incidence of the tax as originally laid." *Id.* at 282–83.

The *Leavenworth* decision is particularly helpful to our consideration of the Alabama license tax, because the franchise fee imposed by the Leavenworth city ordinance was not, by the terms of the ordinance—as the Alabama tax is not by the terms of its authorizing statute—*required* to be passed on to the customers of the taxed utilities. Nevertheless, in both cases the state public utility

commissions required the customers of the taxed utilities to raise their bill payments by a proportionate share of the utilities' increased tax liability.[17]

In 1979, another district court considered a similar challenge to a Maryland statutory environmental surcharge as applied to purchases of electricity by federal agencies. The challenged statutes in *United States* v. *State of Maryland*, 471 F. Supp. 1030 (D. Md. 1979), involved a surcharge on electric energy generated within the State which was first imposed on electric companies in 1971. Revenues from the surcharge were required by the terms of the statute to be collected from the electric companies by the Comptroller of the State and placed in a special fund known as the Environmental Trust Fund. For the years 1971 through 1974, the statute required the Public Service Commission to "authorize the electric companies to add the full amount of the surcharge to customers' bills." *Id.* at 1034. In 1974, the Maryland Legislature amended the statute to provide that the Public Service Commission

> shall authorize the electric companies to add the full amount of the surcharge to customers' bills. *To the extent that the surcharge is not collected from customers, the surcharge shall be deemed a cost of generation* and shall be allowed and computed as such, together with other allowable expenses, for rate-making purposes. Revenues from the surcharge shall be collected by the Comptroller and placed into the special fund known as the Environmental Trust Fund.

Id. (emphasis added).

The United States challenged the State's exaction of this surcharge from federal agencies pursuant to both the original and the amended legislation as an unconstitutional tax by the State on agencies of the United States. The *Maryland* court, citing *Leavenworth, supra,* approvingly, observed that the circumstances in the *Maryland* case were even more supportive of the constitutionality of the

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[17] The United States filed an appeal of this decision to the Tenth Circuit, but the appeal was later dismissed by stipulation of the parties (10th Cir. No. 79–1088). *See* Memorandum from Assistant Attorney General Ferguson, Tax Division, "Memorandum for the Solicitor General Re. *United States* v. *City of Leavenworth, Kansas*" at 3 (Mar. 16, 1979), recommending that the appeal be dismissed, on the ground that "the 'exaction' complained of is not a tax but a user fee, rental, or charge imposed on the electric company for the right to use the city's streets," to which the Supreme Court has held the intergovernmental constitutional immunities inapplicable *See Massachusetts* v *United States*, 435 U.S. 444 (1978). Nor did the impact of the Kansas State Corporation Commission's order alter the analysis contained in the Ferguson Memorandum

> The fact that the state regulatory commission ordered that all franchise fees were to be charged pro rata to the customers within the city exacting the fee does not change the character of the fee from a user fee or rental, etc., to a tax imposed on the consumer. It merely reflects an additional cost of doing business which is passed on to the subscribers, just as every unsubsidized business must "pass on" and recover from its customers every item of operating expense—including state and federal taxes—if it is to operate profitably. This, indeed, was the central point of *Agron* v. *Illinois Bell Telephone Co.*, 449 F.2d 906 (C.A. 7, 1971), *cert. denied*, 405 U.S. 954 (1972). In *Agron*, [the United States] argued, and the court of appeals recognized (449 F.2d at 909), that in public utility rate regulation the regulatory body charged with establishing a fair rate and return is required to sanction rates that will permit the utility to recover or pass on all appropriate expenses, including taxes *Galveston Electric Co.* v *Galveston*, 258 U.S. 388, 399 (1922); *Georgia Railway & Power Co.* v *Railroad Commission*, 262 U.S. 625, 632–33 (1923), *FPC* v *United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967)

Memorandum, *supra* at 5–6.

taxing statute than were the circumstances in *Leavenworth*. The court concluded that "neither the 1974 Act nor the 1971 Act requires that Maryland's environmental surcharge be passed along to customers of the electric companies [, and] [a]ccordingly, . . . the exactions in question are valid and constitutional." *Id.* at 1038.[18]

The factors considered by the court in reaching this conclusion were several. First, the court noted that the titles of both statutes, as well as their language, made clear that the surcharge was a "direct obligation of the electric companies," which the companies could, at their option, pass on to customers or simply compute as part of their costs of generation and therefore be recovered in the form of higher rates. *Id.* Second, citing the Supreme Court's decision in *Gurley* v. *Rhoden, supra,* the district court found persuasive the fact that the statutes had no provisions making the customers liable for payment of the surcharge if the utility companies themselves did not pay the surcharge.[19] *Id.* at 1040. Finally, the court relied on the principle recognized in *Graves* v. *New York ex rel. O'Keefe,* 306 U.S. 466, 483 (1939), as a guide to construing ambiguous or "awkwardly drafted statutory provisions," namely, that "the implied immunity of one government and its agencies from taxation by the other should as a principle of statutory construction be narrowly restricted." *Id.* at 1039.[20]

[18] The United States withdrew its appeal of this decision because the Maryland statutory provisions involved were "so fraught with ambiguity" as to render the case an "[in]appropriate vehicle" to support the United States' position Memorandum from Assistant Attorney General Ferguson, Tax Division, "Supplemental Memorandum for the Solicitor General Re *United States* v. *Maryland*" (Nov 30, 1979). The Ferguson Memorandum also raised a question whether the district court had "too readily accepted" the United States' argument that the environmental surcharge was a tax, rather than a user charge or fee, in support of its claim of federal immunity *Id. See United States* v. *Maryland, supra,* 471 F Supp. at 1036. *See also* n. 17, *supra*

[19] In concluding that the legal incidence of the disputed tax fell on the vendor in the taxed transaction, the Supreme Court in *Gurley* v. *Rhoden, supra,* found the literal language of the taxing statute to be determinative

> The wording of the . statute plainly places the incidence of the tax upon the [vendor]. . . . The [legislative] purpose to lay the tax on the [vendor] and only upon the [vendor] could not be more plainly revealed Persuasive also that such was [the Legislature's] purpose is the fact that, if the [vendor] does not pay the tax, the Government cannot collect it from his vendees, the statute has no provision making the vendee liable for its payment.

421 U S at 205–06 (footnote and citation omitted)

In his Memorandum to the Solicitor General regarding an appeal of the *Maryland* decision, *see* n 18, *supra,* the Assistant Attorney General for the Tax Division referred to the Court's analysis in *Gurley, supra,* as the "mechanical approach." In contrast, the United States argued in favor of a "semantically broader approach—that the legal incidence of the tax is on the United States when the statute as a whole, considering both text and context, creates a legal compulsion to pass on the tax " This broader approach appears to have been followed by the Ninth Circuit in *United States* v *California State Board of Equalization, supra*

Although the line of cases representing the "narrow" or "mechanical" approach to governmental immunities and culminating in the Court's recent decision in *United States* v *New Mexico, supra,* may appear to be irreconcilable with the "broader" approach taken by the Court in *Mississippi State Tax Comm'n, supra,* and most recently summarily affirmed in *California State Board of Equalization, supra,* the difference between the approaches grows out of an underlying distinction between the two types of questions raised by analyses of the taxing statutes The cases following the "mechanical" approach involved relatively unambiguous statutes which made clear where the legal incidence of the disputed tax fell—the question before the court was whether the taxpaying entities, usually federal contractors, constituted "federal agents" for purposes of immunity analysis, because the economic burden of the tax levy was ultimately passed on to the United States, either directly, through specific contractual arrangements or advanced funding procedures, or indirectly, through price increases In contrast, the cases following the "broader" approach to governmental immunities involved the initial determination of who the legislature intended to pay the tax, *i.e.*, the legal incidence of the tax, in making such a determination, the courts looked closely at the language of the taxing statute, as well as the surrounding circumstances—including the "economic realities"—of the tax scheme

[20] *See also United States v. New Mexico, supra,* 455 U S at 735–36 ("a narrow approach to governmental tax immunity accords with competing constitutional imperatives, by giving full range to each sovereign's taxing authority"), citing *Graves* v. *New York, supra;* and at 738 ("the States' power to tax can be denied only under 'the clearest constitutional mandate'") quoting *Michelin Tire Corp* v. *Wages,* 423 U S. 276, 293 (1976)

Both the *Leavenworth* and the *Maryland* courts relied heavily on the language of the *taxing statutes* to determine whether the legal incidence of the tax fell upon the utility or its customers. In *Leavenworth*, although the State Corporation Commission had required the tax to be passed on, the underlying statute had not, and the court found as a matter of law that the legal incidence of the tax therefore fell upon the utility. Likewise, although less compelling, the Maryland statutes required the Public Service Commission to authorize the electric companies to pass the tax on to their customers. Nevertheless, in both cases "the statutory provisions in question, construed in the light of all the circumstances, . . . control[led] in determining where the incidence of the tax falls." *Maryland, supra*, 471 F. Supp. at 1040.

III. The Law as Applied to the Alabama Utility License Tax

In order to determine the constitutionality of the Alabama license tax as applied to federal agencies, the critical question to be resolved is whether the legal incidence of the tax falls upon the VAMCs, or whether it falls upon the Alabama Power Company, a third party doing business with the VAMCs. As set forth in detail above, determination of where the legal incidence of a particular tax falls involves close analysis and consideration of the entire State taxation scheme and the context in which it operates, as well as the express words of the taxing statute. *United States* v. *California State Board of Equalization, supra*, 650 F.2d at 1131. *See United States* v. *Mississippi State Tax Comm'n, supra; United States* v. *State of Maryland, supra*. As an aid to this determination, the *Leavenworth* court, as discussed above, suggested three primary inquiries: (1) the legislative history of the tax and the intent of the taxing authority; (2) the rights and obligations of the parties to the transaction on which the tax is imposed; and (3) whether the economic burden of the tax is required by the terms of the statute, or by economic realities, to be passed on to customers which are federal agencies. *Leavenworth, supra*, 443 F. Supp. at 282.

Pursuing these inquiries, we note first that we have available very little of the legislative history of the utility license tax. The tax, by its literal terms, imposes a fee on "electric or hydroelectric public utilities" in an amount equal to 2.2 percent of their gross receipts from the preceding year. This language is in marked contrast to that of §§ 40–21–82, 86, which impose a 4 percent gross receipts tax on public utilities operating within the State,[21] but which specifically require the utilities to "add that tax to the price or charge for such utility services to every purchaser thereof . . . [and to] *collect said amount from every purchaser*

[21] Section 40–21–82, Code of Alabama, 1975, provides.

> There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax *against every utility* in the state of Alabama on account of the furnishing of utility services by said utility; and the amount of said tax shall be determined by the application of rates against gross sales or gross receipts, as the case may be, from the furnishing of utility services in the state of Alabama and shall be computed monthly with respect to each person to whom utility services are furnished, in accordance with the . table [provided in this section].

(Emphasis added.)

of such utility services[, making it] unlawful for any person furnishing utility services to fail or refuse to collect from the purchaser the amount required by this section to be collected." § 40–21–86, Code of Alabama, 1975, as amended (emphasis added). In addition, § 86 clearly states that the 4 percent gross receipts tax is "*conclusively presumed to be a direct tax on the purchaser* precollected for the purpose of convenience and facility only." *Id.* (emphasis added). Neither the Power Company nor the District Counsel disputes the United States' immunity from this tax, as the terms of the statute clearly indicate that the 4 percent gross receipts tax is intended to be a direct tax on the consumer, and, as far as we are aware, the Power Company has never attempted to pass this tax on to, or collect it from, its customers which are federal agencies. *See* Letter from Counsel to the Alabama Power Company to the District Counsel of the Veterans Administration (Aug. 3, 1981).

The statutory language of §§ 82 & 86 of the Public Utilities chapter of the Revenue Code suggests a clear and unambiguous legislative intent to tax the utility companies' customers directly, and not to impose a tax on the companies themselves; such language presents a clear indication of the legislature's knowledge of the distinction between direct and indirect taxation of the consumer, and is therefore significant in our analysis of the legislative intent of § 53. Had the legislature intended to collect the fee directly from the utilities' customers, it is reasonable to assume that it would have manifested its intent with language similar to the language in § 86; from its failure to do so, as well as from the plain terms of the statutory language that it *did* use, we may infer that the legislature intended to levy the § 53 license tax on the utility companies. *See generally East Brewton Materials* v. *Department of Revenue*, 233 So. 2d 751 (Ala. 1970).[22]

Although we are not aware of this provision's having been construed by the Alabama courts, we do have statements "by the highest officials charged with the duty of administering the tax laws," *id.* at 754, construing this provision.[23] Officials in the Legal Division and the Franchise Tax Division of the State of Alabama Department of Revenue, as well as the Attorney General of the State of Alabama, have construed the 2.2 percent utility license tax imposed by § 53 as a license tax *on the utilities*, "a cost of doing business [which] can be included in the rate base allowed by the Alabama Public Service Commission, . . . itemized on bills, or . . . absorbed partially or wholly by the utility." Letter from Corporate Tax Specialist, Franchise Tax Division, to Telpage, Inc. (January 3, 1977). *See* Letter from Assistant Attorney General, State of Alabama, to Abernethy Memorial Hospital (March 10, 1975); Memorandum from Counsel to the Legal Division, Department of Revenue (March 3, 1975). Further, in a 1977 letter responding to an inquiry regarding the 2.2 percent license tax, the Franchise Tax Division described the tax as:

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[22] Although the "credit allowance" of subsection (b) of § 53, *see* n. 1 *supra*, appears to assume that the utility companies would increase their customers' rates by an amount sufficient to recover the amount paid in license taxes, the law is settled that the mere shouldering of the ultimate economic burden of a tax is not determinative of where its legal incidence lies *See, e.g . Gurley* v. *Rhoden, supra; King & Boozer, supra; Dravo Contracting Co , supra.*

[23] *See State* v. *Southern Electric Generating Co.*, 151 So 2d 216, 218 (Ala 1963), ("The interpretation by the Attorney General will be given weight as a factor in judicial construction of a statute where its meaning is doubtful"), citing *Cherokee County* v *Cunningham*, 68 So 2d 507 (Ala. 1953).

> a cost of doing business just as much as labor, supplies, materials, etc. are a cost of doing business. Before the tax was increased from 2 and 4 mills to 2.2% in 1971, some of the utilities had the rate imbedded in their rate bases and most consumers were not even aware of it.

Letter of Jan. 3, 1977, *supra.*

Notwithstanding these constructions of § 53 by state officials, however, the characterization of state taxes for the purpose of determining the legal incidence on federally immune institutions is ultimately a federal question. *Diamond National Corp.* v. *State Board of Equalization, supra; First Agricultural National Bank* v. *Massachusetts State Tax Comm'n, supra; United States* v. *California State Board of Equalization, supra.* Thus, while the Attorney General and Revenue Department statements are instructive of the Alabama legislature's intent, such interpretations are not binding on the federal courts, and are not, therefore, necessarily determinative in our inquiry.[24]

The second factor suggested by the *Leavenworth* court as indicative of the legal incidence of a particular tax involves consideration of the rights and obligations of the parties to the transaction on which the tax is imposed. The license tax imposed by § 53 is imposed on the privilege of selling electricity by electric or hydroelectric public utilities to retail customers within the State. *See generally State* v. *Southern Electric Generating Co.*, 151 So. 2d 216 (Ala. 1963). As discussed above, the statutory language, by its literal terms as well as its construction by the Department of Revenue and the State Attorney General, creates a legal obligation only on utility companies. Although the Commission's order purports to impose a legal obligation for a proportionate share of the license tax on the utilities' customers, the statutory obligation to remit the revenue collected pursuant to § 53 still rests with the utility companies. Furthermore, the statute makes no provisions for direct collection of the fees from the utilities' customers, nor does it impose any penalties on the customers for failure to pay that part of their bills which constitutes a proportionate share of the license tax.

Nor do we believe that the statute creates so strong an economic incentive to pass the tax on as to compel the utility companies to collect the fees from their customers. *See, e.g., United States* v. *California State Board of Equalization, supra.* Although the 1.8 percent increase in license taxes enacted by the legislature does not pose an insignificant financial burden for the utility companies, we cannot say, without more, that the increase is evidence of the legislature's intent to shift the legal incidence of the tax from the utilities to the customers.[25]

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[24] As in the *Leavenworth* and *Maryland* cases discussed *supra*, an argument may be made that the § 53 license tax is a user fee levied on the public utility companies for the privilege of using public lands to operate their businesses *See* nn. 17, 18, *supra.* As previously noted, such a characterization of the tax would render the analysis contained in this section moot, as intergovernmental immunities are not applicable to user fees *See United States* v *Massachusetts, supra* However, we do not have sufficient information regarding the purposes of the tax and the contractual arrangements between the utilities and the State to make such a determination.

[25] Notwithstanding the mandatory language of the Commission's 1969 order, we believe that the *Leavenworth* court's reliance, in analogous circumstances, on the language of the taxing statute was both correct and appropriate to the facts before us "[S]o far as the [taxing authority's] interest in collection is concerned, there is no requirement that [the utility] pass on to the United States all or any part of the financial burden of the [license tax] fee." *Leavenworth, supra,* 443 F. Supp at 282. *See generally Gurley* v. *Rhoden, supra*

The fact that the tax was increased with knowledge—whether actual or constructive—of the 1969 Commission order is not determinative of the legislature's intent in enacting § 53; were the Commission's order purporting to construe the statutory predecessors of § 53, the District Counsel's argument might well be conclusive. *See East Brewton Materials, supra,* 233 So. 2d at 754 ("The re-enactment without change of a statute which has been given a uniform construction by the administrative department [charged with the duty of administering the tax laws] 'may be treated as legislative approval of the departmental construction of the statute, quite as persuasive as the re-enactment of a statute, which has been judicially construed,'" citing *State* v. *Southern Electric Generating Co.*, 151 So. 2d 216 (Ala. 1963)).

As it is, however, we are faced with a regulatory order promulgated in 1969 which, if applied to the license tax statute that was re-enacted in 1971, would conflict with the terms of that statute. We are not aware of the 1969 order's having been construed to apply to the § 53 license tax or to its predecessor; to the contrary, we do have statements by the Alabama Revenue Department and the Attorney General construing § 53 as a license tax on the utilities, "a cost of doing business [which] can be included in the rate base allowed by the Alabama Public Service Commission." Letter from Corporate Tax Specialist, Franchise, Tax Division, *supra; see* Letter from Assistant Attorney General, *supra;* Memorandum from counsel to the Legal Division, Department of Revenue, *supra.*[26] In circumstances where such ambiguity exists, we believe that the language of the taxing statute, construed "in the light of all the circumstances," must prevail. *United States* v. *Maryland, supra,* 471 F. Supp. at 1040. *See Gurley* v. *Rhoden, supra; United States* v. *California State Board of Equalization, supra; East Brewton Materials, supra,* 233 So. 2d at 754 (the "legislative ratification of prior administrative interpretations" rule of construction cited above should be laid aside "where it seems reasonably certain that the administrator's interpretation has been erroneous and that a different construction is required by the language of the act").

In addition, the Comptroller General of the United States recently considered the § 53 license tax which is presently at issue and determined that the legal incidence of the tax falls on the utility companies and not on the United States. Dec. Comp. Gen. B–204517, "Veteran's Administration Medical Centers—Payment of Alabama Public Utility License Tax" (Feb. 22, 1982). The Comptroller General reasoned that the failure of the statutory terms of § 53 to require that the tax be passed through to customers, as well as their failure to provide a mechanism for doing so, is indicative of the Alabama Legislature's intent that the

[26] We are not unaware of the February 11, 1980, letter from the Director of the Utility Financial Analysis and Auditing Division of the Public Service Commission to the District Counsel of the Veterans Administration interpreting the Commission's 1969 order to "require [the] Alabama Power Company to pass each applicable increase in taxes directly through to its retail customers as a line item on the customer's bill." This interpretation is, at best, a construction of its own order as applied to taxing statutes in general, considered without regard to the statutory language underlying the specific utility tax with which we are presently concerned. Moreover, we believe that the opinion of the Attorney General carries greater weight than that of the Commission *See generally State* v *Southern Electric Generating Co., supra,* 151 So. 2d at 218

incidence of the license tax remain on the utilities. The Comptroller General disputed the VAMCs' claim that the Public Service Commission's order transferred the legal incidence of the tax to the customers; rather, he found that the Commission's order "merely provides that the utilities shall pass the economic burden of the tax to their customers as part of their rates." *Id.* at 3. The Comptroller General determined that the VAMCs should return to the Alabama Power Company that portion of their utility bills which they have erroneously withheld.

Were the statutory terms of § 53 less clear in this case, the Commission's order, as construed by the District Counsel and the Director of the Utility Financial Analysis Division of the Public Service Commission, might carry greater weight in our determination of where the legal incidence of the tax falls. We also have no other indication that the statute was ever intended to impose a direct tax on the utilities' customers; to the contrary, we have statements by the state's highest legal officer construing the license tax as a tax on the utilities. While it is reasonable to assume that the legislature believed that any tax increase would be recovered in customer billings as a cost of doing business, it is equally clear that it did not impose a statutory requirement that the utilities pass the increase on to customers. In addition, we have the benefit of the Comptroller General's consideration of this issue, his analysis and conclusions. In short, we are guided, as was the court in *United States* v. *Maryland, supra,* by the principle recognized by the Supreme Court in *Graves* v. *New York ex rel. O'Keefe,* 306 U.S. 466, 483 (1939), that "the implied immunity of one government and its agencies from taxation by the other should as a principle of statutory construction be narrowly restricted." *See United States* v. *Maryland, supra,* 471 F. Supp. at 1039. *See also United States* v. *New Mexico, supra,* 455 U.S. at 733–38.

IV. Conclusion

In view of the clear language used by the Alabama legislature in imposing the § 53 utility license tax, particularly as it has been interpreted by the Revenue Department and the Attorney General of the State of Alabama, and the Comptroller General of the United States, and viewed "in the light of all the circumstances," *United States* v. *Maryland, supra,* 471 F. Supp. at 1040, we are persuaded that the disputed license tax is a constitutionally valid tax levied on the public utility companies within the State. Although the 1969 order of the Alabama Public Service Commission may have increased the economic burden of the license tax on the utility companies, a burden which will ultimately be borne by the Veterans Administration and other federal agencies in the State which are customers of the taxed utilities, we believe, for all of the reasons discussed above, that the legal incidence of the license tax continues to rest on the utilities.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of the Hatch Act to the Chairman of the Native Hawaiians Study Commission

The Native Hawaiians Study Commission is an "Executive agency" whose employees are covered by the Hatch Act, even though its functions are by statute confined to advising Congress. The part-time Chairman of the Commission is covered by the Hatch Act on the days she is paid to perform government services.

June 3, 1982

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

This responds to your request regarding the applicability of the Hatch Act to the Chairman of the Native Hawaiians Study Commission (Commission). Based on the memorandum accompanying your request, and on subsequent conversations with attorneys in the Lands Division, it is our understanding that the Chairman intends to announce her candidacy for Lieutenant Governor of Hawaii. She currently serves as a delegate to the State Legislature of Hawaii.

The Commission was established in 1980 pursuant to the Native Hawaiians Study Commission Act (NHSCA). Pub. L. No. 96–565, Title III, 94 Stat. 3321, 3324–3327 (1980), 42 U.S.C. § 2991a note (Supp. V 1981). The NHSCA directs the Commission to "conduct a study of the culture, needs, and concerns of Native Hawaiians." § 303(a). The Commission is to publish "a draft report of the findings of the Study," to distribute the draft to "appropriate" federal and state agencies, native Hawaiian organizations, and the interested public, and to solicit their written comments. § 303(c). The Commission is also directed to issue a "final report of the results of this Study" and to send copies to the President and to two congressional committees.[1] § 303(d). Finally the NHSCA directs the Commission to "make recommendations to the Congress based on its findings and conclusions [from the Study]." § 303(e). *See generally* Memorandum Opinion for the Chairman, Native Hawaiians Study Commission, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Jan. 4, 1982).*

[1] The two committees are the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives

*NOTE: The January 4, 1982, opinion ("Applicability of the Federal Advisory Committee Act and the Government in the Sunshine Act to the Native Hawaiians Study Commission") appears in this volume at p. 39, *supra*. Ed.

The members of the Commission were appointed by the President, who designated the Chairman and Vice Chairman. These appointments were not subject to the advice and consent of the Senate. § 302(b), (c). Commission members who are not otherwise fulltime officers or employees of the United States receive $100 for each day they are engaged in performing Commission duties. § 302(g). All Commission members also receive travel expenses. § 302(h).

Based on our review of the materials forwarded to us and the NHSCA, we conclude that the Commission Chairman is subject to the Hatch Act on the days she is compensated for Commission business. We note, however, that the Special Counsel, Office of Personnel Management, is charged with primary jurisdiction over the Hatch Act, and that more particular advice regarding application of the Hatch Act to Commission members may be obtained from that Office. We have also addressed briefly certain other statutory or regulatory provisions that may be applicable.

I. The Hatch Act

The Hatch Act, 5 U.S.C. § 7324 (1976), provides in relevant part:

> (a) An employee in an Executive agency . . . may not—
> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
> (2) take an active part in political management or in political campaigns.

Two initial questions are raised by this provision: (1) Is the Commission an "Executive agency" within the meaning of the Act; and (2) Is the Chairman a covered employee?

A. Is the Commission an "Executive Agency"?

An "Executive agency" is defined in 5 U.S.C. § 105 (1976) as "an Executive department, a Government Corporation, or an independent establishment." The Commission is neither an executive department, *see* 5 U.S.C. § 101 (1976), nor a government corporation, *see* 5 U.S.C. § 103 (1976). However, an "independent establishment" is essentially any other organization within the Executive Branch. *See* 5 U.S.C. § 104 (1976).[2] Thus, if the Commission is an entity within the Executive Branch, it is an "Executive agency" within the meaning of the Hatch Act.

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[2] 5 U S C. § 104 provides

> For the purposes of this title, "independent establishment" means—
> (1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment, and
> (2) the General Accounting Office.

Whether the Commission falls within the Executive Branch or the Legislative Branch is a difficult question because of the Commission's hybrid nature. Several factors point to its being non-executive. First, the Commission was established to advise Congress rather than the President or executive agencies. *See Gannett News Service, Inc.* v. *Native Hawaiians Study Commission,* Civ. No. 82–0163, slip op. at 5 (D.D.C. June 1, 1982) (holding that the Commission is not advisory to the Executive and is therefore not subject to the Federal Advisory Committee Act); January 4, 1982 Memorandum Opinion, *supra*. Second, the Commission was initially funded from the contingent fund of the Senate, § 307(a), thus indicating its close ties with the Legislative Branch.

Our prior conclusion that the Commission was not "established" to advise the President or federal agencies pointed out that the Commission would nonetheless be subject to the Federal Advisory Committee Act (FACA) were it so utilized by the President or federal agencies. *See* January 4, 1982 Memorandum Opinion, *supra*. In other words, the Commission could become advisory to the Executive by its actions or the ways in which it was used in the Executive Branch. This possibility serves to point out that there is not always a bright line dividing the Legislative and Executive Branches, and that an advisory function to one branch does not preclude a similar function to another. Thus, while the fact that the Commission was established as advisory to Congress deserves special weight in assessing whether the Commission falls within the Executive Branch, this factor alone need not be conclusive.

Other factors, in fact, suggest that the Commission is in the Executive Branch. First, the members of the Commission are appointed solely by the President, § 302(b), who also designates the Chairman and Vice Chairman, § 302(c), and who is responsible for calling its first meeting, § 302(e). Several Commission members are fulltime employees in the Executive Branch. Second, although the Commission is advisory only to Congress because it makes recommendations only to Congress, § 303(e), its final report and written comments are submitted to the President as well as to Senate and House committees, § 303(d). Third, the Commission is now funded from appropriations for the Executive Branch out of the Unanticipated Needs Fund, which is an item in the appropriations for the Executive Office of the President. Executive Office Appropriations Act of 1980, Pub. L. No. 96–74, 93 Stat. 565 (1979). Finally, the Commission's office space is located in an executive department, the Department of the Interior, from which it receives staff support. These factors tend to support a conclusion that the Commission is established within the Executive Branch.

Not all committees in the Executive Branch are advisory in nature, as the Office of Legal Counsel has previously recognized. *See* Memorandum Opinion for the Acting Director, Executive Office of United States Attorneys, 5 Op. O.L.C. 283 (1981) (possible to construct committee that is not advisory but is rather intended to exchange information and data). Furthermore, a commission may have dual responsibilities—as in this case, advisory to Congress, fact-finding and reporting to the President—without necessarily losing its character as an executive entity.

On the one hand, therefore, we are faced with a body established to advise Congress, whose role in conducting a study, publishing a report, and making recommendations to Congress might be viewed as merely in aid of Congress' legislative functions. *See Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976) (per curiam). On the other hand, however, the Commission's members are appointed solely by the President and include executive officers; it is funded out of and physically located in the Executive Branch; and its responsibilities include fact-finding and reporting to the President. Furthermore, the making of recommendations to Congress is not a purely legislative function, but falls squarely within the duties and powers of the Executive. *See* U.S. Const. Art. 2, cl. 3. Thus, even the mandate of the Commission to make recommendations to Congress need not be viewed as inconsistent with executive functions. Although we recognize that this is a difficult question, we conclude that the circumstances viewed as a whole point to the Commission as an entity within the Executive Branch.

B. Are Commission Members Covered Employees?

The Hatch Act applies generally to employees in executive agencies, with certain specified exceptions. *See* 5 U.S.C. § 7324(c) & (d); Federal Personnel Manual at 733–5 ("In the absence of specific statutory exemption, the basic political activity restrictions apply to any person employed in the executive branch of the Federal Government. . . ."). The Chairman is clearly not a fulltime employee of an executive agency. Nevertheless, the Hatch Act applies to employees who work on an irregular or occasional basis on those days for which they are paid to perform government services. *See* 5 C.F.R. § 733.123(b)(4) (1981). As explained in the Federal Personnel Manual, "[p]ersons who are employed on an irregular or occasional basis, *e.g.*, experts and consultants on a per diem basis, . . . are subject to the political activity restrictions of the law while in an active duty status only and for the entire 24 hours of any day of actual employment." Federal Personnel Manual at 733–5. Employees in both the competitive service and the excepted service are subject to the restrictions of the Hatch Act. *See* 5 C.F.R. § 733.201.

There are several exceptions to Hatch Act coverage. The prohibition against taking an active part in political management or political campaigns does not apply to "an employee paid from the appropriation for the office of the President." 5 U.S.C. § 7324(d)(1). It has been suggested that this exemption would apply to Commission members for so long as the Commission is funded from the Unanticipated Needs Fund in the Executive Office of the President.

The item "Office of the President," as used in appropriation statutes when the Hatch Act was enacted, has since been replaced by the item "The White House Office" in appropriations for the Executive Office of the President. The Office of Legal Counsel has previously interpreted the "Office of the President" exemption to apply only to the White House Office. *See* 1 Op. O.L.C. 54, 56 (1977). (Application of the Hatch Act to the Vice President's staff: "the exemption to the Hatch Act in 5 U.S.C. § 7324(d)(1) was intended to apply only to persons paid

from the item for the 'White House Office,'" and not to those paid from other items in appropriations for the Executive Office of the President.) This distinction reflects the congressional intent to provide an exemption for that "inner circle of personal advisers to the President" whose government jobs are essentially "as adjuncts to the President in his role as a political officer." *Id.* at 55–56.

The current appropriation for the Executive Office of the President has 12 separate items, including items for the White House Office, the Unanticipated Needs Fund, the Office of Management and Budget, the Office of Policy Development, etc. The Unanticipated Needs Fund is independent of the White House Office item. Consistent with prior OLC precedent, therefore, we conclude that funding from the Unanticipated Needs Fund is not sufficient to satisfy the Hatch Act exemption for those paid from appropriations for the Office of the President.[3] *See also* Memorandum for the Clemency Board from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (Sept. 24, 1974) (Unanticipated Personnel Needs Fund of the President does not fall within exemption).

Finally, the Hatch Act also does not apply to "the head or the assistant head of an Executive department or military department." 5 U.S.C. § 7324(d)(2). This exception is inapplicable to the Chairman, however, because the Commission is not an "Executive department." *See* 5 U.S.C. § 101. Nor is the Chairman exempt under § 7324(d)(3), which applies to persons appointed by the President, "by and with the advice and consent of the Senate." Thus, none of the arguably relevant statutory exceptions applies to the Chairman of the Commission.[4]

We therefore conclude that the Chairman of the Commission is subject to the provisions of the Hatch Act, as set forth in more detail at 5 C.F.R. § 733.122, on the days for which she is paid to perform government services. According to informal advice from the legal staff of the Office of Personnel Management (OPM), these prohibitions go to the Chairman directly, but would not prohibit billboard or other advertisements on her behalf on those days. We suggest, however, that the Chairman obtain further advice as to particular prohibitions from the Office of the Special Counsel at OPM, which has primary jurisdiction over Hatch Act matters.

II. Other Statutory and Regulatory Provisions

There are several other statutory and regulatory provisions of which the Chairman should be aware. Pursuant to 18 U.S.C. § 602, for example, it is a crime for "a person receiving any salary or compensation for services from money derived from the Treasury of the United States to knowingly solicit any

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[3] It might be argued that when the President uses Unanticipated Needs Funds for the White House Office itself, the Hatch Act exemption should apply nonetheless We need not address this possibility, however, because it is clear in this case that Commission members are not located in the White House Office as advisers to the President.

[4] "Persons who are retained from time to time to perform special services on a fee basis and who take no Oath of Office" also enjoy exemption from the Hatch Act *See* Federal Personnel Manual at 733–6. We have assumed that the Commission members take an oath of office, but in any event we do not believe this exception applies to a Commission Chairman appointed for a term. It is intended instead to apply to those receiving a fee, such as attorneys

contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 from any other such officer, employee, or person." 18 U.S.C. § 602(4) (Supp. V 1981).[5] Additionally, no officer or employee of the United States, or a person receiving any salary or compensation from the United States Treasury may make such a contribution to his or her employer or employing authority. 18 U.S.C. § 603 (Supp. V 1981). Presumably, this latter provision would prohibit Commission staff from making any contribution to the Chairman's campaign efforts.[6]

Finally, the Chairman should also be cognizant of the standards of conduct embodied in 3 C.F.R. § 100.735 for the Executive Office of the President, which will presumably apply for so long as Commission expenses are paid from Executive Office appropriations,[7] and those embodied in 5 C.F.R. § 735, which represent the minimum standards of conduct applicable to federal employees. Of particular concern during a campaign for state office is the following prohibition:

> (1) An employee shall avoid any action, whether or not specifically prohibited . . ., which might result in, or create the appearance of:
> (1) Using public office for private gain. . . .

3 C.F.R. § 100.735–4(c)(1); *accord* 5 C.F.R. § 735.201a(a). Copies of the standards of conduct embodied in Titles 3 and 5 of the Code of Federal Regulations are attached.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[5] "Contribution" is defined in detail at 2 U.S.C. § 431(e).

[6] For the purposes of the criminal conflict of interest laws, 18 U.S.C. §§ 202–209, the Chairman is a "special Government employee," *see* 18 U.S.C. § 202, to whom some, but not all, of those provisions apply. *See, e.g.*, 18 U.S.C. § 208 (prohibiting personal and substantial participation in a particular matter in which employee or his or her family or organization has a financial interest).

[7] The standards of conduct found at 3 C.F.R. § 100.735 apply not only to the White House Office, but also to other entities in the Executive Office of the President, including "any committee, board, commission, or similar group established in the Executive Office of the President." 3 C.F.R. § 100.735–2(a).

Title VI and Urban Indian Housing

The Department of Housing and Urban Development is not authorized by statute or regulation to provide tenant rental assistance to an urban housing program whose occupancy is limited to Indians, and such assistance to a program with a racially or ethnically exclusive tenant policy is affirmatively prohibited by Titles VI and VIII of the Civil Rights Act of 1964 and by the Fifth Amendment.

Legislation affecting Indians should be construed in their interest; however, if Congress does not explicitly single out Indians for preferential treatment, courts should not imply an intent to treat Indians more favorably or differently from all other citizens.

While Congress has approved special aid for Indians in connection with housing on reservations and Indian areas, neither the Housing Act of 1937 nor long-settled and congressionally ratified administrative practice under that Act sanction off-reservation Indian housing preferences which would otherwise violate statutory or constitutional nondiscrimination requirements

June 8, 1982

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

This responds to your request for our opinion whether the Department of Housing and Urban Development (HUD) may make available federal funds for a 24-unit scattered site, detached rental housing program open only to Indians residing in St. Paul, Minnesota. You ask specifically whether federal funding for tenant rental assistance pursuant to HUD's Section 8 Moderate Rehabilitation Program, 42 U.S.C. § 1437f (hereinafter Section 8); 24 C.F.R. § 882 (1982), under the United States Housing Act of 1937, 42 U.S.C. § 1437 (hereinafter Housing Act), is permissible in light of the nondiscrimination requirements that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3631, imposed on recipients of federal financial assistance.

In the course of considering the various issues raised by this particular plan, we have identified a threshold legal issue which, as we have resolved it, is necessary to the disposition of the matter. That issue is whether the Secretary of HUD has discretion under Section 8 to make funds available to an off-reservation housing project that conditions tenant eligibility on at least one-fourth Indian blood, as determined by tribal membership. Once this question is resolved, the Title VI issue is considerably simplified. For reasons stated below, we conclude, first, that

although Congress expressed an intent to assist Indians under the Housing Act, it did not indicate that special treatment of Indians was to extend beyond Indian reservations and Indian areas. Second, nothing in Section 8 of the Housing Act or its accompanying regulations authorizes HUD to provide tenant rental assistance under its Moderate Rehabilitation Program to an urban housing program available only to Indians. Thus, absent express congressional approval for, or administrative acceptance of, off-reservation Indian-only Section 8 housing, Titles VI and VIII and the Fifth Amendment prohibit federal assistance for a program with a racially or ethnically exclusive tenant policy. An affirmative legislative intent to aid urban Indian housing or to treat urban Indians specially would, of course, alter the Title VI, Title VIII, and constitutional analysis. *See Fullilove* v. *Klutznick*, 448 U.S. 448, 492 n.77 (1980) (later, specific preference provision supersedes earlier, general nondiscrimination statute); *Morton* v. *Mancari*, 417 U.S. 535, 550–551 (1974) (specific statutory preference for Indians would supersede general nondiscrimination statute, regardless of the priority of enactment).

I. Facts

As we understand the facts, the St. Paul Inter-Tribal Housing Board is a coalition of the four major Indian organizations serving St. Paul: the St. Paul American Indian Center; the Red School House, Inc.; the St. Paul American Indian Movement, Inc.; and the St. Paul Urban Indian Health Board Clinic. Three different Tribes are represented on its five-member Board of Directors. The Board has applied to be the nonprofit sponsor of 24 scattered sites, detached rental housing units of three and four bedrooms, for low-income Indian families. The contemplated sites are six central St. Paul neighborhoods with high Indian concentrations.[1] Only Indian families whose head of household has at least "one-quarter degree Indian blood, as verified by tribal enrollment," would be eligible for the housing.[2] The local Tribes have endorsed the Inter-Tribal Housing Board and its plans as fulfilling a need of their members.[3]

The Minnesota Housing Finance Agency would provide a 30-year no interest loan of $820,000 under the state's Urban Indian Housing Loan Program (UIHLP)

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[1] We do not know whether these St. Paul Indians are tribal members or not. We have not been asked, and therefore have not considered, whether locating the housing units in areas with high Indian concentration would be consistent with federal policies of integration in housing. *See Hills* v *Gautreaux*, 425 U.S. 284 (1976), *Otero* v *New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973), 24 C.F.R. § 882.503(a)(9)(i) (objective of "deconcentration" for Section 8 program).

[2] This classification is similar to the Bureau of Indian Affairs employment preference at issue in *Morton* v *Mancari*, which required that an individual be "one-fourth or more degree Indian blood and be a member of a federally recognized tribe." 417 U.S. at 553 n.24. The Supreme Court characterized that preference as follows:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

[3] Letter from Donna Follstad, Chairperson, Urban Indian Advisory Council, to Minnesota Housing Finance Agency Board Members (Mar. 23, 1981), Resolution 15–81, Minnesota Sioux Tribe, Inc. (Aug. 19, 1981); U.S.C. Resolution 27–81, Upper Sioux Community (Aug. 25, 1981).

to purchase the units. The UIHLP is apparently established pursuant to a state law that permits the State Housing Agency to "engage in housing programs for low and moderate income American Indians. . . ." Minn. Stat. Ann. § 462A.07(15) (West Supp. 1981).[4] A $360,000 low interest loan from the city and a private foundation would cover rehabilitation of the units. The purchase and rehabilitation loans have been obtained, contingent upon approval by HUD of Section 8 housing assistance payments.

HUD would provide tenant rental assistance to the St. Paul Public Housing Agency (PHA) on behalf of families who would then lease the units pursuant to the provisions of Section 8 of the Housing Act. 42 U.S.C. § 1437f; 24 C.F.R. § 882 (1981) (Section 8 Moderate Rehabilitation Program). To ensure that only Indians would benefit from the proposed project, the PHA would maintain a separate list of eligible Indian applicants for initial occupancy and vacancies as they occur. The basis for this Indian preference is the PHA's findings that the St. Paul American Indian population has not been well-served by the existing Section 8 program; that the state has been unsuccessful in implementing its Section 8 program, for which 75 units are allotted; and that the 24-unit project would enable the St. Paul Inter-Tribal Housing Board to make use of special state funds for urban Indians which have been largely unused.[5]

II. Analysis: May HUD Provide Section 8 Moderate Rehabilitation Funds for a Program Conditioning Eligibility on Membership in an Indian Tribe?

A. Section 8 and its Legislative History.

The Housing Act of 1937 is the basic statutory authority for low-income housing programs. Its provisions cover public housing projects, congregate housing for the displaced, elderly, or handicapped, and the Section 8 housing assistance program. 42 U.S.C. § 1437d, e, f. The Section 8 assistance program was developed by Congress in 1974 in an effort "to give private developers the

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[4] Subdivision 15 of Minn. Stat Ann § 462A 07 provides in full:

> It [the Housing Finance Agency] may engage in housing programs for low and moderate income American Indians as that term is defined in § 254A 02, subdivision 11, residing in the metropolitan area defined in § 473.121, subdivision 2, and cities with a population greater than 50,000 persons. The program shall demonstrate innovative methods of providing housing for urban Indians, may involve the construction, purchase and rehabilitation of residential housing, and may be administered through any other provision of this chapter. To the extent possible, the programs shall combine appropriated money with other money from both public and private sources. . . . The agency shall consult with the advisory council on urban Indians created pursuant to § 3 922, subdivision 8, in the development of programs pursuant to this subdivision

Subdivision 14 of the same section states in pertinent part:

> It [the Minn Housing Finance Agency] may engage in housing programs for low and moderate income American Indians developed and administered separately or in combination by the Minnesota Chippewa tribe, the Red Lake band of Chippewa Indians, and the Sioux communities as determined by such tribe, band, or communities. In developing such housing programs the tribe, band, or communities shall take into account the housing needs of all American Indians residing both on and off reservations within the state.

[5] Letter to HUD from Marshall D. Anderson, Executive Director, PHA (Jan 23, 1981)

incentive for profit and the risk of loss in the construction and management of housing developed for low income families." S. Rep. No. 693, 93d Cong., 2d Sess. 43 (1974). Section 8 continued, in a substantially modified form, the leased housing assistance program Congress had enacted in 1965 to provide private accommodations for sublease to low-income families. S. Rep. No. 693, 93d Cong., 2d Sess. 43 (1974); H.R. Conf. Rep. No. 1279, 93d Cong., 2d Sess. 138 (1974); Housing and Community Development Act of 1974, Pub. L. No. 93–383, 88 Stat. 653, 662, 42 U.S.C. § 1437f.

Section 8 authorizes the payment of lower-income housing assistance "[f]or the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing. . . ." 42 U.S.C. § 1437f(a). It empowers the Secretary "to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section." 42 U.S.C. § 1437f(b)(1). It also establishes limitations on the maximum monthly rent and the percentage of assistance allocated, for example, to very low-income families. *See* 42 U.S.C. § 1437f(c)(1)–(8).

For purposes of tenant selection, the relevant subsection of Section 8 provides:

> (d)(1) Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that
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> (A) the selection of tenants for such unit shall be the function of the owner, subject to the provisions of the annual contributions contract between the Secretary and the agency,[6] except that the tenant selection criteria used by the owner shall give preference to families which occupy substandard housing or are involuntarily displaced at the time they are seeking assistance under this section.

42 U.S.C. § 1437f(d)(1)–(A).

On its face, this provision indicates only that preferences are permissible for "families which occupy substandard housing or are involuntarily displaced at the time they are seeking assistance. . . ." However, it also places the responsibility for selecting tenants on the owner, which suggests that an individual owner has some discretion to devise eligibility priorities on his own. Moreover, the exception mandating preferences for involuntarily displaced families is a recent 1979

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[6] The provisions of the annual contributions contract establish, *inter alia*:

(1) the maximum monthly rent which "shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically . . ."

(2) provisions for adjustment "annually or more frequently in the maximum monthly rents" that "reflect changes in the fair market rentals . . . or, if the Secretary determines, on the basis of a reasonable formula . . ."

42 U.S.C. § 1437f(c)(1), (2)(A). Aside from the provision that "At least 30 per centum of the families assisted under this section with annual allocations of contract authority shall be very low-income families at the time of the initial renting of dwelling units," there is no express qualification, other than qualifying as a "lower income family," on *whom* an owner may select as tenants. 42 U.S.C. § 1437f(c)(7), (f)(1).

amendment. See Pub. L. No. 96–153, § 206(b)(1), 93 Stat. 1101, 1108. Prior to 1979, Section 8 had simply provided that "the selection of tenants . . . shall be the function of the owner, subject to the provisions of the annual contributions contract between the Secretary and the agency." 42 U.S.C. § 1437f(d)(1)(A) (1976) (prior to 1979 amendment).

The legislative history accompanying the 1979 change explained the nature of the preference:

> The Committee has provided a priority in the selection of tenants in public housing and section 8 for families who occupy substandard housing or have been involuntarily displaced at the time they apply for assistance. The Committee believes that in a period of reduced funding for assisted housing, the programs should be directed toward those families who have housing needs which require more urgent attention. . . . The priority is not intended nor should it be used to allow the Department to direct an owner or PHA to select certain tenants. It would be unacceptable and clearly not authorized by this provision for the Department to require a PHA or owner to select tenants from a list developed by the Department. This provision is not intended to alter the basic responsibility over tenant selection which, under current law, rests solely with the PHA and owner. It is simply intended to have owners and PHAs give priority to meeting the urgent housing needs of those families living in substandard conditions or being involuntarily displaced.

H.R. Rep. No. 154, 96th Cong., 1st Sess. 16 (1979); Housing and Community Development Amendments of 1979, Pub. L. No. 96–153, 93 Stat. 1101. Section 8 and its legislative history offer no additional guidance on the rationales behind, and the permissibility of, tenant preferences.

B. Rules of Statutory Construction Relative to Legislation Affecting Indians.

Section 8 and its legislative history give no clear indication of the extent of discretion that a PHA or owner may exercise in selecting tenants and, more specifically, whether an Indian preference is permissible. The answers to these questions must be evaluated in light of two rules of statutory interpretation relevant to statutes that arguably affect the legal rights of Indians. One is the familiar rule that "legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred." *United States* v. *Nice,* 241 U.S. 591, 599 (1916). This policy of generously construing any ambiguities in favor of Indians would be applicable if either language in the Housing Act generally, or Section 8 interpreted in light of administrative practice, indicated an intention to permit an Indian housing preference in the present circumstances.

However, a second rule of statutory construction prescribes that if Congress does not explicitly single out Indians for preferential treatment, courts should not imply an intent to treat Indians more favorably or differently from all other citizens. The Supreme Court has often noted that if Congress intends to aid or protect Indians in a manner different from others, "it should say so in plain words. Such a conclusion cannot rest on dubious inferences." *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 607 (1943) (no express intent to exempt restricted Indian lands from state estate taxation); *F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. 99, 117 (1960) (no intent to exempt Indian reservations beyond those specially defined in the statute). Thus, if further scrutiny reveals an absence of legislative intent to treat specially off-reservation Indian housing programs, there is no basis for inferring preferential treatment simply because Indians have been favored in some other context. Faced with congressional silence, we could not find that Indians, simply by being Indians, should be excluded from the legislative and administrative rules that generally govern Section 8 housing programs. *See F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. at 116.

Third, unless the Housing Act of 1937 contains an Indian preference, to infer that Congress intended to exempt Indians from the general requirements of the nondiscrimination statutes that apply to federal housing assistance, without specifically indicating such an intent, would constitute a repeal by implication. Because Congress is presumed to be aware of the entire body of law, and thus aware of prior statutes when it enacts later ones, courts strongly disfavor any repeals by implication. *See Watt* v. *Alaska*, 451 U.S. 259, 267 (1981); *Morton* v. *Mancari*, 417 U.S. at 549; *Universal Interpretative Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 339 U.S. 186, 193 (1968).

As is well-known, § 601 of Title VI of the Civil Rights Act of 1964 provides that

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3631 more specifically bans discrimination in the sale or rental of housing "because of race, color, religion, sex or national origin." 42 U.S.C. § 3604. This prohibition applies to public housing authorities like the St. Paul agency involved here that receive federal financial assistance. 42 U.S.C. § 3603(a).

Were the Housing Act of 1937, or long-settled and congressionally ratified administrative practice thereunder, found to have sanctioned an Indian housing preference, then the subsequently enacted nondiscrimination statutes would not impliedly repeal such a specific preference. *See Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum"); *Morton* v. *Mancari* (rejecting contention that Equal

Employment Opportunity Act impliedly repealed Indian preference provisions of Indian Reorganization Act). But if the 1937 Act was silent with respect to Indian preferences, converse presumptions apply. When Congress amended the Housing Act in 1974 to provide for Section 8 housing assistance, and in all subsequent amendments to Section 8, Congress was legislating against the backdrop of Titles VI and VIII. Presumably, if Congress intended to exempt Indians from the nondiscrimination statutes, it would make express its desire to modify or preclude the applicability of these existing statutes that would otherwise affect the later enactments. This is especially so when major public statutes reflecting important national policy, such as Titles VI and VIII, are involved. *See Watt* v. *Alaska*, 451 U.S. at 281 n.5 (Stewart, J., dissenting) ("it would be unreasonable to assume Congress would alter fundamental policy without an unambiguous expression of its intent to do so"); 1A, C. Sands, Sutherland on Statutory Construction § 23.10 (3d ed. 1972). Indeed, there is no question about Congress' awareness of Title VI: it expressly incorporated Title VI requirements into the housing regulations. *See* n.15 *infra*. Thus, if Congress had been previously silent concerning urban Indian housing, it would require an explicit Indian exemption or equivalent "clear and manifest" intent to effect a partial amendment of Title VI. *See United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

C. Application of Rules of Statutory Construction.

(1) Congress Did Not Intend to Permit an Indian Only Off-Reservation Section 8 Housing Program Under the Housing Act.

First, we must determine whether the Housing Act is legislation enacted for the benefit of Indians and therefore should be construed generously in their favor. We conclude that with respect to off-reservation housing the statute contains no evidence of an intent to treat Indians specially.

The Housing Act is a general statute and not legislation specifically designed to benefit Indians.[7] In the opening declaration of policy, the Housing Act states "[i]t is the policy of the United States to promote the general welfare of the nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income. . . ." 42 U.S.C. § 1437.

The Act refers explicitly to Indians on only two occasions. The primary reference to Indians is in a definition, rather than substantive, section of the Act.[8]

[7] *Cf.* The Bartlett Act, 42 U.S C § 3371 (assistance for housing for Alaskan natives) In *Eric* v *Sec'y of Housing and Urban Development*, 464 F. Supp 44 (D. Alaska 1978), the court held that the legislative history of the Bartlett Act indicated that an Indian preference was intended.

[8] The other reference appears in 42 U.S.C. § 1437d, which excepts projects on Indian reservations or in Alaskan Native villages from the general rules binding the Secretary in assessing prototype costs *See* p 15 *infra*. The 1974 Amendments had also contained a provision targeting funds to Indians for certain types of housing from 1974 to 1976 42 U S C § 1437c(c) *See* p 23 *infra*. After 1976, Congress did not make explicit reference to Indian funds in the Housing Act and the 1978 Housing and Community Development Amendments specifically rejected the concept of set-asides Congress concluded that "[d]eletion of the set-asides would provide the Secretary maximum flexibility in utilizing the funds made available for public housing and section 8 housing assistance payments " S Rep. No 871, 95th Cong., 2d Sess 14, 73 (1978).

Section 1437a provides that when used in this chapter "[t]he term 'State' includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, the Trust Territory of the Pacific Islands, and Indian Tribes, bands, groups, and Nations, including Alaska Indians, Aleuts, and Eskimos, of the United States." 42 U.S.C. § 1437a(7). No legislative history explains this 1974 amendment which included "Indian Tribes, bands, groups, and Nations" within the reach of the statute. Pub. L. No. 93–383, 88 Stat. 653; S. Rep. No. 693, 93d Cong., 2d Sess. 119 (1974).

We believe that the inclusion of Indians in this general definitional section, as opposed to a substantive section of the Act, suggests only that Congress intended to establish that HUD can have the same type of administrative relationship with Indian Tribes as it does with the states or the District of Columbia. *See Alexander* v. *U.S. Dept. of Housing & Urban Development*, 441 U.S. 39, 50–53 (1979) (short, general statement of purpose not intended to be substantive departure from Congress' statutory design). In treating Indian Tribes as essentially equivalent to political subdivisions, Congress would be dealing with Indians as members of quasi-sovereign tribal entities, not as individuals of a particular race.[9] This interpretation comports with the prevailing rationale underlying Congress' plenary power to legislate specially with respect to Indians: that Indians are a separate people with their own institutions. *See United States* v. *Antelope*, 430 U.S. 641, 646 (1977); *Morton* v. *Mancari*, 417 U.S. at 555.

That Congress intended by the Act to direct housing assistance exclusively to Indian Tribes only insofar as they functioned as governmental authorities with discrete jurisdictions is supported by earlier legislation and existing regulations. Prior to the 1974 Amendment which included "Indian Tribes, bands, groups . . ." within the categories of eligible recipients, Congress had infrequently addressed Indian housing problems. The initial 1937 legislation providing housing for low-income families did not specifically include Indians as beneficiaries of governmental largesse. *See* United States Housing Act of 1937, § 1, 50 Stat. 888, 42 U.S.C. § 1401. In 1968, Congress amended Section 1 of the Act by adding "Indian areas" to the previously designated urban and rural nonfarm areas targeted for federal assistance. Housing and Urban Development Act of 1968, § 206(a), 82 Stat. 504; 42 U.S.C. § 1401. This reference to "Indian

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[9] The Senate Report to the Housing and Community Development Act of 1974 gave a more extensive definition of the Indian tribal groups which Congress intended to be eligible for planning assistance under an amendment to another housing statute, the Housing Act of 1954. Insofar as the amendment, similar to the amendment in § 1437a(7), redefined the list of eligible recipients, the description of Indian recipients is enlightening but not dispositive:

> The amendments would, however, authorize the Secretary to make planning assistance available to *Indian tribal groups, or bodies which represent Indians living as a community and owning contiguous lands* for which planning assistance is sought, whether or not these tribal groups or Indians are eligible to receive grants under other Federal assistance programs. The term "Indian tribal group or body" is intended to mean any tribe, band or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized by the State in which they reside and any tribe, band or groups of Eskimos, Aleuts, or Alaskan natives (emphasis added)

S. Rep. No. 693, 93d Cong., 2d Sess. 60 (1974).

areas" was the predecessor of the 1974 Amendment that defined "Indian Tribes, bands, groups, and Nations," as potential recipients of assistance under the Act.

The legislative history explained the 1968 change which first mentioned Indians, as follows:

> Section 206 of the bill would amend the U.S. Housing Act of 1937 so as to permit public housing assistance for Indian families without regard to the present limitation which does not permit public housing programs to include a site which is on a farm or is an appurtenance to a farm. The existing limitation has presented difficulties in connection with conventional low-rent housing and mutual-help housing programs for Indians. . . . In some cases, the present limitation has the effect of permitting the use of certain sites, and prohibiting others, in connection with the same project on an Indian reservation. This amendment is intended to apply to all Indian reservations, whether they be State or National.

S. Rep. No. 1123, 90th Cong., 2d Sess. 32 (1968). By expressly stating that the amendment applied to Indian areas—which the legislative history described as reservations—Congress presumably intended to direct such federal aid that far but not necessarily any further.

The Supreme Court reached an analogous conclusion in *F.P.C.* v. *Tuscarora Indian Nation,* 362 U.S. 99, which presented the question whether lands owned by the Tuscarora Indian Nation could be taken, with just compensation, for the storage reservoir of a hydroelectric power project by the New York Power Authority under a license from the Federal Power Commission. The statute at issue exempted "reservations" *of the United States,* including "tribal lands embraced within Indian reservations," from the lands that could be condemned, if the taking would interfere with the purpose of the reservation. 362 U.S. at 112. Yet the Court held that lands *owned in fee simple by the Indian Nation* were "not within a 'reservation' as that term is defined and used in the [statute]." 362 U.S. at 115. The Court distinguished the extent to which Congress dealt specially with Indians—excluding tribal lands within federally owned reservations from the statute's scope—and the extent to which Congress "intended to include lands owned or occupied by any person or persons, including Indians . . ." within the takings power of the statute. 362 U.S. at 118.

Interpreting Congress' intent in the Housing Act to limit special aid to Indians to Indian areas[10] is further supported by a recent amendment to the Act. Section 1437d(b)—the other express statutory reference to Indians—excepts "projects to be constructed as a result of assistance provided under this chapter and which are to be located on Indian reservations or in Alaskan Native villages" from the general rules that bind the Secretary's determination of prototype costs. The

[10] "Indian areas" is a term of art used both in the 1968 Housing Act and in existing regulations. 24 C.F.R. § 805.102 (1981). Essentially coterminous with the word "reservation," the word is also intended to include the similarly owned Indian lands that cover large sections of Oklahoma and Indian areas in Alaska, neither of which fall technically within the term "reservation."

subsection notes that "with respect to remote areas such as may be found in connection with projects developed under the Indian and Alaskan Native housing program assisted under this chapter, the extensive transportation required to provide the necessary labor, materials, and equipment to the project site and any additional conditions that the Secretary determines should be taken into consideration . . ." shall be accounted for in determining the prototype costs. 42 U.S.C. § 1437d(b)(8). The statutory language implies that Indian program assistance is targeted to Indian lands which may not be well-integrated into the state's transportation network or which simply may be remote from sources of materials, equipment, and supplies. Nowhere is there a congressional indication that the Indian program is operative in the cities, for Congress most likely found no reason to differentiate Indians from other citizens in urban areas.

(2) HUD Regulations Supply no Suggestion of Legislative Intent to Treat Off-Reservation Indians Specially.

The HUD regulations that define the Indian Housing Program under the Housing Act also buttress the conclusion that no special treatment of Indians was intended outside Indian areas. The Indian housing regulations set forth at 24 C.F.R. § 805 (1981) are applicable "to such projects which are developed or operated by an Indian Housing Authority [(IHA)] *in the area* within which such Indian Housing Authority is authorized to operate" (emphasis added). 24 C.F.R. § 805.101(a)(1). If the IHA is established by a tribal ordinance enacted "by exercise of a tribe's powers of self-government," it operates over "all areas within the jurisdiction of the tribe." 24 C.F.R. § 805.108(a); App. 1 (tribal ordinance). If the IHA is established pursuant to a state law, it must have "all necessary legal powers to carry out low income housing projects for Indians." 24 C.F.R. § 805.108(b).[11] That is, even an IHA created by state law must function as a governing body with respect to housing matters within a particular region or area.[12]

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[11] Alaska, Maine, Oklahoma, and Texas have enacted laws to permit the establishment of IHAs to provide housing in Indian areas in those states *See, e.g* , 63 Okla. Stat Ann. § 1054. As the HUD Interim Indian Housing Handbook 7440–1, *amended* 1979, explains, "[a] public housing agency which serves Indians as well as other low income families is not eligible as an IHA since the statute creating such as authority is not a statute providing specifically for housing authorities for Indians." Chapt. I–1(C) at 1–3

[12] In addition, HUD indicated that federal funds for Indian Housing projects were restricted to Indian areas when it first published its Indian housing regulations in 1976. HUD explained the possibility of Section 8 housing as follows:

> Several comments objected to the mention of the Section 8 Housing Assistance Payments program as a type of housing available to IHAs. While the Section 8 Program has not yet been utilized in Indian areas, HUD has not ruled out the possibility of providing this type of housing assistance as beneficial to Indians because it is possible to provide homeownership opportunity housing under it. The provision therefore has been retained (§ 805.103(c).)

41 Fed Reg. 10152 (Mar 9, 1976). In promulgating the 1979 amendments to these regulations, HUD again explained that

> [t]he basic obstacle so far to the use of the Section 8 Program on Indian reservations has been the problem of obtaining private financing by an owner (whether it be a private owner or an IHA) for the construction or acquisition or rehabilitation of a project

44 Fed. Reg. 64204 (Nov 6, 1979) (Indian housing, final rule). These regulations simply assume that Indian housing will be situated in Indian areas

Thus, the Housing Act, its legislative history, and the accompanying Indian housing regulations all indicate that insofar as Congress intended to treat Indians specially under the Act, federal assistance would be directed to Indian areas. The Act is silent on the possibility of Indian-only off-reservation housing. If Congress has not authorized preferential treatment as part of the unique relationship between the federal government and the Indian Tribes, the Court has found that to interpret the law specially for Indians is "not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the over-reaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in this state. . . ." *United States* v. *Oklahoma Gas Co.*, 318 U.S. 206, 211 (1943). Indeed, if the special treatment of Indians cannot be grounded in their unique status as political entities—formerly sovereign nations which still retain a measure of inherent sovereignty over their people—and if no federal statute or practice exists that reflects this determination in regard to urban housing, to treat Indians other than as ordinary citizens would constitute impermissible discrimination. *See Fisher* v. *District Court*, 424 U.S. 382, 390 (1976); *Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue*, 295 U.S. 418, 421 (1935). *Cf. Morton* v. *Mancari*, 417 U.S. at 548 (exemptions in Title VII for tribal employment and preferential treatment by business on or near a reservation reveal "clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed"). Here, in the absence of an express congressional indication specifically referring to Indian preferences in urban housing programs, "Indians are subject only to the same rule of law as are others." *F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. at 119; *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 607 (1944); *United States* v. *Oklahoma Gas Co.*, 318 U.S. at 211.

Because the Housing Act, and administrative practice thereunder have not established off-reservation Indian housing preferences, Titles VI and VIII cannot be read to impliedly repeal such a preference. *Cf. Morton* v. *Mancari*, 417 U.S. at 550–551 (Equal Employment Opportunity Act of 1972 did not supersede specific statutory preference for Indians). The only remaining question is whether the extent of discretion over tenant selection authorized by Section 8 would enable a PHA or owner to condition tenant eligibility on membership in a recognized tribe. That is, has Congress sanctioned any preference concepts in the Section 8 regulations that could conceivably cover an Indian-exclusive tenant policy? Such a preference must either be consistent with Titles VI and VIII or be expressly accepted by Congress as superseding the general nondiscrimination requirements of those earlier statutes. *See Fullilove* v. *Klutznick*, 448 U.S. 448, 492 n.77 (1980) (later, specific preference provision supersedes earlier general nondiscrimination statute).

D. Section 8 and HUD Regulations for Tenant Selection in Section 8 Housing Permit No Specific Preferences That Could be Read to Include an Indian Preference.

(1) As noted above in Section II.A, Section 8 itself places the duty of tenant selection on the housing owner and creates an express statutory preference only

for families which occupy substandard housing or are involuntarily displaced. The regulations describing the policies and procedures applicable to Section 8 Moderate Rehabilitation Programs under the Housing Act are set forth at 24 C.F.R. § 882, with special procedures for moderate rehabilitation in subparts D and E (1981).[13] On the one hand, the regulations explicitly single out certain groups for attention. For example, in submitting an application for a moderate rehabilitation program, the PHA must certify that it will take "affirmative action to provide opportunities to participate in the Program to those elderly persons expected to reside in the locality and those Familys [sic] expected to reside in the community as a result of current or planned employment. . . ." 24 C.F.R. § 882.503(b)(1)(ii). The PHA must further certify "that the PHA will provide a preference for . . . Families displaced as a result of Moderate Rehabilitation. . . ." 24 C.F.R. § 882.503(a)(2)(ii)(C). On the other hand, they provide no indication that the Secretary of HUD could make funds available to an Urban Housing program open only to Indians who are enrolled tribal members. Indeed, a PHA applying for federal funds under Section 8 must include an equal opportunity housing plan in its submission. 24 C.F.R. § 882.503(b).

While the somewhat circular nature of the regulations makes it difficult to determine what an equal opportunity plan entails,[14] there is no reason to believe that the language does not mean what it says: no discrimination. The only preferential treatment expressly permitted by the regulations defining the equal opportunity plan is that "the PHA may establish a preference for applicants currently residing in that neighborhood who are being directly displaced by HUD programs." 24 C.F.R. § 882.517(b). This preference both reflects the Section 8 statutory language and does not conflict with Title VI and VIII or the Fifth Amendment.

Significantly, the permissibility of any preferences is circumscribed by the requirement that the equal opportunity plan must include "signed certification of the applicant's intention to comply with Title VI of the Civil Rights Act of 1964; Title VIII of the Civil Rights Act of 1968; [and] Executive Order 11246. . . ." 24 C.F.R. § 882.503(b)(1)(ii).[15] In contrast to other legislation and regulations that expressly authorize agencies to take affirmative action which favors members of certain disadvantaged racial or ethnic groups to the exclusion of other persons, nothing in the regulations for Section 8 sanctions a racially or ethnically exclusive tenant policy. *Cf. Fullilove* v. *Klutznick*, 448 U.S. 448 (upholding Public

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[13] The special procedures for moderate rehabilitation programs were promulgated in 1979. *See* 44 Fed Reg. 26670 (May 4, 1979)

[14] The plan must describe the PHA's policies for "[s]electing from among eligible applicant Families those to be referred to Owners including any provisions establishing preferences for selection." 24 C F.R § 882.503(b)(1)(C) The only indication of what those preferences might encompass appears in 24 C.F.R § 882 517(b). But § 882.517(b) refers back to § 882 503 in stating that "[t]he PHA must select Families for participation in accordance with the provisions of the Program and in accordance with the PHA's application, including any PHA requirements or preferences as approved by HUD. (*See* 24 C F.R § 882 503(b)(1)(i)(C))."

[15] HUD has also issued specific regulations effectuating the provisions of Title VI 24 C F.R. § 1.1 (1981) Analogous to the Section 8 regulations, the Title VI regulations permit recipients of federal financial assistance operating low-rent housing under the Housing Act of 1937 to assign applicants to dwelling units based on preferences or priorities established by the recipient's regulations and approved by HUD But these preferences may not be "inconsistent with the objectives of Title VI of the Civil Rights Act of 1964 and this Part I." 24 C F.R. § 1.4 The HUD regulations effectuating Title VI were issued in 1973 *See* Fed Reg 17949 (July 5, 1973).

Works Employment Act of 1977, 42 U.S.C. §§ 6701–6710 which establishes in § 103(f)(2) a minority business enterprise set-aside). Pub. L. No. 95–28, 91 Stat. 116, 117 (1977). In light of the express protections for the elderly, the handicapped, or displaced families, the absence of explicit preferences for racial or ethnic groups, and the nondiscrimination obligations imposed on HUD by Titles VI and VIII, HUD would appear to have no discretion to direct Section 8 funds to programs exclusively designed for a special racial or ethnic group, including urban Indians.

E. No Sufficiently Explicit Tenant Preference Provision Exists to Constitute an Exception to Title VI Requirement.

Having determined that neither Section 8 of the Housing Act nor the Section 8 regulations expressly sanction any preference that conceivably could cover urban Indians, two rules of statutory construction are relevant. First, in the absence of any legislative indication or administrative practice, there is no basis for interpreting the word "preference" in the regulations, 24 C.F.R. § 882.503(b), to include an urban "Indian only" policy. *Cf. Morton* v. *Mancari*, 417 U.S. 535. As we concluded in II. C. (1) and (2) above, with respect to urban housing, Indians stand on no different footing than do other minorities in our pluralistic society. Congress has expressed no intent to treat urban Indians preferentially, and, in light of the congressional silence, such a determination "cannot rest on dubious inferences." *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 607.

Second, Congress enacted Section 8 against the backdrop of the nondiscrimination statutes. HUD regulations specifically incorporated Title VI requirements. *See* n.15 *infra*. Congress cannot have been unaware of these laws and therefore its silence concerning urban Indian housing preferences cannot be interpreted as an implied repeal of the earlier nondiscrimination provisions. *See Watt* v. *Alaska*, 451 U.S. at 267–273; *Morton* v. *Mancari*, 417 U.S. at 549–550. The presumption against implied repeals requires that the legislature's intention to repeal must be "clear and manifest." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). Nothing in the legislative history of Section 8 indicates affirmatively a congressional intent to exempt urban Indians from the existing prohibitions on discrimination. The absence of a statutory preference for Indian-only urban housing and the lack of administrative precedent for providing Section 8 funds to Indian-only urban programs clearly do not constitute such a manifest intent to exempt Indians from the otherwise applicable requirements of Title VI and VIII. We conclude that HUD has no discretion to direct Section 8 funds to programs exclusively designed for urban Indians.

In reaching this conclusion, we would add that the present situation differs from that in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), which involved a conflict between a congressional intent to benefit Indians *near* the reservation and an agency's conviction that it was not authorized to provide benefits to off-reservation Indians. In *Ruiz*, the Bureau of Indian Affairs (BIA) asserted that under its regulations it had no discretion to provide general assistance to off-reservation

Indians. 415 U.S. at 204. But the Court noted that the BIA had represented to Congress that Indians "on or near" reservations were eligible for benefits, and Congress accordingly had appropriated funds to cover welfare services for Indians residing at least "on or near" reservations. 415 U.S. at 229–30. The Court, therefore, found the agency's position that it could not provide off-reservation benefits inconsistent with the congressional intent to benefit Indians "on or near" a reservation.

Here, however, Congress has evinced an intent to provide "Indian only" housing solely on reservations or similarly owned Indian areas. *See Indian and Alaskan Native Housing Programs, Hearings Before the Subcommittee on Housing and Community Developments of the Comm. on Banking, Finance and Urban Affairs, House of Representatives,* 96th Cong., 2d Sess. (1980) (no indication throughout hearings that "Indian only" programs are intended for off-reservation Indians). Moreover, the one time that Congress explicitly targeted funds for Indian housing, it expressly prohibited the use of such funds for Section 8 housing. *See* 42 U.S.C. § 1437c(c) (1976);[16] H.R. Rep. No. 1114, 93d Cong., 2d Sess. 25 (1974). Notwithstanding the general rule of statutory construction that legislation involving Indians is to be construed in their favor, we find no evidence whatsoever that Congress intended to provide Section 8 rental assistance specially for Indians in an off-reservation context. Therefore, the policy of construing any ambiguities to the benefit of Indians does not even come into play. *See Cramer* v. *United States,* 261 U.S. 219, 229 (1923) (government protects rights of Indians if such rights are recognized in statute or flow from settled governmental policy).

III. Conclusion

Section 8 provides no authority for HUD to make federal funds available to an urban Moderate Rehabilitation Program whose occupancy is limited to Indian tribal members. Nor do the Indian housing regulations envisage "Indian only" housing programs in urban areas with respect to which Indian tribes have no unique, semi-sovereign relationship. In the absence of any federal legislation or regulations recognizing Congress' special relationship to the Indians with respect to urban housing or authorizing HUD to assist specially urban Indian housing, we conclude that Congress intended to treat Indians in the same manner as all other citizens for purposes of Section 8 Moderate Rehabilitation Housing in urban

[16] In pertinent part, § 1437c(c) stated:

> In addition, the Secretary shall enter into contracts for annual contributions, out of the aggregate amount of contracts for annual contributions authorized under this section to be entered into on or after July 1, 1974, aggregating at least $15,000,000 per annum, which amount shall be increased by not less than $15,000,000 per annum, on July 1, 1975, and by not less than $17,000,000 per annum on October 1, 1976, to assist in financing the development acquisition cost of low-income housing for families who are members of any Indian tribe, band, pueblo, group, or community of Indians or Alaska Natives which is recognized by the Federal Government as eligible for service from the Bureau of Indian Affairs, or who are wards of any State government, except that none of the funds made available under this sentence shall be available for use under section 1437f of this title.

Later amendments did not specifically target funds to Indians

areas. *See F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. at 118. HUD, therefore, has no discretion to provide tenant rental assistance to a Section 8 program with an exclusive occupancy policy.

We would add that nothing in this opinion is intended to suggest that a housing project intended to serve the particular needs identified by St. Paul authorities in this case could not be approximated by developing tenant occupancy policies based on the various types of preferences which are authorized under the Housing Act and Section 8. We conclude only that HUD is presently without statutory authority to grant Section 8 funds to an urban rehabilitation program restricted in its occupancy exclusively to Indians.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

United States Secret Service Use of the National Crime Information Center

The United States Secret Service (USSS) has authority under 18 U.S.C. § 3056 to investigate and maintain files on an individual who it reasonably believes might pose a threat to the physical safety of those it is responsible for protecting, even though that individual is not the subject of an arrest warrant or under investigation for any prior criminal activity.

The USSS has authority to disclose information in its investigative files to the Federal Bureau of Investigation (FBI) and other law enforcement agencies through entry of this information into the National Crime Information Center (NCIC). The Attorney General is also independently authorized by 28 U.S.C. § 534 to disseminate information on criminal investigations, including information on USSS-monitored subjects, for law enforcement purposes.

An exchange of information among law enforcement agencies through the NCIC must satisfy the requirements of the Privacy Act. In order to avoid that statute's general prohibition on disclosure, the USSS and FBI must satisfy the procedural requirements of the "routine use" exemption contained in 5 U.S C. § 552a(b)(3).

Disclosure of information from the NCIC on USSS-monitored subjects for non-law enforcement purposes, such as employment or licensing, is prohibited by the Privacy Act, and may raise serious constitutional problems under the Fifth and Fourteenth Amendments

Both 28 U.S.C. § 534 and the Privacy Act require that reasonable efforts be made to assure that information contained in the NCIC is accurate and relevant to its use for law enforcement purposes.

June 9, 1982

MEMORANDUM FOR THE ASSISTANT DIRECTOR,
TECHNICAL SERVICES DIVISION,
FEDERAL BUREAU OF INVESTIGATION

This memorandum responds to your request for our opinion regarding several issues raised by the proposed entry of data from the United States Secret Service (USSS) into the National Crime Information Center (NCIC). Specifically, you have asked: (1) whether the USSS has the authority to monitor the activities of individuals who are not the subject of outstanding arrest warrants but who may threaten the physical safety of the public figures it protects; and (2) whether the USSS may enter information about such individuals into the NCIC, the Federal Bureau of Investigation's (FBI's) computerized criminal justice information system. For the reasons set forth in detail below, we conclude that the USSS has the authority to gather information and maintain files on such individuals and enter the proposed information about them into the NCIC. We caution, however,

that the NCIC should disseminate this information, as you have proposed, only to law enforcement agencies for law enforcement purposes, and not for non-law enforcement purposes, such as employment or licensing.

I. Background

The USSS is authorized by 18 U.S.C. § 3056 to "protect" various public figures, including the President and Vice President (protectees).[1] In discharging this responsibility, the USSS gathers information and maintains files on certain individuals "whose actions or spoken words indicate that [they] may constitute a threat" to protectees. Opinion Request, p. 1. We understand that most of these persons are not the subject of an outstanding arrest warrant.[2] The USSS has proposed to enter into the NCIC the names and certain information about those persons "who are determined to be dangerous and about whom a decision is made to ensure that the individual is not permitted to inflict harm on protectees."

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[1] Under 18 U.S C § 3056, the Secret Service is authorized to:

> protect the person of the President of the United States, the members of his immediate family, the President-elect, the Vice President or other officer next in the order of succession to the Office of President, and the Vice President-elect, and the members of their immediate families unless the members decline such protection, protect the person of a former President and his wife during his lifetime, the person of a widow of a former President until her death or remarriage, and minor children of a former President until they reach sixteen years of age, unless such protection is declined; protect the person of a visiting head of a foreign state or foreign government and, at the direction of the President, other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad

In addition, the Act of June 6, 1968, Pub L No. 90–331, 82 Stat. 170, as amended, *reprinted in* 18 U.S C. § 3056 note, authorizes the USSS to "furnish protection to persons who are determined from time to time by the Secretary of the Treasury, after consultation with the advisory committee, as being major presidential or vice presidential candidates who should receive such protection," and, in certain circumstances, their spouses.

[2] Pursuant to the Privacy Act, 5 U S C § 552a(e)(4) & (11), the USSS has announced that it maintains protective information files on the following categories of individuals:

> (a) Individuals who have been or are currently the subject of a criminal investigation by the U.S Secret Service or another law enforcement agency for the violation of certain criminal statutes relating to the protection of persons or the security of properties, (b) Individuals who are the subjects of investigative records and reports supplied to the Secret Service by Federal, state, and local law enforcement agencies, foreign and domestic, other governmental agencies; private institutions and individuals for evaluation by the Secret Service in connection with the performance by that agency of its authorized protective functions; (c) Individuals who are the subjects of non-criminal protective and background investigations by the Secret Service and other law enforcement agencies where the evaluation of such individuals, in accordance with criteria established by the Secret Service, indicates a need for such investigations; (d) Individuals who are granted ingress and egress to areas secured by the Secret Service, the Executive Protective Service, or to areas in close proximity to persons protected by the Secret Service, including but not limited to invitees, passholders, tradesmen, law enforcement, maintenance and service personnel; (e) Individuals who have attempted or solicited unauthorized entry into areas secured by the Secret Service; individuals who have sought an audience or contact with persons protected by the Secret Service or who have been involved in incidents or events which relate to the protective functions of the Secret Service; (f) Individuals who are witnesses, protectees, complainants, informants, suspects, defendants, fugitives, released prisoners, and correspondents who have been identified by the Secret Service or from information supplied by other law enforcement agencies, governmental units, private institutions, and members of the general public in connection with the performance by the Secret Service of its authorized protective functions

46 Fed. Reg 16643 (1981).

Opinion Request, p. 2. It estimates this group to number at any given time between 300 to 400 individuals (USSS-monitored subjects).[3]

The stated purpose of this dissemination is to monitor the location and activities of these individuals by using the network of state and federal agencies which obtain information from the NCIC. At present, the NCIC contains separate files on wanted persons, missing persons, stolen property, and criminal histories. It supplies information about a particular individual or property from these files to federal, state, and local criminal justice agencies that make an inquiry about that individual or property.[4] Under the proposal, the NCIC would establish a new file on the USSS-monitored subjects which would be accessible to government law enforcement agencies seeking to use the information for law enforcement purposes, in particular, criminal investigation and arrests. Whenever any participating law enforcement agency seeks information for these purposes from the NCIC about an individual who is in this file, the USSS would be informed about the request. This would permit the USSS to contact the inquiring agency, learn the reasons for the request, and thereby monitor the subject's current activities. If a law enforcement agency seeks information on such an individual for non-law enforcement purposes, such as employment or licensing, the NCIC would not disclose any information about the subject.[5]

While the FBI has not determined finally the specific information which would be included in the NCIC entry on each USSS-monitored subject, we understand that it would probably include identifying information about the subject, such as his height and weight; a notation that the USSS considers him to be a "threat" or

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[3] In determining whether an individual will be considered dangerous to a protectee and included in the NCIC file, the USSS would follow these procedures

(A) Through numerous and varied means, individuals may be brought to the attention of the USSS. An investigation is begun which usually includes a personal interview with the individual. Some criteria used in a determination are. the interview, the facts of the action bringing the subject to the attention of USSS, the potential or capability of the subject to carry out any threat, and a background investigation including criminal and mental checks/inquiries.

(B) If, based upon this initial investigation, an individual is determined to be a potential threat by an investigatory agent, his evaluation and determination are reviewed for concurrence by field supervisors

(C) The original investigation and evaluation, and the field evaluation are reviewed at USSS Headquarters by a Senior Agent/Intelligence Research Specialist

(D) These evaluations are then reviewed and approved by an Intelligence Division supervisor

(E) Once evaluated as dangerous, the individual is subject to a periodic review process.

(F) The decision to enter such individual into the NCIC System will be under the Assistant Director for Protective Research, with the Special Agent in Charge, Intelligence Division, acting on his behalf

Opinion Request, p. 3.

[4] Access to the criminal history file is currently more limited than access to the other files. The non-criminal history files are generally available to state or federal "criminal justice agencies" for any authorized purpose. *See* 46 Fed. Reg 60293, 60294 (1981) (description of system's operation) While criminal history files are accessible to criminal justice agencies for any criminal justice purpose, and to any federal agency authorized to receive it, state criminal justice agencies can only obtain the information for non-law enforcement purposes, such as licensing or employment, if access is specifically authorized by state law and approved by the Attorney General. *Id. See* 28 C F R. § 20.33 (1981)

[5] Our understanding that dissemination of this information from the NCIC would be limited to government law enforcement agencies using the information for law enforcement purposes is based on a discussion with B. Bryan Masterson, Editorial Staff, NCIC.

"potentially dangerous" to a protectee; and a request that any agency inquiring about the subject contact the USSS. In addition, in order to protect law enforcement officials who come into contact with a subject, the USSS would also include a brief description of the subject's dangerous characteristics, for example, that he is "mentally unstable" or "armed and dangerous." Finally, the entry would warn officials not to arrest the subject based on the NCIC entry.[6]

II. Authority of the USSS to Investigate and Maintain Files on Individuals Who Are Not the Subject of an Outstanding Arrest Warrant

Under 18 U.S.C. § 3056, the USSS is authorized to "protect" the person of the President, Vice President, and other designated public figures,[7] and to "detect and arrest" any person who has made a threat against the President or his successor in violation of 18 U.S.C. § 871. Although neither the language of § 3056 nor its legislative history explains what specific activities are included within the protective responsibilities of the USSS, it is clear that the USSS's duties necessarily require it to engage in a broad range of prophylactic investigations and preventive actions.[8] The USSS is not only charged with identifying and apprehending persons who have threatened the safety of the President or other protectees, but also with *preventing* any person from jeopardizing their physical safety. This charge necessarily presumes that the USSS has the authority to investigate individuals who might threaten the safety of protectees but who have not yet taken any concrete action toward realizing that goal.[9]

This authority was specifically recognized by the Fifth Circuit in *Moorefield* v. *United States Secret Service*, 611 F.2d 1021 (5th Cir.), *cert. denied*, 449 U.S. 909 (1980). In that case, the plaintiff, Moorefield, had sought disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, of a USSS protective file maintained on him. Even though he was not being investigated to detect any

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[6] This description of the NCIC entry is based on an "example" of an "NCIC inquiry" and "a positive U.S Secret Service response" which was furnished us by the staff of the NCIC.

[7] The public figures are listed in note 1, *supra*

[8] The Supreme Court has described the USSS's responsibility for assuring the physical safety of the President as representing an "overwhelming" national interest *Watts* v *United States*, 394 U S 705, 707 (1969) (per curiam)

[9] The implied authority of the executive branch generally to take appropriate action to prevent the commission of federal crimes was recognized over 90 years ago in *In Re Neagle*, 135 U.S. 1 (1890). There the Supreme Court noted.

> It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed. *Id* at 59 More recently, the Office of Management and Budget has specifically observed that "[a]gencies can derive authority to collect information about individuals [either by direct constitutional or statutory authorization] or [b]y the Constitution, a statute, or Executive order authorizing or directing the agency to perform a function, the discharge of which requires the maintenance of a system of records." Office of Management and Budget Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28948, 28960 (1975) Section 3056, which directs the USSS to assure the physical safety of protectees, is a statute "directing the agency to perform a function, the discharge of which requires the maintenance of a system of records."

prior criminal activity,[10] the court held that the file was maintained pursuant to the USSS's statutory authority and therefore constituted "investigatory records" prepared for "law enforcement purposes" within the meaning of FOIA, 5 U.S.C. § 552(b)(7)(A).[11] The materials in the file, it reasoned,

> include[d] background and other matters specifically relevant to Moorefield, and were prepared to help the Service fulfill its duty under 18 U.S.C. § 3056 (1976) [of] ensuring the lives and safety of the President, members of his family, and certain other persons.

Id. at 1024 (footnote omitted). Gathering of this information, therefore, served the "prophylactic purpose of keeping Service protectees from harm." *Id.* at 1024 n.3. The court went on to conclude that the file was exempt from disclosure under FOIA because disclosure would have directly undermined an "enforcement proceeding," which the court defined to mean, in that case, the protection of the President:

> In discharging its responsibility to protect the President, the Secret Service does not conduct its routine investigations with a view towards apprehending law-breakers and bringing them to justice. Thus, if the Service has succeeded in its prophylactic mission, it should never appear in an adjudicatory proceeding to prosecute the assailant of a President, or any of its other protectees. Its job is to *prevent* an attack from ever being made. . . . Notwithstanding that Service investigations are not directed toward trials or hearings, they are certainly directed toward an active and concrete effort to enforce the law—in fact, nothing could be more "active and concrete" than activities that are part of the security apparatus that surrounds the President of the United States.

Id. at 1025 (citations omitted and emphasis in original).[12]

Congress also recognized the broad scope of the USSS's investigatory authority and protective files when it passed the Privacy Act, 5 U.S.C. § 552a. Although the Privacy Act grants the subject of many agency records access to

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[10] Moorefield had previously been convicted of making threats against the President *See* 611 F.2d at 1022, 1024.

[11] Section 552(b)(7)(A) prohibits disclosure of "investigatory records compiled for law enforcement purposes, . . . to the extent that the production of such records would . . . interfere with enforcement proceedings." *See generally Federal Bureau of Investigation* v. *Abramson*, 456 U.S. 615 (1982).

[12] Similarly, in *Scherer* v *Brennan*, 379 F.2d 609, 611 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967), the Seventh Circuit held that Treasury Department agents were acting within the scope of their duty to protect the person of the President when they monitored the activities of an individual who they believed might pose a threat to the President, even though he was not the subject of an arrest warrant or under investigation for any prior criminal activity. The agents were thus held to be immune from suit for any damages to the subject that might have resulted from their surveillance. *Cf Galella* v. *Onassis*, 487 F.2d 986, 993 (2d Cir. 1973) (USSS charged "with guarding against and preventing any activity by any individual which could create a risk to the safety and well being of" protectees).

them,[13] it authorizes an agency head to exempt from this requirement any files "maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056." 5 U.S.C. § 552a(k)(3). Speaking against an amendment which would have deleted this exemption from the Act, Representative Moorhead recognized that "[t]he list of the protective service by the Secret Service has gotten too broad," but added that the "list also contains the names of people who are a real threat" and "that an amendment which completely eliminates the secrecy of the legitimate protective right of the Secret Service just goes too far." 120 Cong. Rec. 36966 (1974). Similarly, the House Committee Report on the Act noted that "[a]ccess to Secret Service intelligence files on certain individuals would vitiate a critical part of Secret Service work which was specifically recommended by the Warren Commission [the Commission to Investigate the Assassination of President Kennedy]." H.R. Rep. No. 1416, 93rd Cong., 2d Sess. 19 (1974). The Warren Commission had recommended that the USSS expand its activities beyond the investigation of "persons communicating actual threats to the President," or persons expressing "some manifestation of animus against a Government official." The President's Commission on the Assassination of President Kennedy (Warren Commission Report) at 461–62 (1964). In its view, such a limitation was "unduly restrictive." *Id.* at 462. "A basic element of Presidential protection," it advised, "is the identification and elimination of possible sources of danger to the President before the danger becomes actual." *Id.* at 429.[14] In passing the exemption for the USSS protective files, therefore, Congress apparently recognized that the USSS would be engaged in the prophylactic investigation and surveillance of a variety of individuals, including many who are not the subject of an arrest warrant or suspected of any prior criminal activity.[15]

Accordingly, we believe that the USSS has the authority to monitor the activities of individuals who are not the subject of an outstanding arrest warrant or being investigated for the commission of prior crimes, so long as the USSS

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[13] The Act generally covers any "system of records" "maintained" by an agency on an individual "Maintain" is defined to include "maintain, collect, use or disseminate" 5 U.S.C. § 552a(a)(3) A "system of records" is defined as a "group of any records under the control of any agency from which information is retrieved by the name of the individual," or by some other symbol 5 U.S.C. § 552a(a)(5). The USSS protective files are a "system of records" within the meaning of the Act. *See* 46 Fed Reg 16643 (1981).

[14] The Warren Commission apparently assumed that the USSS has the authority to undertake such investigation under § 3056. Although the Commission criticized the prior lack of preventive investigation, and strongly recommended that the USSS and FBI expand such activity in the future, it did not suggest that any new statutory authority was necessary for such investigation. The only recommendations made by the Commission with respect to the authority of the USSS under § 3056 were that Congress should make assaults or attempted assaults on the President or his successor a federal crime, and grant its agents the authority to make arrests without a warrant. Warren Commission Report at 454–56 Congress adopted these recommendations by amending § 3056 in Pub L. No. 89–218, 79 Stat. 890 (1965), to give the USSS the authority to make arrests without a warrant, and by enacting 18 U.S.C. § 1751 to make an assault on the President (-elect), Vice President (-elect), or the President's successor a federal crime.

[15] In adopting this provision, Congress also failed to rely on a more general exemption from the Privacy Act requirements for files "maintained" "for the purpose of a criminal investigation" by an agency or component thereof "which performs as its principal function any activity pertaining to the enforcement of criminal laws." 5 U.S.C. § 552a(j)(2)(B). This may suggest that Congress believed investigations undertaken by the USSS might be somewhat broader than traditional "criminal investigations" *Cf.* 120 Cong Rec 36966 (1974) (remarks of Rep. Erlenborn) (supporting USSS exemption even though it "falls under the same general category of law enforcement where we already have an exemption")

reasonably believes that the individuals might pose a threat to the physical safety of protectees.[16]

III. Authority of USSS to Enter Information About USSS-Monitored Subjects into the NCIC

Having determined that the USSS has the authority to collect information about, and maintain files on, individuals who are not the subject of an arrest warrant, we next consider whether it may disclose the proposed information about these individuals to the FBI, and whether the FBI may in turn disclose it to other agencies, by creating the proposed new file in the NCIC. These disclosures raise two issues: first, whether the USSS has the statutory authority to disseminate this information to the FBI, or the FBI, in turn, to other agencies; and second, even if they do, whether the Privacy Act prohibits such disseminations.

A. Statutory Authority of the USSS and FBI to Disseminate Information on USSS-Monitored Subjects to Agencies with Access to the NCIC

The USSS clearly has the authority to transmit information on individuals it believes may threaten a protectee to the FBI in order to facilitate protection of protectees. Such authority is implicit in its power under § 3056 and explicit in its authority under the Presidential Protection Assistance Act of 1976, Pub. L. No. 94–524, § 6, 90 Stat. 2475, as amended, *reprinted in* 18 U.S.C. § 3056 note, to seek the assistance of other federal agencies in its protective responsibilities. We also believe that the FBI has the authority to disseminate this information to law enforcement agencies in the circumstances you have proposed, although this conclusion requires a more detailed explanation.

Section 534, Title 28 (1976), authorizes the Department of Justice to collect and disseminate various types of "records." It states in pertinent part:

> The Attorney General shall—
>
> (1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and
>
> (2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

By authorizing the collection and dissemination of "identification, criminal identification, crime, and other records," the language of this provision appears

[16] We note that the Privacy Act generally requires that an agency "maintain no record describing how any individual exercises rights guaranteed by the First Amendment" 5 U S C § 552a(e)(7). This restriction, however, would not limit surveillance of individuals or maintenance of files for the protection of protectees The Act provides an exception to this prohibition for surveillance which is "pertinent to and within the scope of an authorized law enforcement activity" The Attorney General has previously determined that USSS and FBI protective investigations undertaken pursuant to § 3056 constitute a "law enforcement activity" *See* Memorandum from Edward H. Levi, Attorney General, to Clarence M. Kelley, Director, FBI, "Gathering and Reporting Data Regarding Civil Disturbances," p. 2 (Mar. 4, 1976) We see no reason to reconsider this conclusion

to support the Attorney General's power to collect and disseminate a wide variety of criminal investigatory information, including the proposed entry on USSS-monitored subjects.[17]

Some question about this interpretation, however, is raised by the D.C. Circuit decision in *Menard* v. *Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974), which interpreted the Attorney General's authority under § 534 very narrowly. In *Menard*, the plaintiff had brought suit to expunge an FBI record of his "detention" by California State Police.[18] In granting him relief, the court held that the FBI lacked statutory authority under § 534 to retain a record of a detention in the arrest file for dissemination to law enforcement agencies. It appeared to reason that the Department only had authority to disseminate "criminal records," *i.e.*, criminal matters of record, such as arrests or convictions, and not criminal investigatory information. Since a record of a "detention" was, in its view, a type of investigatory information, the FBI had no authority to maintain the record in a file for dissemination.

The court based its narrow reading of § 534 on the brief congressional debate attendant to its "original enactment." The Chairman of the House Judiciary Committee had described the practice of the Identification Bureau during this debate as follows:

> There are two classes of information that [are] gathered. One is criminal records, and another is the information that is gathered about criminals that is not a matter of record. That they do not give out, but the criminal records they do give out. That information is gathered for the department itself and its agents, in order that they more effectually do their work.

72 Cong. Rec. 1989 (1930) (remarks of Rep. Graham). Thus, according to the court, Congress did not intend to authorize the dissemination of investigatory information, such as the plaintiff's detention record, which was not a "matter of record." 498 F.2d at 1028–29 n.42.

The *Menard* decision should undoubtedly be read narrowly. As a practical matter, the FBI disseminates criminal investigatory information in many cases to other federal and state agencies. *See, e.g.*, 46 Fed. Reg. 60311, 60321 (1981) (describing dissemination of criminal investigatory information in FBI Central Records System). The court in *Menard*, however, was concerned principally with the FBI's dissemination of inaccurate or misleading information from its files, such as a record of a "detention" in an arrest file, where that information would be used for employment decisions. In its opinion, the court specifically found that the retention of plaintiffs' file was "not consistent with the FBI's duty,

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[17] The Attorney General has delegated his authority under § 534 to the Director of the FBI. *See* 28 C.F.R. § 0.85 (1981)

[18] After the plaintiff was arrested by California police, the police were unable to connect him with any felony or misdemeanor, and therefore they classified his custody as a detention pursuant to California law. Nevertheless, this incident was initially entered into the FBI criminal identification files as an arrest. After plaintiff brought suit, the FBI amended the entry in its arrest file to show that the plaintiff had been "detained" under California law. 498 F.2d at 1019–20

corollary to its function of keeping identification records, to take appropriate measures to assure that this function is discharged responsibly and that the records are reliably informative." *Id.* at 1027–28. A subsequent District of Columbia decision emphasized this aspect of the decision. *See Tarlton* v. *Saxbe*, 507 F.2d 1116, 1121 & n.7 (D.C. Cir. 1974). Thus, the decision should probably be read as only prohibiting the NCIC from disseminating inaccurate records in this context, and not from disseminating accurate investigatory information to other law enforcement agencies.

Indeed, even if *Menard* were read to prohibit the dissemination of general criminal investigatory information, we believe that this limitation would not apply to the Attorney General's dissemination of information to assist in the protection of the President and other protectees. There is no doubt, for example, that the USSS and the FBI may contact local law enforcement officials in the area where the President or another protectee is traveling in order to provide background information on USSS-monitored subjects. Such authority flows directly from the USSS's ability to protect such figures pursuant to 18 U.S.C. § 3056 and to obtain assistance in this effort from other executive agencies. *See* Presidential Protection Assistance Act of 1976, § 6, *reprinted in* notes to 18 U.S.C. § 3056. For similar reasons, we believe that both the USSS and the FBI have implied authority to disseminate generally some limited background information in order to monitor the subject's activities. This authority would not only permit the disclosure of identifying information about the subject, but also USSS evaluations. These descriptions would assist police in handling the subject and ultimately contribute indirectly to the USSS protection of protectees.

Even if *Menard* could not be distinguished, however, we believe that 28 U.S.C. § 534 clearly authorizes the Attorney General to disseminate criminal investigatory information. Our conclusion that other courts should not and will not adopt *Menard's* analysis of § 534, at least with respect to the entry on USSS-monitored subjects, is based on three weaknesses in the *Menard* analysis.

First, the legislative history of § 534 does not support the court's narrow interpretation. The court relied on the congressional debates during the enactment of a predecessor statute, 5 U.S.C. § 340 (1964), *repealed by* Pub. L. No. 89–554, § 8(a), 80 Stat. 632, 648 (1966), which had authorized dissemination of only "criminal identification and other crime records." In 1966, however, Congress had combined § 340 with 5 U.S.C. § 300 (1964), *repealed by* Pub. L. No. 89–554, § 8(a), 80 Stat. 632, 648 (1966), to form present § 534. Section 300 had authorized the Attorney General to appoint officials to exchange "identification and other records."[19] Section 534, which combines both provisions, not only authorizes the dissemination of "criminal identification" and "crime records," but also "identification" and "other records." Accordingly, Congress' narrow intent in passing 5 U.S.C. § 340 (1964), on which the court in *Menard* relied, does not limit the dissemination of records under the broader language of 28

[19] Section 300 was based on the Department of Justice Appropriation Act, 1965, Pub L. No. 88–527, 78 Stat. 71 § 201 (1964) Similar provisions authorizing the exchange of "identification and other records" had been passed every year since 1932 *See, e g* , ch. 361, 47 Stat. 488 (1932).

U.S.C. § 534.[20] Moreover, while the separate legislative history of 5 U.S.C. § 300 (1964), does not clarify the meaning of "other records," there is no indication that Congress intended to give it the restrictive interpretation which the court in *Menard* gave to 5 U.S.C. § 340 (1964).

Second, *Menard's* interpretation of the language of the statute is illogical. The court apparently did not challenge the obvious authority of the Attorney General to gather and maintain records on criminal investigations. *See* 498 U.S. at 1029. Thus, the definition of records for purposes of acquisition and storage of information covers records of criminal investigations. The court adopted a narrower interpretation of records, however, with respect to the dissemination of criminal information. In such cases, "records" were defined as matters of official record. This bifurcated definition of record obviously finds no support in the text of § 534. The section authorizes the exchange of "these records," meaning the same "records" which the Attorney General is permitted to "acquire, collect, classify, and preserve." Therefore, unless the provision is interpreted to prohibit the Attorney General from maintaining investigatory records, a position that not even the court in *Menard* was willing to adopt, the language of § 534 and its legislative history authorize the dissemination of some types of investigatory information, including, we believe, the entry on USSS-monitored subjects.

Third, the Court in *Menard* partly based its narrow reading of § 534 on the view that dissemination of criminal investigation information would create a constitutional problem which should be avoided through narrow statutory construction. *See* 498 F.2d at 1029. After *Menard* was decided, however, the Supreme Court in *Paul* v. *Davis*, 424 U.S. 693 (1976), held that no liberty or privacy interest was implicated by the dissemination of criminal justice information unconnected with any tangible property interests such as employment. Thus, there is no justification for interpreting § 534 so as to avoid constitutional problems with respect to the dissemination of investigatory information only for law enforcement purposes.

In light of all of these factors, we believe that federal courts should not and will not adopt *Menard's* narrow interpretation of § 534 in this context. Section 534, in our view, authorizes the dissemination of investigatory information for law enforcement purposes, including the USSS entry on USSS-monitored subjects.

B. The Privacy Act

Although the USSS and FBI have the authority to disseminate this information, this disclosure must still satisfy the requirements of the Privacy Act. The USSS files are a "system of records" within the meaning of the Privacy Act.[21]

[20] The Court in *Menard* ignored the more expansive language of 28 U.S.C. § 534 because the 1966 amendments specifically stated that they were not intended to change the substantive meaning of the predecessor statutes. *See* 498 F.2d at 1028–29 n.42, *citing* Pub. L. No. 89–554, § 7a, 80 Stat 611, 631 (1966). However, if § 300 authorized the dissemination of investigatory records before it was combined with § 340, then the court's exclusive reliance on the language and history of § 340 was misplaced.

[21] "System of records" is defined as "any records under the control of any agency for which information is retrieved by the name of the individual or by some identifying" symbol. 5 U S.C. § 552a(5). The USSS's Privacy Act notice on its protective files recognizes that they constitute a "system of records." *See* 48 Fed Reg. 16643 (1981).

The Act prohibits an agency from "disclosing" to another agency any record which is contained in a "system of records" unless the subject of the record gives his consent or one of several other exceptions are met. The only exemption that might permit the transmission of information on USSS-monitored subjects is that exemption which authorizes disclosure for a "routine use" of the information, 5 U.S.C. § 552a(b)(3), *i.e.*, "use [of the record] for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C. § 552a(a)(7).[22] Thus, dissemination of the records from the USSS to the NCIC, and from the NCIC to the various participating law enforcement agencies, must each come within this exception to satisfy the requirements of the Act.

The precise meaning and outer limits of the "routine use" exception have not been clearly delineated. In adopting this admittedly "ambiguous" language, 120 Cong. Rec. 36957 (1974) (remarks of Reps. Ichord and Erlenborn), it was recognized that "[i]t would be an impossible legislative task to attempt to set forth all of the appropriate uses of Federal records about an identifiable individual." 120 Cong. Rec. 36967 (1974) (remarks of Rep. Moorhead). It is clear, for example, that the exemption may cover the dissemination of information even though it is used for a purpose different from the one for which it was collected. *See, e.g.*, 120 Cong. Rec. 36967 (1974) (remarks of Rep. Moorhead); 120 Cong. Rec. 40406 (1974) (remarks of Sen. Ervin); OMB Circular No. A–108 (1975), 40 Fed. Reg. 28953 (1974); *United States* v. *Collins*, 596 F.2d 166 (6th Cir. 1979) (per curiam); *Burley* v. *United States Drug Enforcement Administration*, 443 F. Supp. 619, 623 (M.D. Tenn. 1977). The "routine use" exemption may also permit dissemination of information for a particular purpose even though the dissemination occurs infrequently. *See* 120 Cong. Rec. 36967 (1974) (remarks of Rep. Moorhead).

Because of the difficulty in defining legislatively the limits of the routine use exception, Congress chose to prevent irregular disclosures under this exemption primarily by requiring agencies to promulgate the regulations setting forth the "routine uses" of their own information. Under 5 U.S.C. § 552a(e)(4) & (11), agencies must publish the routine uses of information in the *Federal Register* 30 days before dissemination for notice and comment. This "public scrutiny" was intended to "caution . . . agencies to think out in advance what uses it will make of information," 120 Cong. Rec. 40406 (1974) (remarks of Sen. Ervin) and provide a "check" against "potential bureaucratic abuses." 120 Cong. Rec.

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[22] The Privacy Act also exempts disclosure to any government agency "for a civil or criminal law enforcement activity," but only "if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought" 5 U.S.C § 552a(b)(7) Because requesting agencies in the NCIC do not make written requests for information, this exception would not exempt the exchange of information through the NCIC

The other exceptions also do not cover the exchange of information through the NCIC They exempt the disclosure of information to employees of the agency that maintains the record; to the Bureau of the Census for Census purposes; to the Natural Archives if the information is of historical value; to either House of Congress; to a committee of Congress if within its jurisdiction, to the Comptroller General if pursuant to its GAO duties, to a court of competent jurisdiction if pursuant to court order, to a recipient who gives adequate assurances that the information will be used for statistical purposes and the information is transmitted so as not to be personally identifiable, to a person who can show "compelling circumstances" affecting the health or safety of the subject of the file; and pursuant to the Freedom of Information Act 5 U S C § 552a(b).

36655 (1974) (remarks of Rep. Moorhead). The only cases to date in which courts have disallowed disclosures of information sought to be transmitted under this exception have arisen where the agency failed to satisfy the procedural requirements of public notice and comment. *See, e.g., Parks* v. *United States Internal Revenue Service,* 618 F.2d 677 (10th Cir. 1980).

Assuming the USSS and FBI satisfy these procedural requirements of public notice and comment, we believe that the transmission of the proposed information on USSS-monitored subjects into the NCIC, and from the NCIC to other federal and state agencies, would come within the "routine use" exception. The proposal involves the transmission of two types of information. First, the names of and identifying information about these individuals would be disclosed to a participating agency in order to obtain current information from that agency about the subject. In such cases, the information on the subject is being disclosed for the same purpose for which it was originally collected—protection of protectees—and therefore is clearly a "routine use."

Second, certain evaluative descriptions, such as "potentially dangerous to a protectee," "mentally unstable," or "armed and dangerous," are disclosed, according to your letter, essentially to assist law enforcement personnel in their own dealings with the subject. *See* Opinion Request, p. 3. So long as law enforcement personnel are obtaining the information to further a criminal investigation or an arrest, and the information may be of assistance in this effort, this use would appear to be "compatible" with the use for which the information has been collected. The information is being used to assess the subject with regard to the possible commission of a crime and his danger to police officers. Moreover, this disclosure may also assist in the protection of the President and other protectees by making local law enforcement personnel aware of possible threats to protectees and the specific danger they pose.[23]

We caution, however, that disclosure of the information for the purpose of making non-law enforcement decisions, such as licensing or employment, which are unrelated to criminal investigation, would present different issues. Such use might well not satisfy the underlying intent of the routine use exemption in many cases. The purpose of the "routine use" exception is "to discourage the unnecessary exchange of information to another person or to agencies who may not be as sensitive to the collecting agency's reasons for using and interpreting the material." 120 Cong. Rec. 40406 (1974) (remarks of Sen. Ervin) ("Analysis of House and Senate Compromise Amendments to the Federal Privacy Act"). Designation of certain individuals as dangerous to protectees or "mentally unstable," as the above discussion has suggested, may often be based on necessarily tentative, highly prejudicial and conclusory judgments. While such evaluations may be valuable to law enforcement investigation, they may be

[23] We note, however, that this issue will probably be litigated if individuals in the file believe that they have been subjected to police harassment as a result of this designation. Accordingly, we recommend, as discussed in greater detail below, that adequate precautions be taken to assure that designations are accurate, timely, and no more derogatory than is necessary to provide needed information. It is also extremely important, as the proposed entry provides, to warn local officials *not* to arrest the subject based on the NCIC entry.

unduly prejudicial when used for purposes such as employment or licensing, which are unrelated to criminal investigation. Employment personnel clearly "may not be as sensitive to the [USSS's] reasons for using and interpreting the material."[24]

This possibility is underscored by the legislative history of 5 U.S.C. § 552a(k)(3), which permits USSS protective files to be exempted from the access requirements of the Act. In speaking against a proposed amendment that would have deleted this exemption, Representative Erlenborn conceded that "real harm" could result from the dissemination of USSS investigatory information "to some other agency where the person would be harmed in his application for employment or some other right or privilege under the laws of the United States." 120 Cong. Rec. 36966 (1974). He recommended that the exemption for USSS protective files should be passed only because the "prohibition of transfer to other agencies," except for routine uses, would still apply to USSS files. *Id.* Thus, Congress may have exempted USSS protective files from the access requirements of the Act with the understanding that the restrictions on dissemination of these files to other agencies would be carefully scrutinized.

Dissemination of this information for non-law enforcement purposes could also create serious constitutional problems. In *Paul* v. *Davis*, 424 U.S. 693 (1976), the Supreme Court held that no liberty or privacy interest of the plaintiff was violated by a police department's dissemination of a flyer identifying him as an "active shoplifter." The Court reasoned that defamation, "standing alone," does not deprive an individual of any liberty interest protected by the procedural guarantees of the Fifth and Fourteenth Amendments. 424 U.S. at 709. The Court suggested in dicta, however, that imposition by the government of a stigma plus a loss in government employment might trigger a liberty interest. Other cases have similarly suggested that a stigmatizing government disclosure coupled with the loss of employment or property interest might trigger due process protection. *See Owen* v. *City of Independence, Mo.*, 445 U.S. 622, 633 n.13 (1980); *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972). Although we need not reach the question of whether and when dissemination of information on USSS-monitored subjects for non-law enforcement purposes would be impermissible, in light of these decisions and the legislative history of the Privacy Act,[25] we strongly

[24] We note that one court has held that the disclosure of drug investigation records about a state pharmacist to a state licensing board constituted a routine use *See Burley* v *United States Drug Enforcement Administration*, 443 F Supp 619, 623–24 (M D Tenn 1977). In contrast to the general and conclusory designation of individuals as a "threat to a protectee" or "mentally unstable," however, drug investigation information is directly relevant to the licensing decision of such boards. Moreover, as the court noted, 21 U.S.C § 873 specifically authorizes the Attorney General to disclose drug investigation information to state officials

[25] Dissemination for non-criminal investigation purposes could also restrict the flexibility of the USSS in gathering information about USSS-monitored subjects The Privacy Act requires federal agencies to "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs." 5 U.S.C § 552a(e)(2) Dissemination of information on USSS-monitored subjects in a way that would result "in adverse determinations about an individual's rights, benefits, and privileges under Federal programs" would therefore require the USSS to collect information on USSS-monitored subjects "as much as practicable" from the subjects themselves, unless the information were construed to come within the law enforcement exemption to this requirement *See* 5 U.S.C § 552a(j)(2)(B).

recommend that care be taken to assure that dissemination of this information is strictly limited to law enforcement purposes.[26]

IV. Maintaining the Accuracy of Information on USSS-Monitored Subjects

Finally, we note that even though the NCIC has the authority to disseminate this information to law enforcement agencies, § 534 and the Privacy Act, 5 U.S.C. § 552a(e)(6), require that reasonable efforts be made to assure that the information is accurate and relevant to its use for law enforcement purposes. In *Tarlton* v. *Saxbe*, 507 F.2d at 1125, the D.C. Circuit "interpret[ed] § 534 in a manner designed to prevent government dissemination of inaccurate criminal information without reasonable precautions to ensure accuracy." *See also Pruett* v. *Levi*, 622 F.2d 256, 257 (6th Cir. 1980); *United States* v. *Doe*, 556 F.2d 391, 393 (6th Cir. 1977); *Menard* v. *Saxbe*, 498 F.2d at 1026. *Tarleton* recognized, however, that this "duty must be accommodated to the particular role the FBI plays in the collection and dissemination of criminal information in the Federal system, the FBI's capacity to take reasonable measures to ensure accuracy and the practicalities of judicial administration and executive efficiency." *Id.* at 1126. Similarly, the Privacy Act, 5 U.S.C. § 552a(e)(6), provides that "prior to disseminating any record about an individual to any person other than an agency . . ., [an agency must] make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes." Since state law enforcement agencies with access to the NCIC are not agencies within the meaning of the Privacy Act, 5 U.S.C. § 552a(a)(1),[27] the FBI should satisfy this standard if the records are to be introduced into the NCIC for general dissemination.[28]

Because we are not sufficiently familiar with the process by which individuals receive designations such as "dangerous" to a protectee or "mentally unstable," we believe that it would be inappropriate for us at this time to express an opinion on what procedural safeguards should be provided. We emphasize that some periodic reassessment of these designations, as your proposal indicates will be undertaken, would probably be necessary. We also believe that the entry on USSS-monitored subjects should clearly note, as the current proposal provides, that the individual should not be arrested as a result of the entry.[29] *Cf. Testa* v.

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[26] We note that information on USSS-monitored subjects in the NCIC file would remain exempt under 5 U S C. § 552a(k)(3) from the access requirements of the Privacy Act. This provision permits the head of an agency to exempt files which are "maintained in connection with providing protective services pursuant to section 3056 " Although the new NCIC files on USSS-monitored subjects are not maintained "by" the USSS, they are maintained "in connection with" providing protective services under § 3056

[27] Agency means "agency as defined in § 552(e) of Title 5," which does not include state institutions.

[28] Section 552a(e)(5) also requires that an agency "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." Because dissemination of these files through the NCIC is clearly covered by 5 U S.C § 552a(e)(6), we need not decide whether inclusion of an individual in the file on USSS-monitored subjects for law enforcement purposes is a "determination" within the meaning of the section

[29] *See* note 3, *supra*.

Winquist, 451 F. Supp. 388, 394–95 (D.R.I. 1978) (operator of criminal history computer system may be held liable for knowing dissemination of inaccurate information which leads to unconstitutional arrest). If you would like us to look into this issue after being briefed in more detail about the investigation process, we will be happy to do so.[30]

Conclusion

We believe that the USSS has the authority to monitor the activities of individuals who are not the subject of an arrest warrant so long as the USSS reasonably believes they may pose a threat to protectees. We also believe that the USSS can introduce the proposed information about USSS-monitored subjects into the NCIC. We emphasize, however, that care should be taken to assure that evaluative information about such individuals is periodically reevaluated and not disseminated from the NCIC for non-law enforcement purposes.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[30] Finally, we note that establishment of the new file in the NCIC would require amendment of the present regulations on the operation of the NCIC, *see* 28 C.F.R. §§ 20 1–20 38 (1981), as well as a new Privacy Act disclosure statement for both the USSS and NCIC *See* 5 U.S.C. § 552a(e)(4) & (11)

Federal "Non-Reserved" Water Rights

[The following memorandum of law deals with the scope of the federal government's rights to unappropriated water flowing across federally owned lands in the western states It discusses the background and development of the federal "non-reserved" water rights theory, and concludes that that theory does not provide an appropriate legal basis for a broad assertion of water rights by federal agencies without regard to state laws. It then sets forth the legal standards and considerations that are applicable to an analysis of federal water rights in connection with the management of particular federal lands under specific statutes authorizing federal land management.]

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June 16, 1982

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

I. Introduction

You have asked us for our analysis and legal opinion concerning the federal government's legal rights to unappropriated water arising on or flowing across federally owned lands in the western states. Specifically, you have asked us to consider whether the federal government can assert rights to unappropriated water, without regard to state laws governing the use of such water, under what has come to be known as the federal "non-reserved" water rights theory. For the reasons set forth in detail in this opinion, we conclude that the federal non-reserved water rights theory which we address in this opinion does not provide an appropriate legal basis for assertion of water rights by federal agencies in the western states.

The question presented to us arose in your Division in pending litigation in Wyoming State court involving, *inter alia*, rights of the United States Department of Agriculture, through the Forest Service, to water in the Big Horn and Shoshone National Forests. The question presented to us initially was whether an appropriate legal basis exists for the Forest Service to assert amended claims in that litigation based on the federal non-reserved water rights theory. At that time the Forest Service supported assertion of such claims, at least for the purposes of the Wyoming litigation. The Department of Agriculture has since changed its position and decided as a matter of policy that it will not assert claims based on the non-reserved water rights theory, but rather will rely on state law to obtain water rights, except where Congress has specifically established a water right or where a federal reserved right exists. *See* Letter from John B. Crowell, Jr., Assistant Secretary for Natural Resources and Environment, Department of Agriculture, to the Honorable David H. Leroy, Attorney General, State of Idaho (Feb. 5, 1982).

While the question of the validity of the federal non-reserved water rights theory arose in the relatively narrow context of the Wyoming litigation, it is a

question that has created considerable uncertainty for you and your client agencies (the Departments of the Interior, Agriculture, and Defense), and for the western states. It is no exaggeration to say that water is the single most vital resource in the western states. The importance of the availability of water for management of federal lands in the western states and concern at the state level with allocation of dwindling water resources have led in the past to conflicts within the Executive Branch and intense controversy with the western states over the basis and scope of the federal government's right to use unappropriated water arising on or flowing across federal lands. Previous Executive Branch positions relative to federal government claims to water in the western states have been inconsistent and have produced confusion, turmoil, and significant hostility toward the federal government.[1] The need to establish clear, dependable, reliable, and sound legal policies and to avoid conflicts and uncertainty in the western states to the extent possible, and to facilitate future planning for the use of water resources by both the western states and the responsible federal agencies has led you to ask this Office to address the matter more broadly.

We address here only the legal issues raised by the federal non-reserved water rights theory. Some uncertainty may persist as to how the legal principles we outline here should be applied to specific factual situations. Policy considerations will also continue to be important, for example, in the determinations by federal agencies relative to the breadth of permissible rights which they wish to assert or in the choice of procedures and forums in which to adjudicate federal water rights, and quantification of current and future water rights may have to await comprehensive adjudications in each state. However, because much of the uncertainty has been created by contradictory analyses of the legal basis of the federal non-reserved right theory, a comprehensive resolution of the legal issues involved will go far toward reducing the uncertainty and therefore the tensions among the various federal agencies and between the Executive Branch and the western states.

At the outset, it is important to understand what we address in this opinion. First, we are concerned here only with the federal government's right to use unappropriated water—*i.e.*, water that is not subject to any vested right of ownership under applicable state or federal law at the time the federal right accrues. We do not deal here with the scope of the federal government's right to acquire, by purchase or condemnation, existing vested ("appropriated") water rights held by private individuals or by the states. Second, the question we address is not simply whether a federal non-reserved right exists in the abstract. The federal government can, and does, acquire rights to use unappropriated water on federal lands by complying with state procedural and substantive laws. In

[1] The Attorney General for the State of Wyoming has stated, for example, that "the non-reserved right doctrine creates a nightmare for Western States' water resources management." Letter from the Honorable Steven F. Freudenthal, Attorney General, State of Wyoming, to Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Apr. 1, 1982) The Montana Attorney General has suggested that failure to resolve the non-reserved water rights dispute would lead to "a long and acrimonious confrontation between the federal and state governments." Memorandum from the Honorable Mike Greely, Attorney General, State of Montana, to Theodore B Olson, Assistant Attorney General, Office of Legal Counsel (Apr 1, 1982) at 12.

addition, the Supreme Court has recognized federal "reserved" water rights—*i.e.*, when the federal government, acting pursuant to congressional authorization, reserves or withdraws public land for a specific federal purpose, such as a national forest, it also reserves sufficient water to accomplish that purpose, regardless of limitations that might otherwise be imposed on the use of that water under applicable state law. *See* Part IIB(3)(a) *infra*. In its broadest formulation, a federal non-reserved water right might include any use by the federal government of unappropriated water that is recognized neither under applicable state law nor under the reserved right doctrine. Defined this broadly, federal non-reserved water rights would include even uses of water that have been explicitly authorized by Congress, but that may not be recognized by state law, such as preservation of a minimum instream flow in a particular river,[2] or diversion of a stream and construction of a dam for flood control, improvement of navigation, or production of hydroelectric power.[3] Although Congress has rarely been explicit in directing the use or disposition of water by federal agencies, there is no question that, by operation of the Supremacy Clause, such a specific directive preempts inconsistent state laws. *See* discussion in Part IIIA(1) *infra*. As we discuss below, a legal basis may therefore exist under particular federal statutes for assertion of federal water rights that do not fall into the category of either reserved or state-recognized rights, and that might conceivably be classified as "non-reserved" water rights simply because they do not stem from the reserved doctrine.

This is not to say, however, that an appropriate legal basis exists for the federal non-reserved water rights *theory*, as it has been articulated by, among others, former Solicitor Leo Krulitz of the Department of the Interior. It is this theory that we address here. In his June 25, 1979, opinion on the legal bases for acquisition of water rights by the Department of the Interior, Solicitor Krulitz concluded that, in the absence of an explicit congressional directive to the contrary, a federal agency may claim and use whatever unappropriated water is necessary to carry out congressionally authorized "management programs" for federal lands, without regard to state law. *See* Part IIB(3)(c)(i) *infra*. Solicitor Krulitz's theory of federal non-reserved water rights rested on the presumption that the federal government need not comply with state water law in its acquisition and use of water for federal purposes on federal lands—a presumption that could be rebutted only by an explicit statutory directive that the federal agency responsible for management of the federal lands in question abide by state law in the use, appropriation, or distribution of water on those lands. Thus, under this theory, in the absence of such a directive a federal agency may use whatever unappropriated water is necessary to carry out its land management functions without regard to state law.[4]

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[2] *See, e.g.*, 16 U S.C. § 577b (1976) (prohibiting any "further alteration of the natural water level of any lake or stream" in the Lake Superior National Forest).

[3] *See, e g., Oklahoma* v. *Guy F Atkinson Co* , 313 U.S. 508, 535 (1941), *First Iowa Coop.* v *Federal Power Comm'n*, 318 U.S. 152, 176 (1946), discussed in Part IIB(3)(b) *infra*

[4] As we discuss in Part IIB(3)(c)(i) *infra*, Solicitor Krulitz concluded that federal agencies are immune from both substantive and procedural state law, but recommended as a matter of policy that the agencies comply with state procedures wherever possible

We conclude that the broad federal non-reserved water rights theory asserted by Solicitor Krulitz is not supported by an analysis of the applicable statutes and judicial decisions. As we discuss below, to the extent Solicitor Krulitz relies on federal ownership of unappropriated water in the western states as a basis for federal rights to water, that reliance is misplaced. More importantly, when the question is considered as one of competing state and federal regulatory jurisdiction, rather than ownership of the water—as we believe it must—Solicitor Krulitz's opinion fails to give adequate consideration to the pattern of congressional deference to state water law, which the Supreme Court has recognized as critical in analyzing federal rights to water on federal lands. *See California* v. *United States*, 438 U.S. 645, 648–63 (1978); *United States* v. *New Mexico*, 438 U.S. 696, 701–02 (1978).

We believe that the history of federal-state relations with respect to water rights in the western states and Congress' weighing of the competing federal and state interests establish a presumption that is directly opposite to that asserted by Solicitor Krulitz: in the absence of evidence of specific congressional intent to preempt state water laws, the presumption is that federal agencies can acquire water rights only in accordance with state law. The mere assignment of land management functions to a federal agency, without more, does not create any federal rights to unappropriated water necessary to carry out those functions.

It is important to keep in mind, however, that this presumption is rebuttable. There is no question that the federal government has the constitutional authority to acquire rights to whatever water is necessary to manage federal lands, either through purchase or condemnation of existing water rights or by clear congressional action. The critical question is what evidence of congressional intent is necessary to rebut the inference that state law is controlling. The Supreme Court has addressed that question in its recent decisions in *California* v. *United States* and *United States* v. *New Mexico*, albeit in limited contexts. We believe that the Court's reasoning in those two cases provides the relevant framework for analysis here. Read together, those cases suggest that congressional intent to preempt state control over unappropriated water in the western states will be found only if conditions imposed under state law on the use or disposition of water by a federal agency conflict with specific statutory directives authorizing a federal project or directing the use of federal lands, or if application of state law would prevent the federal agency from accomplishing specific purposes mandated by Congress for the federal lands in question. The scope of the federal rights that may be asserted under those circumstances is limited to water minimally necessary to carry out the relevant statutory directives or purposes.

Although we believe that the water rights that can be asserted by federal agencies without regard to state law are far more limited than those available under Solicitor Krulitz's non-reserved water rights theory, we do not believe it is appropriate to reach a blanket conclusion that under existing federal statutes no implied federal water rights exist except for reserved rights. The reasoning used by the Supreme Court to support federal reserved rights does not depend solely on a formal reservation of land from the public domain, but rather on Congress'

exercise of a constitutional authority such as the Property or Commerce Clauses, coupled with the Supremacy Clause. Therefore, that reasoning is applicable even if there has been no such reservation. We believe, for example, that the Court's decision in *United States* v. *New Mexico* is equally applicable to water necessary to fulfill the primary purposes of a federal statutory scheme where the lands in question have been acquired by the federal government from private ownership, rather than reserved from the public domain, and dedicated to particular federal purposes, such as a national forest, park, or military base. *See* Part IIIB *infra*. We also believe that it is open to federal agencies to argue that Congress has established particular mandatory purposes for the management of public domain lands that would be frustrated by the application of state water law, although, as we discuss below, the primary federal statutes authorizing management of the public domain appear to provide little basis for that argument. The *New Mexico* decision leaves virtually no room for arguing, however, that federal agencies can appropriate water without regard to state law if that water is necessary only to carry out a "secondary use" of federal lands, in the terminology of the Court in *New Mexico—i.e.*, an incidental or ancillary use that is permitted by Congress, but not within the primary purposes mandated by Congress for the federal lands in question.

The scope of the federal government's rights to unappropriated water for use in the management of specific federal lands in the western states, whether characterized as "reserved" or "non-reserved," can be definitively determined only by a careful examination of the individual federal statutes that authorize management of those lands and their legislative history, and of the potential conflicts that may be created by application of state laws. We cannot undertake that analysis here with respect to all federal statutes governing the use of federal lands, but must leave that task, at least initially, to the individual agencies responsible for administration of those statutes. We outline in this opinion, to the extent possible, the legal standards and considerations that are applicable to that analysis, and the bases for our conclusions.

II. Background

The rights of the federal government to use water in the western states cannot be analyzed solely as a question of abstract constitutional or statutory interpretation. *See California* v. *United States*, *supra*, 438 U.S. at 648. The unique geography, history, and climate of the western states and the ownership by the federal government of substantial land within those states have shaped many of the relevant questions and conclusions. In order to analyze the scope of the federal government's rights to unappropriated water in the western states, it is therefore necessary to look in some detail at the development of western water law and the role played by the federal government in managing and disposing of the western public lands.

A. Development of "Appropriative" Water Rights in the Western States

Because of different climatic, topographic and geographic conditions and the differing demands of agricultural and economic development, the arid and semi-arid western states have developed legal doctrines and administrative machinery governing water rights that bear little resemblance to those developed in the humid eastern states.[5] Most of the eastern states have adopted, with some variations and modifications, the common law riparian theory of water rights. In general, under a riparian theory, the right to use water goes with ownership of land abutting a stream. Each owner of land on a stream has the right to make reasonable use of the water, but cannot interfere unreasonably with the right of a downstream owner to the continued flow of the stream. For example, if the riparian owner diverts the water, he must return it to its natural channel, undiminished except for reasonable consumptive uses. *See* 1 R. Clark, Waters and Water Rights, §§ 4.3, 16.1 (1967) (hereinafter cited as Clark); F. Trelease, Water Law, at 10–11 (3d ed. 1979). Similarly, a landowner in a riparian state generally has the right to make reasonable use of ground water arising on his land, but not to make unreasonable withdrawals of that water if it comes from a pool common to other landowners. *Id.* A landowner's riparian rights exist whether or not he actually takes steps to use the water, and the use may be initiated at any time. *See id.* at 11.

The riparian doctrine has for the most part been adequate to allocate water rights in the eastern states, where water is generally abundant and water problems most often involve flooding, drainage, pollution, or navigation.[6] As the arid and semi-arid western states were settled, however, the riparian system proved to be inadequate to meet the needs of the early settlers, particularly the miners and, later, the farmers.[7] The major problem faced by early settlers in those states was a shortage of water. The two primary occupations, mining and agriculture, required large consumptive uses of water, which could be accomplished only by construction of systems to divert and store available stream and ground waters. Tying water rights to the ownership of adjacent land, and thereby retarding or

[5] Land is generally considered arid or semi-arid if it cannot be cultivated without irrigation. *See* Note, *Federal-State Conflicts Over the Control of Western Waters*, 60 Colum. L. Rev. 967 n 2 (1960) (hereinafter cited as Colum Note) Seventeen western states are usually included in this category. Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. These states, where water is relatively scarce, have developed systems of legal rights to water based on the doctrine of "appropriation" or capture of the water for a productive use *See* discussion at pp 8–11 *infra*. The remaining 31 contiguous states have adopted some form of a riparian system for the allocation of water rights, based on ownership of land *See* discussion at pp 7–8 *infra*. Alaska appears to have largely rejected a riparian doctrine in favor of an appropriative system, while Hawaii has a mixed system based on custom, ancient rights, and legislation *See* 1 Clark, *supra*, § 4 4

[6] Although most of the states outside of the seventeen arid or semi-arid western states still adhere to riparian rights, in many of those states the common law has been codified or preempted by statutes governing specific uses such as construction of dams and use of water by cities, districts and state agencies, or preserving public uses such as minimum flows or, more recently, aesthetic and environmental values *See* F. Trelease, Water Law, *supra*, at 12. Some riparian states now require administrative permits prior to the initiation of new water uses. *Id; see also* F Trelease, "Federal-State Relations in Water Law" (Legal Study No 5, prepared for the National Water Commission) at 15–18 (Sept 7, 1971) (hereinafter cited as "Federal-State Relations").

[7] A riparian system was particularly ill-suited for use by the first wave of miners, who staked their claims at a time when most of the western lands were still owned largely by the federal government and not legally open for settlement Thus, for the most part there was no private ownership of land to which riparian rights could attach. *See* Colum. Note, *supra* n 5, at 969

precluding the diversion of waters from their normal channels, would have entirely frustrated development of the west. *See, e.g., California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 157 (1935). Accordingly, based largely on customs of the early miners, the western states developed what has come to be known as the "law of the first taker," or the "appropriative" system. Under an appropriative system, unlike under a riparian system, the right to use water does not depend on ownership of underlying or appurtenant lands. Rather, the right depends on capture or "appropriation" of the water for a particular use. The first person to put water to use is entitled to that water as long as the use continues, to the exclusion of subsequent users. The principle of "first-in-time-first-in-right" embodied in this customary system was quickly confirmed by the state courts,[8] and refined and codified by state statute.[9] Most of the western states have now adopted comprehensive water codes based primarily on appropriation, which provide for recognition, administration, and enforcement of water rights and, in several of those states, for large-scale planning of water resource use.[10]

Although statutory and case law differ in many respects among the western states, there are several common principles that distinguish the appropriative systems from riparian systems. *See generally* Trelease, "Federal-State Relations," *supra* n.6, at 29–33; 1 Clark, *supra*, § 4.

First, the right is based on the beneficial use of water, rather than on ownership of appurtenant land. Unless there has been an actual application of water to a beneficial use, there has been no valid appropriation. The beneficial use is also the measure of the right; an appropriator is entitled to only that quantity of water beneficially used in any given year upon particular land. *See* 5 Clark, *supra*, § 408.1. Uses considered "beneficial" vary from state to state. Recognizing that the term must be applied pragmatically, the states have generally considered beneficial uses to include a variety of productive uses such as mining, irrigation, domestic and municipal uses, industry, power production, stock watering, and, more recently, wildlife preservation and recreation.[11] *See id.* Some states have

[8] *See, e g., Irwin* v *Phillips*, 5 Cal. P. 140, 63 Am Dec 113 (1855), *Lux* v. *Haggin*, 69 Cal. 255, 10 P. 674 (1886), *Coffin* v *Lefthand Ditch Co.*, 6 Colo. 443 (1882).

[9] *See, e.g.*, Cal Civ. Code, tit. 8, pt 4, div 2, §§ 1410–22 (1872), Colo Laws 1862, ch. 28, § 13, Colo Laws 1864, § 32, Mont Laws 1865, p 30, §§ 1–2 Bannack Stats 367; §§ 69–70 Mont. Sess Laws 57; Laws of Dec. 9, 1850, Laws of Utah (1866) ch. 110–111, Law of Feb. 18, 1852, Laws of Utah (1866), ch 117; Law of Jan. 17, 1862, Laws of Utah (1866) ch. 119, Hills Laws Ann (Oregon) § 3832 (1864); Howell Code (Arizona) §§ 1, 3 (1864)

[10] For a general description of state water laws, *see* R Dewsnup & D Jensen, A Summary-Digest of State Water Laws (1973) (study prepared for the National Water Commission) and 3 W Hutchins, Water Rights Laws in the Nineteen Western States (U S. Dept. of Agriculture Misc Pub. No. 1206, 1971) Nine of the western states, most notably California, have in the past recognized some limited forms of riparian rights on private lands, in addition to appropriative rights. *See* 1 Clark, *supra*, § 18 2(B). By statute or constitutional amendment those states have largely eliminated or severely circumscribed reliance on riparian ownership, and consequently riparian rights now have, for the most part, only historic significance *See* 5 Clark, *supra*, § 420 The only states in which new uses may be initiated by exercising a riparian right are California and, to a limited extent, Nebraska. *See* F. Trelease, Water Law, *supra*, at 11–12

[11] The Montana and Washington water codes contain examples of broad definitions of beneficial use.

> "Beneficial use" . . means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to, agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power and recreational uses.

Mont Rev Code 1979 § 85–2–102(2)

> Uses of water for domestic stock watering, industrial, commercial, agricultural, irrigation, hydro-

Continued

established statutory preferences to be given effect if there are competing applications for new uses that exceed the available unappropriated water supply. These preferences do not generally affect past or existing uses.[12]

Second, the water must be "appropriated," or reduced to possession. As a general rule, appropriation may be accomplished only by a physical diversion of a stream or capture of ground water. Although some states recognize exceptions for uses such as stock watering and irrigation by natural overflow, uses of a whole stream or lake, without diversion, for purposes such as maintenance of minimum instream flows to preserve fish and wildlife or for recreation are often not recognized. *See* 5 Clark, *supra*, § 409.2. A few states allow instream uses on a discretionary basis[13] or provide that state agencies may make appropriations of minimum instream flows for recreational, wildlife, or other purposes.[14]

Third, when there is insufficient water to meet the needs of all appropriators, priority among appropriators is established chronologically, based on the time the various appropriators first put the water to use, rather than based on any proration that takes account of the utility of the competing uses. The priority date gives an appropriative water right its primary value, because it guarantees that a senior (in time) appropriator will receive the entire quantity of water to which he is entitled prior to delivery of any water to a more junior appropriator. Originally, priority dates were established on the basis of when the water was actually put to use. Most western states, however, have enacted statutes requiring noticing or filing of applications for new water uses. In many western states, that statutory procedure is the exclusive means for acquiring water rights. In these so-called "permit states," priority dates are normally fixed by the date of application for the water right rather than the date of actual use. *See* 5 Clark, *supra*, at § 410.1. In permit states, it is possible that an appropriator who fails to make the filings or applications required by state law but actually puts the water to use may find his rights cut off by a more junior appropriator who makes a timely filing.[15]

Fourth, an appropriation of water is a transferable right of permanent, or at least indefinite duration, provided the use is continued. It may be sold or transferred with the land or separately. Changes in the location or nature of the use (but generally not the quantity) may be permitted, provided they do not injure the rights of other appropriators, but in most cases must be approved in advance

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> electric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial
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> Wash. Rev Code Ann § 90 54.020

[12] *See, e g.*, Ariz. Rev. Stat. Ann § 45–147B (West Supp.) (relative values are (1) domestic and municipal, (2) irrigation and stock watering; (3) power and mining, and (4) recreation and wildlife, including fish); Wyo. Stat. § 41–3–102 (1977); 5 Clark, *supra*, §§ 408.1, 408.4

[13] *See, e.g* . Wyo. Stat. § 41–3–306 (1977) (State Engineer can make allowances for instream stock watering, without recognizing a right to such use).

[14] *See, e.g.*, Colo Rev. Stat § 37–92–102(3), 37–92–103(3) (4) & (10) (1973) (state agency may make appropriations of minimum instream flows).

[15] Particularly where water rights may antedate water codes or adjudication statutes, rights in those states may in some cases be awarded priority by equity decrees or other adjudicative procedures, despite a failure to make the requisite filing *See* 5 Clark, *supra*, § 410.1.

by the state. *See* 5 Clark, *supra*, at § 412; Trelease, "Federal-State Relations," *supra* n.6, at 33.

All the western states have developed administrative or judicial systems to recognize, administer and enforce water rights. In most of these states, new appropriations must be approved by a state administrator (often known as the State Engineer) who has the authority, *inter alia*, to determine if there is sufficient unappropriated water available, if the proposed use is beneficial and, in some states, if the use is in the public interest. *See* Trelease, "Federal-State Relations," *supra* n.6 at 135–36; 1 Clark, *supra*, §§ 20–21. Judicial review of administrative determinations, and adjudication of competing rights are available in each state, often in special courts or under special procedures applicable only to water rights. *Id.* The western states do not generally provide any explicit exemption from their substantive or procedural requirements for the federal government or give any special recognition to uses of water by the federal government that may have no private counterpart, such as minimum instream flows necessary to sustain wildlife and fish or to provide recreational opportunities.[16]

In addition to statutes providing for the appropriation of water and enforcement of water rights, most of the western states have asserted, by statutory or constitutional provision, some form of "title" to or "ownership" of waters by the state or the people of the state.[17] Many of those states also recognize, however, that the federal government may have reserved some "proprietary" interests in unappropriated water appurtenant to federal lands at the time the states were admitted into the Union. In the so-called "California doctrine" and "Oregon doctrine" states,[18] the state courts have held that the federal government had an original property right to all non-navigable waters on the territories that formed those states, a right it did not pass to the states at the time of their admission. Those states, however, by virtue of their sovereignty over lands within their borders, can nonetheless determine rights that appertain to federal as well as private ownership of property, such as the use of water, subject to the ultimate authority of the federal government to determine such rights on federally owned lands.[19] In

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[16] Some states have, however, recognized that *state* agencies may have particular interests and rights not available to private parties *See* nn 13, 14 *supra*

[17] *See, e g* , Colo Const art. XVI, § 5 ("The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided"), Wyo Const art. VIII, § 1 ("The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state"), N.D Const. art XVII, § 210 States such as California, Nevada and Oregon have provided by statute that all water within the state "is the property of" or "belongs to" the public or the people of the state. *See* Cal Water Code § 102, Nev Rev Stat § 533 025 (1979); Ore Rev Stat. § 537 110 (1963). *See generally* E Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 Rutgers L Rev. 423, 446–59 (1966) (hereinafter cited as *Federal-State Conflicts*)

[18] The "California doctrine" states are California, Kansas, Nebraska, North Dakota, Oklahoma, Texas and Washington The "Oregon doctrine" is followed in Oregon and South Dakota *See* Colum. Note, *supra* n.5, at 972–75; Note, *Federal Nonreserved Water Rights*, 48 U Chi L Rev. 758, 766 n.46 (1980); 2 Clark, *supra*, § 102 3.

[19] The "Oregon doctrine" differs from the "California doctrine" in that it construes the Desert Land Act as establishing a uniform rule of appropriation applicable to private and federal rights The "California doctrine" holds that the Desert Land Act, together with the Mining Acts of 1866 and 1870 (discussed at pp 18–24, *infra*) merely recognized and affirmed whatever state system had been developed for allocation of water rights, including systems such as California's that recognized some riparian rights *See* Colum Note, *supra*, n 5, at 972–75; 2 Clark, *supra*, § 102.3.

the "Colorado doctrine" states, by contrast, the courts have held that the United States never acquired any proprietary interest in waters in those states, and therefore that the transfer of sovereignty to such states with their admission simultaneously transferred full power to control the disposition and use of those waters.[20]

B. Role of the Federal Government

The most significant role that the federal government has played in the development of water law in the western states has been that of owner of vast public lands within those states. As we discuss below, the federal government has largely acquiesced in or fostered the development of comprehensive state control over water in the western states, even with respect to water flowing over or arising on federally owned lands. With rare exceptions, Congress has not directly regulated the acquisition or use of water flowing over or arising on federal lands in the western states. The federal laws that have the greatest impact on state interests and state regulation of water rights are directions or authorizations to government agencies to construct projects, administer programs, manage property, and use water on federal lands. To the extent that a "federal" law of water rights exists—*i.e.*, rights that can be asserted under federal statutes without regard to state law—it arises primarily because programs or projects on federal lands operated by federal agencies require the use of water, rather than because federal regulation of the uses of water overlaps with state regulation. As one commentator has noted:

> Most conflicts [between federal and state agencies] have come not from direct clashes between inconsistent laws applicable to the same subject of regulation, but from federal uses or operations which in particular applications do not mesh with state laws or private rights. [For example a] federal project may be illegal, or at least unauthorized, under state water law. A private use under state law may interfere with a federal use of water or of land. A federal use may destroy a state use. A federal program may encourage uses not provided for by state law.

Trelease, "Federal-State Relations," *supra* n.6, at 56–57. Therefore, Congress' policies towards the settlement, disposition, and management of federal lands in the western states provide the context for our consideration of the scope of federal water rights in those states.

1. Federal ownership of western lands

The federal government was the original owner of substantially all the land that comprised the western territories.[21] The acts of admission of the western states,

[20] The "Colorado doctrine" states are Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming 2 Clark, *supra*, § 102.3(C) n 21 For a full discussion of the origins and holdings of the California, Oregon, and Colorado doctrines, *see* 5 Clark, *supra*, §§ 401, 405, 420; Colum Note, *supra* n.5, at 972–75

[21] Title to most of the western territories was obtained by the United States from foreign powers through purchase and treaty during the first half of the 19th century Generally, the terms of acquisition provided for recognition of the few existing private property rights, but granted title over the vast non-private lands to the United States Texas was an exception, it was admitted by annexation in 1845, and retained title to all its public lands. *See* Morreale, *Federal-State Conflicts*, *supra* n 17, at 431 & n 41; Colum Note, *supra* n 5, at 968–69 & nn. 8, 9.

which guaranteed each state "equal footing with the original States in all respects whatever" (*see, e.g.*, 9 Stat. 452 (1850)), reserved to the federal government ownership of unappropriated lands within the state, but made no provision with respect to unappropriated waters. *See, e.g., California* v. *United States, supra,* 438 U.S. at 654. Much of the land originally owned by the federal government has been sold or disposed of under the terms of the federal public land laws,[22] but the federal government still holds title to substantial acreage in the West.[23]

The lands owned by the federal government are generally classified as either "public domain" or "reserved" lands. The public domain includes lands that are open to settlement, public sale, or other disposition under the federal public land laws, and not exclusively dedicated to any specific governmental or public purpose. *See, e.g., Federal Power Commission* v. *Oregon,* 349 U.S. 435, 443–44 (1955); *United States* v. *Minnesota,* 270 U.S. 181, 206 (1926). Public domain lands are for the most part managed by the Department of the Interior, through its Bureau of Land Management (BLM).[24] Reserved lands are lands that have been expressly withdrawn from the public domain by statute, executive order, or treaty, and dedicated to a specific federal purpose. Federal statutes authorize reservation of public domain land for a variety of purposes, such as national parks and monuments,[25] national forests, refuges and wilderness areas,[26] reclamation projects,[27] hydroelectric dams,[28] and military facilities.[29] Other withdrawals have been made by executive order, pursuant to the general authority of the Executive Branch to manage and administer federal lands, subject to congressional authorization or assent. *See United States* v. *Midwest Oil Co.*, 236

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[22] The term "public land laws" is generally used to refer to statutes providing for the sale or disposition of public lands, such as the Homestead Act, 12 Stat. 392 (1862), 43 U S.C § 161 (1970), and the Desert Land Act of 1877, 19 Stat 377, 43 U.S C § 321 *et seq.*, which provided for land grants to settlers of western lands, and various statutes providing for the sale or grant of public lands to private individuals or the states under conditions set by Congress *See, e.g.*, Act of Aug 18, 1894, 28 Stat. 422, 43 U.S.C § 641 (1976), Public Lands Act of 1964, Pub. L No 88–606, 78 Stat 982, 43 U.S C. § 1391 *et seq* (1970) The sale and disposition of public lands are now governed primarily by the Federal Land Policy and Management Act of 1976, Pub L No. 94–579, 90 Stat 2743, 43 U S C § 1701 *et seq*. Public land laws are usually distinguished from mining laws, which govern the mining of hard minerals on public lands, and mineral leasing laws, which provide for leasing of public lands for gas and oil. *See generally* 63 Am Jur. 2d "Public Lands," § 2

[23] In 1978 the Supreme Court recited that the percentage of federally owned land in the western states, excluding Indian reservations and trust properties, ranged from 29.5 percent of the land in the State of Washington to 86 5 percent of the land in the State of Nevada, with an average of approximately 46 percent *See United States* v *New Mexico, supra,* 438 U.S at 699 n 3 (1978)

[24] The two major statutes authorizing management of the public domain by the BLM are the Taylor Grazing Act, 48 Stat 1269 (1934), *as amended,* 43 U.S C. § 315 *et seq.*, which authorizes the Secretary of the Interior to manage the public domain for grazing purposes, and the Federal Land Policy and Management Act, *supra* n 22, which directs the Secretary of the Interior to manage the public domain on the basis of "multiple uses" and for "sustained yield " *See* 43 U S C § 1702(c), (h)

[25] *See, e g.*, National Park Service Act of 1916, 39 Stat 535, *as amended,* 16 U.S C § 1 *et seq.*, American Antiquities Preservation Act of 1906, 34 Stat 225, 16 U S C § 431 (1976)

[26] *See, e g* , Forest Service Creative Act of 1891, 26 Stat. 1103, 16 U S.C. § 471 (1976), Forest Service Organic Administration Act of 1897, 30 Stat 34, 36, *as amended,* 16 U.S.C. § 473 (1976), National Wildlife Refuge Administration Act of 1966, Pub. L No 89–669, 80 Stat 927, 16 U S C § 668dd (1976), Wild and Scenic Rivers Act, Pub. L No 90–542, 82 Stat. 906 (1968), 16 U.S C. § 1271 *et seq.*, Wilderness Act of 1964, Pub. L No. 88–577, 78 Stat 890, 16 U S C. § 1131 *et seq.* (1976).

[27] *See* Reclamation Act of 1902, 32 Stat 390, *as amended,* 43 U.S.C. § 371 *et seq.* (1976).

[28] *See* Federal Power Act, 41 Stat 1075 (1920), *as amended,* 16 U.S.C. § 818 (1976).

[29] *See State of Nevada ex rel. Shamberger* v. *United States,* 165 F. Supp. 600 (D Nev 1958), *rev'd on sovereign immunity grounds,* 279 F.2d 699 (9th Cir 1960), Act of Feb. 28, 1958, Pub L No 85–337, 72 Stat 27, 43 U.S.C § 155 (withdrawal, reservation or restriction of public lands for defense purposes)

U.S. 459, 474 (1915). As a general rule, land that has been withdrawn from the public domain is no longer subject to laws governing the disposition or sale of public lands. *See, e.g., United States* v. *Minnesota, supra,* 270 U.S. at 206.

The terms "public domain" and "reserved lands" are most often used to refer to land that has been owned continuously by the federal government. There is a third category of federally owned land that includes lands acquired by the federal government from private ownership by purchase, exchange, gift, or condemnation pursuant to statutory authorization. *See, e.g.,* 43 U.S.C. § 315g(c) & (d) (grazing lands); 16 U.S.C. § 515 *et seq.* (1976) (national forest lands). These "acquired" lands may become part of the public domain, or may be set aside for specific federal purposes in the same manner as reserved lands. When acquired lands are set aside, they are not characterized as reserved lands, because they were not, strictly speaking, reserved from existing public domain lands. They are nonetheless usually managed under the same statutory authority and for the same purposes as reserved lands,[30] and therefore for most purposes can be considered as part of a federal reservation. *See Rawson* v. *United States,* 225 F.2d 855, 856 (9th Cir. 1955), *cert. denied,* 350 U.S. 934 (1956) ("It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislative or authoritative directions to the contrary, they remain in the class of lands acquired for special uses, such as parks, national monuments, and the like . . . ."); *Thompson* v. *United States,* 308 F.2d 628, 632 (9th Cir. 1962).

Until the end of the 19th century, federal policy emphasized and encouraged settlement and transfer of the public lands to private ownership. *See* Comment, *Federal Non-Reserved Water Rights,* 15 Land and Water L. Rev. 67, 69 (1980); 1 Clark, *supra,* § 20.2. Since that time, however, federal policy has shifted increasingly towards conservation and retention of land in federal ownership and management. The emphasis on retention of lands in federal ownership began around the turn of the century, with establishment by Congress of several national parks and forests, and passage of statutes of general applicability authorizing the reservation of federally owned land for national forests, parks, and historic monuments,[31] and authorizing management of public domain land to promote purposes such as grazing or wide use of the resources on such lands.[32] In addition, the federal government began to take an active role in the promotion, financing, and use of water resources. In the Reclamation Act of 1902, *supra* n.27, for example, Congress established broad authorization for federal development of facilities to reclaim arid lands. The Federal Power Act, *supra* n.28, passed in 1920, authorized the Federal Power Commission to license private power projects, and other acts provided for federal development or construction

[30] For example, § 521 of the Forest Service statute provides that acquired forest service lands "shall be permanently reserved, held and administered as national forest lands under the provisions of section 471 of this title and Acts supplemental to and amendatory thereof." 16 U.S.C. § 521.

[31] *See* nn 25, 26 *supra*

[32] *See* n.24 *supra.*

of large-scale multipurpose flood control, navigation, or power projects.[33] Most recently, in 1976 Congress declared in the Federal Land Policy and Management Act, *supra* n.22, that federal policy is to retain public lands in federal ownership unless it is determined, following procedures mandated by the Act, that disposal of a particular parcel will serve the national interest.

2. Congressional recognition of state water law

As we described above, even before their admission into the Union, the western states developed customary and statutory laws governing the acquisition and use of water within their borders based primarily on appropriative rights. *See* Part IIA *supra*. Federal ownership of much of the underlying land raised the threat of a general federal law applicable to the acquisition of rights to unappropriated water on federal lands. However, in a series of statutes passed in the last half of the 19th century, Congress rejected the alternative of a general federal water law, and instead largely acquiesced in comprehensive state control over the appropriation of water, including water on federal lands, at least with respect to rights that could be asserted by private appropriators.[34]

The first of these acts, the Mining Act of 1866,[35] officially opened federally owned lands to exploration and development by miners. Act of July 26, 1866, 14 Stat. 253, *codified at* 50 U.S.C. §§ 51, 52 *and* 43 U.S.C. § 661 (1976). Although the primary purpose of the Act was to allow open mining on federal lands,[36] Congress included a provision that specifically disclaimed any intent to interfere with water rights and systems that had developed under state and local law:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the con-

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[33] *See, e g.*, Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S C. § 617 (1976), Colorado River Storage Project, 70 Stat 105 (1956), *as amended*, 43 U S C § 620 (1976).

[34] This deference to state control can be contrasted with Congress' approach to control over mining on federal lands, as to which Congress authorized comprehensive procedures and standards for assertion and protection of mineral claims. *See* 30 U S C § 22 *et seq* (1976) The Supreme Court has recently noted that "although mining law and water law developed together in the West prior to 1866, with respect to federal lands Congress chose to subject only mining to comprehensive federal regulation." *Andrus* v. *Charlestone Stone Products Co* , 436 U S. 604, 613 (1978).

[35] The Homestead Act, passed in 1862 (*see* n.22 *supra*), did not contain any reference to water rights or to the appropriation of water by homesteaders

[36] The 1866 Mining Act was passed to thwart legislative initiatives calling for the sale of mining interests on federal lands Its effect was to legalize the system of "free mining" that had been established by custom and local rules of the western mining communities The legislative history of the provision indicates that proponents of the legislation believed it would merely confirm the existing rules and customs. *See* R. Grow & M Stewart, "The *Winters* Doctrine as Federal Common Law," 10 Natural Res Law 457, App at 486 n. 16 (1980) (hereinafter cited as "Grow & Stewart")

> struction of ditches and canals for the purposes herein specified is acknowledged and confirmed; . . .

43 U.S.C. § 661 (1976).

Four years later Congress amended the Mining Act of 1866 to extend its applicability to "placer" mines. Act of July 9, 1870, 16 Stat. 218, *codified at* 30 U.S.C. §§ 51, 52, *and* 43 U.S.C. § 661 (1976). In perhaps an overabundance of caution, Congress reaffirmed in the 1870 Act that water rights obtained under applicable state or local law were not to be affected by grants made under the Act:

> [A]ll patents granted, or preemption of homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the [Mining Act of 1866].

43 U.S.C. § 661 (1976).[37]

The Supreme Court has interpreted these acts as expressing congressional recognition of and acquiescence in the water rights law developed by the western states:

> Congress intended [by these acts] "to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition."

California v. *United States, supra,* 438 U.S. at 656, *quoting Basey* v. *Gallagher,* 87 U.S. (20 Wall.) 670, 684 (1875). *See also United States* v. *Rio Grande & Dam Irrigation Co.*, 174 U.S. 690, 704 (1899) ("The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws and decisions of courts in respect to the appropriation of water"). The effect of the acts was not limited to recognition of rights that had previously vested under applicable state law or custom:

> They reach[ed] into the future as well, and approve[d] and confirm[ed] the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

California Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935).

In 1877, Congress passed yet a third statute, the Desert Land Act, *supra* n.22, which permitted persons in most of the western states to enter and claim irrigable lands "by conducting water upon the same . . . [by] bona fide prior appropria-

[37] The legislative history of this provision of the 1870 Act is sparse, and indicates only that Congress wanted to assure that water rights vesting under the 1866 Act would not be adversely affected by the new act. *See* Grow & Stewart, *supra* n.36, App. at 493–94

tion."[38] In what has become an important proviso, Congress limited the amount of water that could be appropriated by such entrymen under the statute to that amount "actually appropriated" and "necessarily used" for irrigation and reclamation. Any excess non-navigable water was specifically saved for the public:

> [A]ll surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

43 U.S.C. § 321.

This proviso of the Desert Land Act has been given a somewhat broader reading by the Supreme Court than might be warranted by its legislative history, which suggests only that it was included to prevent any individual from monopolizing a source of water on desert lands.[39] In *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra,* the Supreme Court construed the Act as effecting "a severance of all waters upon the public domain, not theretofore appropriated, from the land itself," and reserving those severed waters "for the use of the public under the laws of the states and territories named." 295 U.S. at 158, 162. The Court held that a land patent granted by the federal government to a settler under the Homestead Act did not carry with it any common law riparian rights not recognized by the state, because in the Desert Land Act (if not before) Congress had acquiesced in the authority of the western states to change the common law riparian system to an appropriative system. *Id.* at 158. Although the question before the Court in that case involved competing *private* rights to water arising on federal lands, the language used by the Court to describe the effect of the Desert Land Act is quite broad, and could be interpreted to apply to rights that may be asserted by the federal government:

> What we hold is that following the Act of 1877, *if not before,* all non-navigable waters then a part of the public domain became *publici juris, subject to the plenary control of the designated states,* including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain . . . [t]he Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and

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[38] The Desert Land Act applies only to California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota. 43 U.S.C. § 323 (1976). It does not apply to Kansas, Nebraska, Oklahoma, or Texas.

[39] *See* F Trelease, *Federal Reserved Water Rights Since PLLRC,* 54 Denver L J 473, 476 (1977). At the time the Act was proposed, concern was voiced that the language "conducting water" upon the desert lands might work a partial repeal of the 1866 and 1870 Acts, and would permit a settler to monopolize available water by conducting it across his land and selling it to contiguous owners *See* Grow & Stewart, *supra* n 36, App. at 495 & n 48. The language quoted above was included to make it clear that an entryman could acquire only such rights as are available by appropriation under state law (*i e* , limited to the quantity necessary for actual beneficial use). *Id.*

> gives sanction, *in so far as the United States and its future grantees are concerned,* to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

295 U.S. at 163–64 (emphasis added). The Desert Land Act has been held inapplicable to federal reserved lands. *See Federal Power Commission* v. *Oregon,* 349 U.S. 435, 448 (1955), discussed at pp. 26–27, 32–33, & n.52.

Thus, in the Mining Acts of 1866 and 1870 and the Desert Land Act, Congress deferred to development by the states of comprehensive water codes and administrative systems, at least with respect to rights of private appropriators. Notwithstanding the broad language in the statutes and in *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra,* it is not so clear, as we discuss *infra,* that Congress also intended to subject *federal* uses of that water to state water law. In that regard, we must consider statutes that touch on the federal government's use of water, including, most importantly, the Reclamation Act of 1902, *supra* n.27, the Federal Power Act, *supra* n.28, passed in 1920, and the McCarran Amendment, July 10, 1952, 66 Stat. 560, 43 U.S.C. § 666.

The 1902 Reclamation Act authorized joint federal-state efforts to construct large-scale reclamation projects on federal lands, subject to the jurisdiction and oversight of the Secretary of the Interior through the Bureau of Reclamation. Several provisions of the Act and subsequent amendments deal explicitly with the acquisition, use, and distribution of water. Section 8 provides expressly for the application of state law:

> Nothing in [this title] shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of [the Act], shall proceed in conformity with such laws, and nothing herein shall in any way affect any rights of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. Other specific restrictions on the use or distribution of water reclaimed in a federal project appear in § 5, 43 U.S.C. § 431, which prohibits the sale of reclamation water to tracts of land in excess of 160 acres, and § 9 of the Reclamation Project Act of 1939, 43 U.S.C. § 485h, which provides for repayment to the United States of funds expended in the construction of reclamation works and authorizes the Secretary of the Interior to make contracts to furnish reclamation water at appropriate rates for irrigation.

The Federal Power Act established a comprehensive licensing scheme for water power projects constructed by private or public entities on navigable streams or federally owned land. The Act contains two provisions referring to the

applicability of state laws: § 9b, which requires an applicant to present evidence of "satisfactory compliance" with certain state laws;[40] and § 27, which expressly saves certain state laws relating to property rights in the use of water from supersedure by the Act.[41]

The McCarran Amendment is not a substantive statute, but rather a limited waiver of sovereign immunity permitting the United States to be joined as a party in state general stream adjudications. It does not affect the federal government's substantive rights with respect to water on federal lands. However, the Act has often been relied upon as evidence of congressional recognition of the primacy of the western states' interests in regulating and administering water rights. *See, e.g., California* v. *United States, supra,* 438 U.S. at 678–79. This position is supported by the Senate Report on the Amendment, which states that:

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof . . . . Since it is clear that the States have the control of water within their boundaries, *it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State,* if there is to be a proper administration of the water law as it has developed over the years.

S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951) (emphasis added).

In each of these statutes, Congress recognized that the western states have a legitimate interest in and responsibility for the allocation of water resources within their borders. Specific provisions of federal statutes such as the Reclamation Act and Federal Power Act, however, have led to conflicts between federally mandated uses of water and state regulation of those uses. Those conflicts were left to the courts to resolve.

3. Judicial recognition of federal water rights

The Supreme Court has grappled on several occasions with the federal government's rights to use or dispose of water in the western states in the context of particular federal statutes, including the Reclamation Act and the Federal Power Act and statutes authorizing the reservation of land for particular federal purposes. Because Congress has not legislated definitively on the scope of the

[40] Section 9(b) requires an applicant to provide the Federal Power Commission with "satisfactory evidence that [he] has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this chapter" 16 U.S.C. § 802(b).

[41] Section 27 provides that "[n]othing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein" 16 U.S.C. § 821.

federal government's rights to use water on federal lands in the western states,[42] we must look at the Court's construction of those specific statutes to determine the principles and analysis the Court would apply to questions of federal rights that have not yet been litigated.

The Supreme Court has recognized that even if a particular federal statute does not expressly authorize a federal agency to acquire water rights without regard to applicable state law, the federal government may nonetheless in some circumstances assert an *implied* right to use or divert unappropriated water in derogation of state law. The Supreme Court's recognition of such implied rights has rested in each case on a finding of implied congressional intent to preempt application of state law. The Court has found such intent in at least two circumstances: (1) when land is reserved from the public domain for a specific federal purpose *(see United States* v. *New Mexico, supra);* or (2) when state regulation of the use of water by a federal agency or licensee is inconsistent with specific congressional directives governing the construction or operation of a federal project requiring the use of water *(see California* v. *United States, supra).*[43]

a. *Federal reserved rights.*

It is now settled that when the federal government reserves land for a particular federal purpose, it also reserves, by implication, enough unappropriated water as is reasonably necessary to accomplish the purposes for which Congress authorized the land to be reserved, without regard to the limitations of state law. The right to that water vests as of the date of the reservation, whether or not the water is actually put to use, and is superior to the rights of those who commence the use of water after the reservation date. *See Cappaert* v. *United States,* 426 U.S. 128, 138 (1976); *United States* v. *New Mexico, supra,* 438 U.S. at 698.

Although the reserved rights doctrine is now well-recognized, its contours and scope have been defined only recently. The doctrine had its origins in *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U.S. 690 (1899). In that case, the Court upheld an injunction restraining the petitioner from constructing an irrigation dam that would have destroyed the navigability of the Rio Grande River. While the Court recognized that Congress had by statute acquiesced in the substitution of appropriative water rights for common law riparian rights in the western states (*see* p. 20 *supra*), it found that Congress had not waived its superior authority under the Commerce Clause to preserve the navigability of navigable waters. The Court listed two "limitations" inherent in the Supremacy Clause on the authority of the states to change the common-law rules:

> First, that, in the absence of specific authority from Congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary

[42] *See* n 91 *infra.*

[43] As we discuss *infra,* the constitutional basis for federal water rights is the same in both circumstances enumerated above, whether the rights fall within the "reserved" rights category or within the category of "specific congressional directives." Because the Supreme Court has developed the reserved right doctrine in a few, well-defined cases, for clarity we will set out the decisions in these two categories separately.

> for the beneficial uses of the government property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

174 U.S. at 703. The Court's holding rested only on the second limitation—*i.e.*, the federal goverment's superior authority under the Commerce Clause to preserve the navigability of the stream.[44]

Nine years later in *Winters* v. *United States*, 207 U.S. 565 (1908), the Court relied, *inter alia*, on the first limitation described in *Rio Grande*—the inability of the state to destroy the federal government's rights to the continued flow of a stream "at least, as may be necessary for beneficial uses of government property"—to support implication of a so-called "reserved" right to water under a treaty between the federal government and the Indians of the Fort Berthold Reservation. The treaty set aside particular tracts of the public domain as a homeland for the Indians, but did not expressly provide for the water necessary to irrigate that land. The Court found nonetheless that the treaty and reservation of land impliedly set aside sufficient water for the present and future needs of the Indians, reasoning that Congress' intent that the Indians become a pastoral and civilized people could not be accomplished without sufficient water to irrigate the reservation land. 207 U.S. at 576. Citing *Rio Grande*, the Court opined that, "[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." *Id.* at 577.

Until 1955, the *Winters*, or reserved right doctrine, was generally thought to be a special rule of Indian law, rather than a general rule applicable to all federal reservations. *See* F. Trelease, "Federal Reserved Water Rights Since PLLRC," 54 Denver L. J. 475 (1977). In 1955, the Supreme Court suggested for the first time that other types of federal reservations might also provide a basis for federal reserved rights. In *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), often referred to as the *Pelton Dam* decision, the Court considered whether a state agency could deny permission to a federal licensee under the Federal Power Act to construct a hydroelectric dam on lands of the United States that had been reserved for that purpose. The state argued, relying on the Court's broad language in *California Oregon Power Co.* v. *Beaver Portland Cement Co.* (*see* pp. 21–22 *supra*), that by the Desert Land Act of 1877 Congress had expressly conveyed to the states the power to regulate all unappropriated water within their borders, and that therefore, in the exercise of its police powers, Oregon could deny use of those waters to an individual, even if the federal government had otherwise licensed the use. The Court rejected the state's arguments on the ground that the Desert Land Act applies only to public domain lands and does not apply to lands that have been reserved by the federal government, even if the land

[44] Nearly seventy years later, the Supreme Court stated that the holding in *Rio Grande* was limited, and to be construed as reaffirming the rights of the states over disposition and use of water except in narrow and specific circumstances "[E]xcept where the reserved rights or navigation servitude of the United States are invoked, *the State has total authority over its internal waters*." *California* v. *United States*, *supra*, 438 U.S. at 662 (emphasis added).

was reserved after passage of the Desert Land Act. *See* 349 U.S. at 448. Although the *Pelton Dam* decision did not involve directly the federal government's right to use water because the licensee was a private party, the Court's holding implies that the licensee was exercising some right of the United States to use water that had been reserved from state control at the time the United States reserved the dam site. *See, e.g., Cappaert* v. *United States, supra,* 426 U.S. at 144 n.10; *Federal Power Commission* v. *Oregon, supra,* 349 U.S. at 453 (Douglas, J., dissenting).

The applicability of the reserved right doctrine to all federal reservations was confirmed in *Arizona* v. *California,* 373 U.S. 546 (1963). There, the Court upheld, with little discussion, a Master's award of reserved rights to the United States in several national wildlife refuges and the Gila National Forest:

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

373 U.S. at 601.

The scope of the reserved rights doctrine on non-Indian land remained somewhat uncertain until the Supreme Court's decisions in *Cappaert* v. *United States, supra,* and *United States* v. *New Mexico, supra.* In *Cappaert,* the Court unanimously held that the reservation of Devil's Hole as a national monument under the American Antiquities Preservation Act, *supra* n.25, also reserved sufficient unappropriated water to maintain the scientific value of the reservation—in that case, to maintain the water level in Devil's Hole at the minimal level necessary to preserve the Devil's Hole pupfish, a unique species that had been endangered by a drop in the water level.[45] The Court stated that:

> [t]his Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3,

[45] The case arose as an action by the United States to enjoin pumping of wells by owners of a ranch near the Devil's Hole Monument. The pumping had been authorized by a state permit after the date of reservation of the monument. *See* 426 U.S. at 134–35.

> which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

426 U.S. at 138 (citations omitted).

The Court made it clear that the determinative issue was whether the federal government intended to reserve unappropriated water, and that such intent would be inferred if "previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created."[46] 426 U.S. at 139. The *amount* of water reserved, however, was "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141 (citations omitted).

In *United States* v. *New Mexico*, the Court upheld, for the first time, a denial of reserved rights to the federal government. In *New Mexico*, the Forest Service asserted reserved rights to waters within the Gila National Forest, including minimum instream flows, "for the requirements and purposes of the forests" as of the date that various tracts of public lands were withdrawn from the public domain for inclusion in the Forest. The Forest Service's claims to reserved rights for, *inter alia*, maintenance of instream flows, recreation, and stock watering were initially granted by the special master appointed to consider all the claims, but were denied by the New Mexico District and Supreme Courts on appeal, on the basis that those uses were not among the purposes included in the Forest Service's Organic Administration Act, pursuant to which the Gila National Forest was created. The New Mexico Supreme Court drew a distinction between the "primary purposes" for which a federal reservation is created, and "secondary uses" of federal lands that may be permitted or authorized by statute or administrative practice, finding that only the former provides a basis for reserved rights. The New Mexico Supreme Court found the primary purposes of national forest reservations to be limited to the preservation of timber and securing of water flows for public and private uses. *Mimbres Valley Irrigation Co.* v. *Salopek*, 90 N.M. 410, 564 P.2d 615, 617–18 (1977).

The United States Supreme Court agreed with both the result and analysis of the New Mexico Supreme Court. Justice Rehnquist, writing for the majority, noted that the application of the reserved right doctrine requires a careful examination of "both the asserted water right and the specific purposes for which the land was reserved" and must rest on the conclusion that "without the water the purposes of the reservation would be entirely defeated." 438 U.S. at 700 (footnote omitted). Such an examination and tailoring of the reserved right is necessary "because the reservation is implied, rather than explicit and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *Id.* at 701–02. The Court noted that, "[w]here Congress has expressly addressed the question of whether federal entities must

[46] The Court actually found the requisite congressional intent to be explicit, rather than implied, because the 1952 presidential proclamation reserving the land recited that the "pool . . . should be given special protection." 426 U.S. at 140

abide by state water law, it has almost invariably deferred to the state law."[47] *Id.* at 702 (footnote omitted).

The Court accepted the primary purpose/secondary use distinction drawn by the New Mexico Supreme Court:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, *that the United States would acquire water in the same manner as any other public or private appropriator.*

Id. (emphasis added). Based on the legislative history of the Forest Service's Organic Administration Act, the Court concluded that Congress' intent in authorizing reservation of the Gila National Forest was "that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law." *Id.* at 718.[48] The Court found recreation, wildlife, and stock watering to be secondary uses rather than primary purposes of the reservation, and therefore upheld the state court's denial of reserved rights for those uses. The Court did not address the further question whether, if the Forest Service applied under state law for appropriative rights not available under the reserved rights doctrine, the state could deny such rights.[49]

After *Cappaert* and *New Mexico*, it is safe to conclude that a federal agency may acquire unappropriated water on federal lands without regard to state substantive or procedural law, when that land has been reserved pursuant to congressional authorization for a specific federal purpose that requires the use of water. The right is based on implied congressional intent, and is limited in two

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[47] In *California* v. *United States*, *supra*, decided the same day as *New Mexico*, Justice Rehnquist, again speaking for the majority, discussed at length the "purposeful and continued deference to state water law by Congress," including principally the Mining Acts of 1866 and 1870, the Desert Land Act and the Reclamation Act of 1902. 438 U.S. at 653–70

[48] The opinion of the Court also concluded that the Multiple-Use Sustained-Yield Act of 1960, 16 U S.C. § 528 (MUSYA), which provides that national forests "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," does not provide any basis for assertion of reserved rights in forests existing as of the effective date of the MUSYA "for the *secondary* purposes there established " 438 U S at 715. The Court "intimate[d] no view as to whether Congress [in the MUSYA] authorized the subsequent reservation of national forests out of public lands to which a broader doctrine of reserved water rights might apply." *Id.* at n.22 As Justice Powell pointed out in his partial dissent from the Court's opinion, the Court's statements on the effect of the MUSYA are probably *dicta* because the United States did not argue that the MUSYA reserved additional water for use on national forests, but only that the Act confirmed Congress' intent in the Organic Administration Act to establish multiple purposes that include fish, wildlife, and recreation *See id* at 718 n.1.

[49] *New Mexico* was a split decision, with Justices Brennan, White, and Marshall joining in a dissent written by Justice Powell The dissenters, however, did not take issue with the conclusion of the majority that Congress had generally deferred to state water law and therefore "that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state law," and concurred in the majority's conclusion that the Organic Administration Act could not be read "as evidencing an intent to reserve water for recreational or stock watering purposes " 438 U.S at 718 The dissenters disagreed rather with the majority's narrow reading of the legislative history of the Organic Administration Act to exclude preservation of wildlife as a primary purpose of the reservation of national forests *Id.* at 719

crucial respects. First, federal rights will be implied only if necessary to accomplish the specific purposes for which Congress authorized reservation of the land, not for incidental, or "secondary" uses that may be permitted by congressional authorization or acquiescence in agency practice. Drawing the line between the "primary purposes" for which water may be reserved and the "secondary uses" for which water may not be reserved requires a careful examination of congressional intent, as expressed in the particular statute authorizing reservation and management of the land in question and its legislative history. Second, the amount of water reserved is only that minimally necessary to accomplish those primary purposes—*i.e.*, that water "without [which] the purposes of the reservation would be entirely defeated." *United States* v. *New Mexico, supra*, 438 U.S. at 700.

b. *Conflicts with congressional directives.*

In the second relevant line of decisions, the Court has held that a state may not veto a federally authorized water project by requiring the federal government or its licensee to obtain a state permit authorizing use of water necessary for the project, and may not impose conditions on the acquisition, use, or distribution of project water that are inconsistent with specific congressional directives authorizing the project. Although in these cases the Court has not developed a coherent theory of water rights comparable to the reserved right theory, there is a common thread: when the federal government, in the exercise of its constitutional powers, for example under the Commerce or Property Clauses, authorizes a project requiring the diversion or use of water, state laws that would effectively prevent the project from being built or operated under the conditions and terms and for the purposes prescribed by Congress must fall under the Supremacy Clause.

The Court has consistently held that a state cannot block construction or operation by the United States or its licensee of dams and reservoirs for flood control, improvement of navigation, power production, or reclamation.[50] For example, in *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941), the Court held that Oklahoma could not block construction by the United States of a dam and reservoir for purposes of flood control and improvement of navigability on the Red River in Oklahoma and Texas. One of the objections raised by Oklahoma to the federal project was that construction of the dam and impoundment of the waters would be inconsistent with the state's water resources program. The Court rejected that argument, finding that:

> [T]he suggestion that this project interferes with the state's own program for water development and conservation is likewise of no

[50] The Supreme Court has recognized that Congress' constitutional authority to construct or license such projects can stem from any of several constitutional grants of power, such as the Commerce Clause, which provides the basis, *inter alia*, for regulation and promotion of the navigability of streams, the Property Clause, which authorizes Congress to manage federal lands, or the General Welfare Clause. *See, e g , Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941) (flood control and navigation project authorized under Commerce Clause); *First Iowa Coop.* v. *Federal Power Comm'n*, 328 U S. 152, 176 (1946) (hydroelectric project on navigable stream authorized under Commerce Clause), *Federal Power Comm'n* v *Oregon*, 349 U S. 435, 445 (1955) (hydroelectric project on non-navigable stream authorized under Property Clause, because project to be constructed on federal lands); *United States* v. *Gerlach Live Stock Co* , 339 U.S 725, 737–38 (1950) (reclamation project authorized under General Welfare Clause).

> avail. That program must bow before the "superior power" of Congress.

313 U.S. at 534–35 (citations omitted).

Similarly, in cases involving federal licenses to construct hydroelectric projects awarded under the Federal Power Act, the Court has consistently rejected state attempts to block authorization of the construction of project facilities and reservoirs. *See, e.g., First Iowa Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 176 (1946); *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 445 (1955); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958). Although some of the language used by the Court in those decisions suggests that state law or permit requirements do not apply to federally licensed projects even if they are consistent with the authorization of the project,[51] in each case application of state law would have prevented construction of the project.[52] Given a direct conflict between federal authorization and state requirements, the Court held that the state law must fall, even though the Federal Power Act contained savings provisions reserving traditional control over water resources to the individual states. *See First Iowa Cooperative* v. *Federal Power Commission, supra*, 328 U.S. at 176; *City of Tacoma* v. *Taxpayers of Tacoma, supra*, 357 U.S. at 340; *Federal Power Commission* v. *Oregon, supra*, 349 U.S. at 445.

The Court has reached similar conclusions in cases involving the reclamation laws.[53] Despite the direction of § 8 of the 1902 Reclamation Act that the Secretary of the Interior "proceed in conformity" with applicable state laws (*see* pp. 22–23 *supra*), the Court has held that state law or permit requirements are preempted if they are inconsistent with other, more specific provisions of the Act or of the legislation authorizing the project. In *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958), the Court reversed the refusal of the California Supreme Court to confirm certain reclamation contracts that contained clauses implementing § 5 of the Reclamation Act of 1902 and § 9 of the Reclamation Project Act of 1939 (*see* p. 23 *supra*) because limitations imposed by those sections were inconsistent with California law. The California Court had held that

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[51] For example, in *First Iowa Coop.*, the Court, discussing the effect of the savings provisions of the Act, noted broadly that "in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course." 328 U.S. at 176. *See generally Federal Power Comm'n* v. *Oregon, supra*, 349 U.S. at 444–45 ("There thus remains no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others. To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision") (citations omitted).

[52] In *First Iowa Coop.*, the power cooperative's development plan required diversion of the Cedar River into another basin in order to get a greater drop and head for water power. That plan would have been barred by an Iowa statute requiring that any water taken from a stream for power purposes be returned to the same stream at the nearest practicable location. *See* 328 U.S. at 166. In *Federal Power Comm'n* v. *Oregon*, the State of Oregon sought to prevent construction of the dam because it would cut off anadromous fish from their spawning and breeding grounds 349 U.S. at 449–50. *City of Tacoma* involved a conflict between the terms upon which the FPC issued a license to the City to construct a power dam on the Cowlitz River, and a Washington statute prohibiting the construction of dams over 25 feet in height on the Cowlitz or other state streams tributary to the Columbia, for protection of salmon. *See* 357 U.S. at 328 n.11.

[53] Most large federal reclamation projects are authorized by specific legislation and appropriations, but incorporate by reference the provisions of the federal "reclamation laws," including, most importantly, the 1902 Act. *See, e.g., California* v. *United States, supra*, 438 U.S. at 651 n.6.

§ 8 required that "whenever there is a conflict between the Federal Reclamation laws and the laws of the State, the law of California must prevail." 357 U.S. at 287. The United States Supreme Court held that the general savings provision of § 8 could not override the mandatory, specific provisions of § 5 and § 9. *Id.* at 292.[54] The Court reaffirmed this view of § 8 in *City of Fresno* v. *California*, 372 U.S. 627 (1963), in which the Court held that § 8 does not require the Secretary of the Interior to ignore the explicit preference established by § 9(c) of the Reclamation Act of 1939 for irrigation over domestic and municipal uses of reclamation water (*see* p. 23 *supra*); and in *Arizona* v. *California*, 373 U.S. 546 (1963), in which the Court concluded that state law could not interfere with the power of the Secretary of the Interior, under the Boulder Canyon Project Act, *supra* n.33, to determine with whom and on what terms water contracts would be made.

Language used by the Supreme Court in *Ivanhoe*, *Fresno*, and *Arizona* suggested that the scope of § 8 was extremely narrow. In *Ivanhoe*, for example, the Court stated that § 8 "merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested rights therein." 357 U.S. at 291. The Court suggested in *Fresno* that state law would not control even the acquisition of water rights when the United States exercises its power of eminent domain, but instead would only determine the "definition of the property interests, if any, for which compensation must be paid." 372 U.S. at 630. In *Arizona*, the Court endorsed its broad holdings in *Ivanhoe* and *Fresno*, noting "[t]he argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court . . . ." 373 U.S. at 586.

However, in *California* v. *United States*, *supra*, decided the same day as *United States* v. *New Mexico*, the Court made clear that its decisions in *Ivanhoe*, *Fresno*, and *Arizona* could be read only to hold that state laws governing the appropriation, use, control, or distribution of water do not control federal uses if they are inconsistent with specific congressional directives, for example § 5 of the Reclamation Act or § 9 of the Reclamation Project Act of 1939. *California* v. *United States* involved construction of the New Melones Dam in California, part of the mammoth Central Valley Reclamation Project, which has spawned much of the case law under the Reclamation Act.[55] The California State Water Resources Control Board, upon application by the Bureau of Reclamation, authorized the impoundment of water for the project, but imposed several conditions on the use of that water. The Bureau of Reclamation then sought a declaratory

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[54] The Court also rejected a constitutional challenge to the reclamation projects in question, finding that "[t]here can be no doubt of the Federal Government's general authority to establish and execute" the projects under the General Welfare Clause and Property Clauses of the Constitution. 357 U S at 294–95 Those clauses give the federal government the power "to impose reasonable conditions on the use of federal funds, federal property, and federal privileges," and prohibit the states from "compel[ling] uses of federal property on terms other than those prescribed or authorized by Congress " *Id.* at 295

[55] *See, e g , United States* v. *Gerlach Live Stock Co* . 339 U.S. 725 (1950); *Ivanhoe Irrigation District* v *McCracken, supra; City of Fresno* v *California, supra; Dugan* v *Rank*, 372 U S 609 (1963).

judgment that the United States could impound whatever unappropriated water was necessary for the project without complying with state law.

The District Court held that the United States must apply to the State Board for an appropriation permit as a matter of comity, but that the Board must issue the permit without condition if there is sufficient unappropriated water. *United States* v. *California*, 403 F. Supp. 847 (E.D. Cal. 1975). The Ninth Circuit affirmed, but held that § 8 of the Reclamation Act of 1902, rather than comity, required the United States to apply for the permit. *United States* v. *California*, 558 F.2d 1347 (9th Cir. 1977). In the Supreme Court the United States argued for affirmance of the decisions below on the ground that a state may not impose any conditions on a federal reclamation project, whether or not they may be consistent with authorization for construction and operation of the project. *See* Brief for the United States at 31–55, *California* v. *United States*, 438 U.S. 645 (1978).[56]

In its decision reversing the Ninth Circuit, the Supreme Court recognized that its prior statements regarding the effect of § 8 of the Reclamation Act of 1902 could be read to support the United States' argument, but the Court characterized those statements as *dicta* "to the extent [they] impl[y] that state law does not control even where not inconsistent with . . . expressions of congressional intent." 438 U.S. at 671 n.24. The Court pointed out that each of its prior decisions involved a direct conflict between state law and a specific provision of the federal reclamation laws, and therefore disavowed that *dicta* insofar as it "would prevent petitioners from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question." *Id.* at 674. Because the courts below had not reached the question whether the conditions actually imposed were inconsistent with congressional directives authorizing the New Melones project, the Court remanded the case for further consideration.[57] The Court suggested that on remand the district court would be free to consider arguments that the legislation authorizing the New Melones project had "by its terms signif[ied] congressional intent that the Secretary condemn or be permitted to appropriate the necessary water rights for the project in question." *Id.* at 669 n.21.[58]

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[56] The United States also argued that the conditions imposed on the permit granted by the California Board were inconsistent with the terms upon which construction and operation of the project had been authorized. *See* U.S. Brief at 57–85. Because the lower courts had both found that California could not impose any substantive conditions on the permit, this argument was not considered below.

[57] Three justices (White, Brennan, and Marshall) dissented from the majority's decision, on the ground that § 8 should be read narrowly, as it was in *Ivanhoe*, *Fresno*, and *Arizona*, to deal only with the acquisition of water rights and to require only that the United States respect water rights that have been vested under state law. *See* 438 U.S. at 691. The dissent would have upheld the lower court decisions "that the State was without power under the reclamation laws to impose conditions on the operation of the New Melones Dam and on the distribution of project water developed by that Dam, which would be undertaken with federal funds." *Id.* at 693. Justice Powell, who wrote the dissent in *United States* v. *New Mexico*, joined in the majority in *California*.

[58] On remand, the district court found that certain conditions imposed by the California Board on the amount and purposes of water to be appropriated, the times of the year in which water could be appropriated, and the distribution of water outside certain counties were not inconsistent with Congress' purpose in authorizing the New Melones project. Other conditions, for example, those imposing limitations on the use of impounded water for the production of power were rejected as inconsistent with the congressional intent. *United States* v *California*, 509 F. Supp. 867 (E.D. Cal. 1981). Cross-appeals were filed in the Ninth Circuit. Those appeals have been briefed and argued and are pending decision. *United States* v *State of California*, C.A. Nos. 81–4189 and 81–4309 (*appeals docketed* Apr. 10, 1981, and June 5, 1981).

c. *Administrative practice and interpretations.*

Because the Supreme Court and Congress have not definitively answered many of the questions in the area of federal-state water rights, administrative practice and interpretation by the federal land management agencies have served to fill some of the interstices. We understand that there has never been a uniform policy among the agencies with primary responsibility over federal lands regarding the extent to which the federal government should or would comply with state laws and procedures in acquiring water rights or give notice to appropriate state agencies or officials of the water needs and uses of the agency.[59] Agencies have participated in general stream adjudications, at least since passage of the McCarran Amendment in 1952,[60] and have litigated water rights in individual cases, but have not developed wholly consistent policies as to whether they should file all water right claims with state agencies. *See Report of the Task Force on Non-Indian Federal Water Rights* at 35 (Government Printing Office 1980) (hereinafter cited as Task Force Report). For example, the Forest Service and Fish and Wildlife Service, at least since the 1930s, have generally attempted to notify the states of water uses and needs and to file for some water rights pursuant to applicable state law. Task Force Report at 36. Since 1946, the Forest Service has generally not filed for water rights on reserved lands, although it has filed for water rights on acquired lands and, since 1966, has informed state officials of the scope of its reserved water rights. The policy of the National Park Service has been to comply with state water laws, particularly with respect to rights not available under the reserved right doctrine. *Id.* Other agencies have often complied with state procedures in acquiring water rights, but have also asserted rights or used water in many instances without compliance with state law or notice to appropriate state authorities.[61]

While the ad hoc approach reflected in the practice of responsible agencies may have accommodated both state and federal concerns when water supplies were relatively ample, over-appropriation of streams in most of the western states and increasing competition for water between and among private and public users has led to efforts at the state and federal levels to achieve certainty in the definition and allocation of water rights. In 1978, President Carter submitted a Federal Water Policy Message to Congress, which recognized the difficulties created for the states by the existence of unquantified, undetermined federal

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[59] These agencies include, most importantly, the Department of the Interior, which has jurisdiction over all public domain lands and some reserved lands, such as national parks, refuges, and wilderness areas; the Department of Agriculture, which, through its Forest Service, has jurisdiction over the national forests; and the Department of Defense, which has jurisdiction over military bases and reservations and, through the Army Corps of Engineers, over flood control and navigational public works.

[60] *See, e g., United States* v. *District Court in and for Water Division No. 5*, 401 U.S 527 (1971); *Colorado River Conservation District* v *United States*, 424 U.S 800 (1976).

[61] For example, following the *Pelton Dam* decision in 1955, the Department of the Navy apparently ceased filing any claims for water with state agencies. *See Nevada ex rel. Shamberger* v *United States, supra* n 29, 165 F. Supp. at 606. That has not, however, been the consistent position of the Department of Defense since then We understand, for example, that the Air Force has agreed that water necessary for deployment of the MX missile system in Nevada and Utah will be appropriated only under state laws *See* Letter from Grant C Reynolds, Assistant General Counsel, Department of the Air Force, to Myles E. Flint, Chief, General Litigation Section, Land and Natural Resources Division, Dept. of Justice (Nov 19, 1981).

reserved rights to water in the western states, and recommended that priority be given to quantification of federal reserved rights.[62] At the same time, federal agencies were directed to expeditiously establish and quantify federal reserved rights.

In response to this initiative, Solicitor Krulitz of the Department of the Interior issued a formal opinion in June 1979, covering both "reserved" and "non-reserved" water rights under statutes authorizing the Department of the Interior to manage federal lands. As we discuss in the next segment of this opinion, Solicitor Krulitz articulated the non-reserved water rights theory of the Department of the Interior, stating that the federal government had a right to use water for "congressionally authorized uses" irrespective of any reservation of land. Solicitor Krulitz's opinion provoked a maelstrom in the western states and an almost immediate decision by Interior Secretary Andrus not to implement segments of the Krulitz opinion except in very limited circumstances. Secretary Andrus' announcement was followed in January 1981 by an opinion by Solicitor Krulitz's successor, Solicitor Clyde O. Martz, restricting the application of the Krulitz opinion. In September 1981, the current Solicitor, William H. Coldiron, issued an opinion repudiating the legal basis and conclusions of the Krulitz opinion. Since these opinions have shaped much of the recent debate on the scope of federal water rights,[63] we will review them in detail here.

i. Krulitz Opinion

In his opinion, Solicitor Krulitz set out to analyze comprehensively the legal bases for the Department of the Interior to assert rights to water on federal lands. In addition to federal reserved rights, Solicitor Krulitz concluded that the federal government has the right to make use of unappropriated water on federal lands without regard to state substantive or procedural law, so long as the water is necessary to carry out "congressionally authorized purposes" or "uses," unless Congress clearly and expressly directs otherwise—the so-called federal "non-

[62] *Pub. Papers of Jimmy Carter*, 1978, pp. 1044–51. Pursuant to this initiative, a Task Force on Non-Indian Reserved Rights was established. The Task Force issued a final report in 1980, in which it recommended, *inter alia*, that federal agencies attempt to quantify all current and future water requirements, that state law be used to the fullest extent possible for water uses not subject to existing reserved rights, and that the Executive Branch attempt, as a matter of policy, to obtain future water rights by purchase, exchange, condemnation, or appropriation under state law. Task Force Report, *supra*, at 3–6 This last recommendation was "grounded on the belief that, to the extent neither existing state law nor existing federal reserved rights provide an adequate base for federal water needs to carry out congressionally established management objectives, in some cases a new reserved right might be created and in other cases a federal non-reserved right might be asserted." The Task Force urged, however, "that neither course be followed except where it is absolutely essential to carry out congressionally mandated management objectives " Task Force Report at 66–67 The Report did not address in any detail the legal basis for assertion of any federal non-reserved water rights.

[63] Solicitor Krulitz's opinion, in particular, has been the subject of considerable comment. *See, e g.*, The Western States Water Council, "Response to the Solicitor's Opinion on Federal Water Rights of June 25, 1979" (Oct 25, 1979); Note, "Federal Nonreserved Water Rights," 48 U Chi. L. Rev. 758 (1981); F Trelease, "Uneasy Federalism—State Water Laws and National Water Uses," 55 Wash. L. Rev 751 (1980); Comment, "Federal Non-Reserved Water Rights," 15 Land and Water L. Rev. 67 (1980), Note, "Federal Acquisition of Non-Reserved Water Rights after *New Mexico*," 31 Stan. L. Rev 885 (1979). Solicitor Coldiron's opinion has been the subject of at least one recent comment. *See* Gould, "Solicitor Rejects Non-Reserved Rights," 14 Water Law Newsletter No 3 (Rocky Mountain Mineral Law Foundation 1981).

reserved" water rights theory. Dept. of Interior Solicitor's Opinion No. M–36914, "Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management," 86 I.D. 553 (1979) (Krulitz Op.). Solicitor Krulitz did not elaborate on the scope of "congressionally authorized purposes" or "uses," but his subsequent discussion of the availability of federal non-reserved water rights under statutes applicable to the Department of the Interior indicates that he thought those purposes and uses should be broadly defined.[64] Thus, in Solicitor Krulitz's opinion, there are only two prerequisites to the existence of a federal non-reserved water right: (1) the assignment of a land management function to a federal agency, *e.g.*, by statute, appropriation, legislation, or acquiescence in long-standing administrative interpretation; and (2) the actual application of water to use.

The non-reserved water right asserted by Solicitor Krulitz is both broader and narrower than the reserved right. It is broader in that it does not depend on a formal reservation of land, and therefore may arise on public domain and acquired, as well as reserved, federal lands. In addition, it is not limited to the specific "primary purposes" for which federal land is managed, but also extends to any management use or function that is permitted by Congress for the land, even if such uses are only incidental to the purposes mandated by Congress for the land, or "secondary," in the language of the Court in *New Mexico*. Thus, under Solicitor Krulitz's formulation, a federal agency may assert a non-reserved right for any secondary use of reserved lands (assuming it has reserved rights covering all primary purposes), and for *all* permissible uses on acquired and public domain lands, whether characterized as primary or secondary. In one respect, however, the non-reserved right is narrower than the reserved right, because it is based on the appropriation of water to actual use, rather than on a reservation of land. Thus, the priority date for non-reserved rights is the date the water was first put to use, and its measure is the amount of water reasonably necessary for that use. By contrast, reserved rights have priority as of the date of the reservation, regardless of when or whether the water was put to use, and extend to all water reasonably necessary for current and future uses. *See, e.g., Cappaert* v. *United States, supra,* 426 U.S. at 138.

Solicitor Krulitz rested his opinion on an asserted federal proprietary interest in unappropriated waters in the western states and the federal government's superior right under the Supremacy Clause to make use of water in furtherance of its constitutional powers. *See* Comment, "Federal Non-Reserved Water Rights," 15 Land and Water L. Rev. 67, 74–75 (1980). He started with the premise that, through cession from foreign nations, the United States acquired ownership of the lands that now comprise the western states and ownership of all rights appurtenant to those lands, including "the power to control the disposition and use of water on, under, flowing through or appurtenant to such lands." Krulitz Op. at 563, 575. He asserted that under the Property Clause of the Constitution, the United States has plenary power to control its property; no interest in that

[64] *See* discussion *infra*.

property may be acquired, by the states or private parties, "in the absence of an express grant from Congress . . . ." Solicitor Krulitz concluded that "absent that grant or consent, [the property] continues to be held by the United States."[65] *Id.* (citing *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 235 (1960); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404–05 (1917)). Solicitor Krulitz buttressed this conclusion with a Supremacy Clause argument:

> Federal control over its needed water rights, unhampered by compliance with procedural and substantive state law, is supported by the Supremacy Clause and the doctrine that federal activities are immune from state regulation unless there is a "clear congressional mandate," or "specific congressional action," providing for state control.

Id. at 564 (citing *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122 (1954)); *Paul* v. *United States*, 371 U.S. 245, 263 (1963); *Hancock* v. *Train*, 426 U.S. 167, 178–81 (1976); *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 214, 217, 221 (1976).

Under either theory, the conclusion reached by Solicitor Krulitz as to the applicable legal analysis is the same:

> [T]o the extent Congress has not clearly granted authority to the states over waters which are in, on, under or appurtenant to federal lands, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of state law.

Id. at 563. Krulitz concluded that neither the equal footing doctrine[66] nor the Acts of 1866 and 1870[67] and the Desert Land Act[68] constituted the necessary clear grant of authority over unappropriated waters on federal lands to the states, and therefore that the federal government may use that water without interference

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[65] However, Solicitor Krulitz disavowed statements made by a prior Interior Department Solicitor that the United States is the "owner of unappropriated non-navigable water on the public domain" as "broad and irrelevant to the right of the United States to make use of such water." He stated that "concepts of 'ownership' of unappropriated waters are not determinative in federal-state relations in non-reserved water rights." Krulitz Op. at 613. Solicitor Krulitz's partial disavowal of the proprietary basis for federal claims is somewhat confusing and seems inconsistent with his statements that the federal government has a retained "proprietary interest" in waters not otherwise appropriated pursuant to state law and "plenary power" over unappropriated waters on federal lands by virtue of the Property Clause. *See, e.g., id.* at 563, 575.

[66] Solicitor Krulitz concluded that the equal footing doctrine (*see* p. 15 *supra*), which is generally relied on to support state claims of ownership of unappropriated waters, did not divest the United States of its ownership interests in unappropriated waters, because (1) the state acts of admission into the Union contained no express grant of ownership, such as is required when the United States divests itself of its property rights, and (2) state ownership of unappropriated water at the time of admission into the Union is "difficult to square with the reserved rights doctrine . . . as appl[ied] to reservations of land in a state after statehood." Krulitz Op. at 564.

[67] Solicitor Krulitz interpreted the 1866 and 1870 Mining Acts to waive the United States' "proprietary and riparian rights to water on the public domain [only] to the extent that water is appropriated by members of the public under state law . . . ." Krulitz Op. at 565. By negative implication, because the acts did not deal with the federal government's rights to use that water, they recognized the United States' "inchoate federal water rights to unappropriated waters that exist at any point in time." *Id.* at 565–66.

[68] Solicitor Krulitz interpreted the Desert Land Act as a statute of limited applicability that "does not directly address federal rights to use water for congressionally authorized purposes on the federal lands, but instead is aimed at appropriation and use 'by the public'." Krulitz Op. at 566.

from the states. Thus, he asserted that by these "relatively narrow" acts, the United States did not divest itself of its authority "to use the *unappropriated* waters on public lands for governmental purposes." *Id.* at 569 (emphasis in original).

Solicitor Krulitz acknowledged that the language of the Supreme Court in *United States* v. *New Mexico, supra,* that, in the absence of a reserved right "there arises the contrary inference that Congress intended federal agencies to acquire water in the same manner as any other public or private appropriator" (438 U.S. at 702) makes it unclear whether federal agencies must conform the assertion of non-reserved federal water rights to state law. He concluded, however, that the Court could not have intended to suggest that state procedural or substantive law would control federal non-reserved uses, because requiring federal agencies to assert non-reserved water rights only for purposes recognized as beneficial under state law would lead to the "anomalous result" that federal land managers would have to manage the same kind of federal land differently in different states. Rather, he argued that the Court intended only to suggest that water rights other than those available as reserved rights must be acquired through some form of appropriation and actual use, and not merely through a reservation of land. *Id.* at 576–77.

As a matter of policy, Solicitor Krulitz recommended that federal agencies comply with procedures established by the states "to the greatest practicable extent." He did not conclude, however, that compliance with state procedural requirements is required as a matter of law. *Id.* at 577–78.

In the second portion of his opinion Solicitor Krulitz outlined reserved and non-reserved federal water rights available to the land management divisions of the Department of the Interior. He acknowledged that the Taylor Grazing Act and the Federal Land Policy Management Act (FLPMA) do not create any reserved rights, but concluded that those statutes express a congressional mandate that the public domain be managed for multiple use and sustained yield purposes, including recreational campgrounds, timber production, livestock grazing, and minimum instream flows necessary to protect and enhance fish and wildlife resources and scenic values. Therefore, he concluded that the BLM may appropriate any water on the public domain necessary to fulfill those purposes. *See id.* at 615. With respect to the National Park Service and the Fish and Wildlife Service, Solicitor Krulitz concluded that those agencies may appropriate (in addition to water available as reserved rights) all unappropriated water necessary to fulfill a broad range of consumptive and non-consumptive uses, including, *inter alia,* conservation of scenery, natural and historic objects, fish, and wildlife; provision for public recreation and enjoyment; construction and maintenance of easements, rights-of-way, and trails; operation of concession operations and construction of airports in national parks; and management of timber, range, agricultural crops, and animals in national refuges. *Id.* at 616–17. Only in § 8 of the Reclamation Act of 1902 did Solicitor Krulitz find a sufficiently clear congressional directive to require that water necessary for operation and maintenance of reclamation projects be acquired pursuant to state law. *Id.* at 615–16.

ii. Martz Opinion

In 1980, Solicitor of the Interior Clyde O. Martz issued a supplemental opinion dealing with the federal non-reserved water rights theory. *See* Dept. of the Interior Solicitor's Opinion No. M–36914 (Supp.), "Supplement to Solicitor Opinion No. M–36914, on Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management," 88 I.D. 253 (1981) (Martz Op.). Solicitor Martz did not disagree with or disavow Solicitor Krulitz's analysis of the existence and nature of the federal non-reserved water rights theory,[69] but concluded that no federal non-reserved water rights could be asserted under FLPMA or the Taylor Grazing Act. Solicitor Martz noted that FLPMA authorizes a wide range of land management activities that require the use of water, but concluded that the savings provision in § 701(g) of the Act[70] indicates that Congress did not intend to provide an independent statutory basis for claims to water that would be inconsistent with the substantive requirements of state law. Martz Op. at 257–58. Without discussion, he concluded that "[t]he same analysis and conclusion is equally applicable to the Taylor Grazing Act." *Id.*[71]

iii. Coldiron Opinion

The current Solicitor of the Interior, William H. Coldiron, issued an opinion on September 11, 1981, concluding that "there is no federal 'non-reserved' water right" and disavowing the Krulitz and Martz opinions to the extent they asserted that such rights exist. *See* Dept. of the Interior Solicitor's Opinion M–36914 (Supp. I), "Non-Reserved Water Rights—United States Compliance with State Law," (Sept. 11, 1981) (Coldiron Op.). Solicitor Coldiron acknowledged that Congress has the power under the Commerce and Property Clauses to control the disposition and use of water appurtenant to lands owned by the federal government, and that, under the Supremacy Clause, it is "unlikely that state law could preclude reasonable water use by a federal agency if Congress specifies a

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[69] Solicitor Martz reaffirmed Solicitor Krulitz's conclusion that situations exist in which the federal government has a legal basis for asserting a federal right to use water in a manner not conforming to all substantive requirements of state law, and not available as a matter of a reserved right. "Federal claims in such cases may be founded on Federal supremacy if and where clearly mandated by Act of Congress Such claims may also be supported by the dominion the United States has and continues to exercise over unappropriated waters arising on the public lands." Martz Op. at 256.

[70] Section 701(g) provides, in relevant part:

> Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands; (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests or rights in water resource development or control

Reprinted at 43 U S.C. § 1701.

[71] Solicitor Martz also noted that the Department of the Interior had previously decided, as a matter of policy, to refrain from asserting non-reserved rights, except if specifically approved in individual cases by the Assistant Secretary or Secretary of the Department, or if the Department was required to submit all claims for water rights in litigation. Martz predicted that in the future most federal water rights would be founded on appropriation or purchase. Martz Op. at 255 n.4.

particular federal usage." Coldiron Op. at 5.[72] However, Solicitor Coldiron observed that Congress can also defer to state control over water resources, and that therefore the crucial question is whether Congress intended to delegate that authority to the states.

Solicitor Coldiron analyzed the question of congressional intent in much the same terms as did the Supreme Court in *California* v. *United States* and *United States* v. *New Mexico*—decisions which Solicitor Coldiron concluded "definitively and directly addressed" the issue of federal non-reserved water rights. Coldiron Op. at 9. Thus, Solicitor Coldiron interpreted the land management statutes of the 19th century, the Reclamation Act of 1902, and other public land use statutes to express congressional recognition of the practical importance of local control of water resources and a general policy of deference to state water law. *Id.* at 6–7. Solicitor Coldiron asserted that only two exceptions have been recognized to this general deference to state water law: the federal navigation servitude and the federal reserved right. *Id.* at 10–11. He concluded, drawing on language from *California* and *New Mexico*, that Congress has given the states broad power to provide for the administration of water rights, which can be infringed by the federal government only where necessary to accomplish the original purpose of a congressionally mandated reservation of land, or to protect the navigation servitude. Therefore, in analyzing land management statutes, the presumption should be that "the United States and its agencies must acquire water rights in accordance with state substantive and procedural law unless necessary for the original purpose of a reservation" (or, presumably, unless incident to the federal government's navigation servitude). *Id.* at 12.

Solicitor Coldiron did not address the question of what evidence of congressional intent is necessary to overcome the presumption that state law applies. He concluded, without an analysis of specific statutory schemes such as that undertaken by Solicitor Krulitz and Solicitor Martz, that "there is an insufficient legal basis for the creation of what has been called federal 'non-reserved' water rights . . . . There is no federal 'non-reserved' water right." Coldiron Op. at 12. This conclusion suggests that, in Solicitor Coldiron's opinion, no existing federal land management statute contains a congressional directive of sufficient specificity to overcome the presumption of deference to state law, and that, unless and until Congress enacts statutes specifically authorizing non-reserved rights or repeals the land management statutes that preserve control over water rights in the states, the only water rights available to federal agencies outside of state law are reserved rights or rights necessary to preserve the navigation servitude. *Id.*

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[72] Although Solicitor Coldiron's analysis is rooted primarily in the Supremacy Clause, he also found a basis for congressional authority in the United States' ownership of unappropriated water on the public domain. He suggested in his opinion that the United States' power over unappropriated non-navigable water located on the public domain "arises from retention of federal property, including the streams and lakes thereon at the time of statehood," and characterized the pattern of ownership of waters with the western states as follows "[w]hen the various western states were admitted to the Union, the title to the beds and waters of the navigable streams and lakes passed to the new states, with the United States retaining title to the non-navigable waters on the public domain." Coldiron Op. at 5

III. Analysis

A. Constitutional Basis for Federal Claims

1. Congressional authority to preempt state water laws

As a matter of constitutional law, Congress clearly has the power to preempt state law governing the use and disposition of unappropriated water by federal agencies on federal lands. That authority arises from the constitutional provisions authorizing the federal government, for example, to regulate interstate commerce (Art. I § 8), to provide for a common defense (Art. I § 8), to enter into treaties (Art. II § 2), to manage federal property (Art. IV § 3), and to provide for the general welfare (Art. I § 8).[73] In the exercise of its constitutional authority under the Commerce, Property, or General Welfare Clauses, or under its treaty and war powers, Congress has the power to authorize the appropriation of unappropriated water by federal land management agencies. If Congress exercises that power, by operation of the Supremacy Clause such an exercise preempts inconsistent state laws. *See United States* v. *Rio Grande Dam & Irrigation Co., supra,* 174 U.S. at 703; *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941).

Congress may, for example, authorize a comprehensive interstate plan for control and disposition of water resources that preempts inconsistent or duplicating state regulation;[74] provide for maintenance of instream flows without regard to whether such flows are recognized under state law;[75] authorize federal agencies or licensees to divert streams for the construction and operation of hydroelectric projects without regard to state restrictions on such diversions;[76] place limitations or conditions on the use or disposition of water from federal projects that are inconsistent with state laws governing the use of such water;[77] or impliedly reserve water necessary to carry out specific federal purposes at the time land is withdrawn from the public domain.[78] The question, therefore, is not generally whether Congress has the *power* to establish federal rights to unappropriated water, but whether it has exercised that power. *See United States* v. *New Mexico, supra,* 438 U.S. at 698.

It is important to understand that any water rights that may be asserted by the federal government outside of state law—whether called reserved, non-reserved,

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[73] For the most part, the authorizations to federal agencies that are of concern here are based directly on the Property Clause, which grants Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Art. IV § 3 cl.2 As we discuss at pp. 51–56 *infra*, we believe the proper analytical approach is to consider that the "property" that is subject to federal control in this context is not the unappropriated water arising on federal lands, but the lands themselves. *See generally Kleppe* v. *New Mexico*, 426 U S. 529, 537–39 (1976).

[74] *See, e.g.*, *Arizona* v *California*, 373 U S. 546 (1963) (Boulder Canyon Project); *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941) (navigation and flood control project)

[75] *See, e g.*, 16 U S.C. § 557b (prohibiting any "federal alteration of the natural water level of any lake or stream" in the Lake Superior National Forest)

[76] *See, e g., Ashwander* v. *Tennessee Valley Authority*, 297 U S. 288, 350 (1936), *First Iowa Coop.* v. *Federal Power Comm'n*, 328 U S. 152, 176 (1946); *Federal Power Comm'n* v. *Oregon*, 349 U.S. 435, 445 (1955), *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958); *United States* v *Grand River Dam Authority*, 363 U.S 229, 232–33 (1960).

[77] *See, e.g.*, *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958), *City of Fresno* v *California*, 372 U.S 627 (1963); *California* v *United States*, 438 U S 645 (1978)

[78] *See, e.g., Cappaert* v *United States*, 426 U.S. 128 (1976); *United States* v *New Mexico*, 438 U.S. 696 (1978).

or by some other name—rest on this same constitutional basis. Thus, federal reserved rights are not a unique species of federal rights that arise directly out of the reservation of federal lands, so that, absent a reservation of land, no federal water rights can exist. As one commentator has noted, "the reservation doctrine is not a *source* of federal power." Trelease, "Federal-State Relations," *supra* n.6, at 139 (emphasis added). The reserved right doctrine does not rest on any unique constitutional basis. Rather:

> [t]he federal functions exercised in the name of the reservation doctrine rest instead on the supremacy clause, coupled with the power exercised in making the reservation of land, or with some other power incidentally exercised on the reserved land.

Id.[79]

Thus the willingness of the Supreme Court to recognize federal reserved rights does not, under an *exclusio unius* principle, necessarily preclude the federal government from asserting in other circumstances water rights not available under state law or under the reserved right doctrine. The fact that the Supreme Court has never explicitly recognized a non-reserved water right in *haec verba* does not mean that the Court would not recognize the federal government's implied rights to unappropriated water, arising from clear congressional intent, in a situation that has not yet been presented to it.[80] As we discuss below, however,

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[79] Similarly, the navigation servitude, which has been characterized as one of only two "exceptions" to Congress' deference to state law (*see California* v. *United States*, *supra*, at 602; Coldiron Op. at 8), is not a unique source of federal constitutional authority or federal rights. The navigation servitude is a doctrine which holds that the federal government is not constitutionally required to pay compensation if, in the exercise of its power over navigable streams, it takes, destroys, or impairs private property rights that depend on the use or presence of the water. *See United States* v. *Rands*, 389 U.S. 121, 122–23 (1967); *see generally* Trelease, "Federal-State Relations," *supra* n. 6, at 72, 175; E. Morreale, "Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation," 3 Natural Resources J. 1, 64–65, 74–75 (1963). The navigation servitude stems from Congress' power to preserve and promote the navigability of waters, which in turn rests on the Commerce Clause. *See, e.g., Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 707 (1899); *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 232–33 (1960). As with other exercises of constitutional authority, inconsistent state laws, programs, or permit requirements must fall by operation of the Supremacy Clause. *See Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534–35 (1941); *First Iowa Coop.* v. *Federal Power Comm'n*, 328 U.S. 152, 176 (1946). The analysis of federal water rights under Congress' navigation power is the same as the analysis of any federal water rights. Has Congress exercised its power under the Commerce Clause over navigable waters? If so, what is the scope of the congressional mandate? Would state law conflict with or frustrate that mandate?

[80] Although the Court has recognized under specific statutes such as the Reclamation Act and the Federal Power Act that the federal government has certain rights to unappropriated water outside of the reserved right doctrine (*see* pp. 31–37 *supra*), the Court has not addressed directly a broad assertion of federal implied water rights such as that asserted by Solicitor Krulitz—*i.e.*, that a federal agency may assert a federal water right based solely on the assignment of land management functions to a federal agency. In *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), an action between Nebraska, Wyoming, Colorado, and the United States for allocation of water of the North Platte River, the Court specifically declined to rule on an argument analogous to that made by Solicitor Krulitz. The United States argued that, given the federal ownership of unappropriated water on federal lands, the federal government could acquire all water necessary to carry out two reclamation projects using water from the river regardless of state law, because "if the right of the United States to these water rights is not recognized [by state law], its management of the projects will be jeopardized." 325 U.S. at 615. The Court declined to rule on that contention, however, as it found that all necessary rights had been acquired by the United States under applicable law. The Court expressly reserved decision on the broader claim.

> We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system. We are dealing here only with an allocation, through the States, of water rights among appropriators. The rights of the United States in respect to the storage of water are recognized.

Id. at 615.

the reasoning used by the Court in shaping the reserved right doctrine is relevant to an analysis of what other rights the federal government may have. *See* pp. 70–72 *infra*.

2. "Ownership" of unappropriated water

Much of the confusion about the federal government's rights to unappropriated water in the western states stems from arguments based on "ownership" of the unappropriated waters on federal lands and the effect of the land management statutes of the 19th century. As we outlined *supra*, Solicitor Krulitz's assertion of a broad federal non-reserved water right, while not clearly stated, apparently rested in part on the assumption that the United States acquired proprietary rights to all unappropriated water on public lands at the time it acquired the territories that became the western states, and that it has never subsequently granted away that proprietary interest except to the extent that private individuals may have actually appropriated water on those lands. Some of the western states have argued that the federal government acquired ownership of unappropriated water together with the public lands, but ceded ownership of the water to the states by the acts of admission into the Union or at least by the passage of the Desert Land Act in 1877, or that the federal government never acquired ownership of those waters.[81] The contention is made that the states therefore own those waters and can exercise control over their use, even if the use is by the federal government. *See, e.g.*, Morreale, "Federal-State Conflicts," *supra* n.17, at 446–59; Colum. Note, *supra* n.5 at 972–74. The only exception to that control is if Congress withdraws land (and water) from the applicability of those acts by a formal reservation.

This proprietary view of western water rights has significant ramifications both for the federal government and the states. As Solicitor Krulitz noted, the Supreme Court has characterized the federal government's control over the use and disposition of its property as "complete" and "without limitation," and has stated that an interest in property of the United States may be acquired only by an express grant from Congress. *See* Krulitz Op. at 563; *Kleppe* v. *New Mexico*, *supra*, 426 U.S. at 539–40; *Caldwell* v. *United States*, 250 U.S. 14, 20–21 (1919). Therefore, if the United States "owns" the water, it may be contended that all that is necessary to perfect its rights is use of that water for an authorized federal purpose; a state cannot impose any restrictions on that use unless Congress has explicitly granted an ownership interest to the states. *See* Comment, "Federal Non-Reserved Water Rights," 15 Land and Water L. Rev. 67, 76 (1980). At the same time, the ownership theory provides a basis for the states' argument that statehood acts and the federal land acts passed in the 1860s and 1870s (*see* Part IIB(2) *supra*) constituted an express grant of ownership to the states of all unappropriated water within their borders, and that therefore they

[81] *See* Part IIA *supra*.

may now exercise plenary authority over that water.[82] If the states own that unappropriated water, the only way the federal goverment can acquire an interest in the water is if Congress withdraws certain lands from the scope of the acts, appropriates water under state law, or acquires existing water rights through purchase, exchange, or condemnation.

We believe that state and federal claims of title to or ownership of unappropriated water within the western states do not provide an adequate basis for either denial or assertion of federal water rights. Arguments made on either side of the issue are difficult to reconcile with the reserved rights doctrine, as it has been developed by the Supreme Court. With respect to state claims of ownership, the theory creates substantial questions concerning the constitutionality of the reserved water rights doctrine. That is, if Congress, either by the statehood acts or land management statutes, gave the states ownership of all unappropriated waters on the public domain, on what basis can the federal government reserve some of that water for a federal use, without compensation, by a withdrawal of land made after ownership of the waters passed to the states? On the other hand, with respect to federal claims, the Supreme Court has clearly limited the reserved rights that the United States can assert to those which are minimally necessary to fulfill the explicit or necessarily implied congressional intent, and has recognized that the United States will not, in every instance, have reserved rights to all unappropriated water on federal reserved lands. *See United States* v. *New Mexico, supra,* 438 U.S. at 702. If the United States owned all the unappropriated water on the public domain at the time a particular parcel was reserved and had plenary control over its disposition, this limitation would appear to be superfluous, and the Court's extended analysis of the scope of the reserved right doctrine unnecessary.

Furthermore, it seems anomalous to suggest that an entity can own water that has not yet been appropriated, if ownership is understood to mean a proprietary

[82] Aside from the effect of the Mining Acts of 1866 and 1870 and the Desert Land Act, the western states have also asserted other theories to support claims of ownership in unappropriated waters within their borders, *viz,* (1) in the original thirteen (riparian) states, the federal government had no interest in water as a sovereign and, therefore, under the constitutional equal footing doctrine, which guaranteed admission to the western states on an "equal footing" with the original thirteen states, the federal government relinquished all claims to water within the new states, or (2) Congress by the various acts of admission impliedly accepted or ratified state constitutional and statutory provisions asserting the ownership of water Neither theory provides an adequate or consistent basis for state claims of ownership of unappropriated water Although in *California* v. *United States, supra,* 438 U S at 654, the Court noted, without elaboration, that "[o]ne school of legal commentators held the view that, under the equal-footing doctrine, the Western States, upon their admission to the Union, acquired exclusive sovereignty over the unappropriated waters in their streams," the Court's interpretation of the equal footing doctrine in other cases has been limited In enera, the Court has interpreted the doctrine to apply only to political rights of sovereignty granted the original states, not to property or economic rights. *See, e g., United States* v. *Texas,* 339 U.S 707, 716 (1950) In *Arizona* v *California,* 373 U S 546, 597–98 (1963), the Court rejected the contention that the equal footing doctrine could limit "the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art IV, § 3 of the Constitution " *See* discussion at 2 Clark, *supra,* § 102 6 The ratification and compact theories also suffer from several deficiencies. Most notably, the language and meaning of the various constitutional and statutory provisions relied upon by the states vary considerably, as do the admission procedures followed by the western states It is impossible to construct a coherent theory that would apply to each state, especially as several of the western states either have no constitutional or statutory provision asserting ownership or passed such a provision only after admission. The ratification or compact theory would make a state's ownership of unappropriated water within its borders turn on the fortuitous language of its constitution and the circumstances of its admission into the Union As several commentators have noted, the theory therefore provides little support for state claims of ownership *See, e g , Morreale,* "Federal-State Conflicts," *supra* n.17, at 446–55; Trelease, "Federal-State Relations," *supra* n 6, at 117 n*; Goldberg, "Interposition—Wild West Water Style," 17 Stan L. Rev 1, 12–16 (1964).

interest in the water. Unappropriated water, much as wild animals, has been viewed as *res nullius*—the property of no one—until it has been captured. *See* F. Trelease, "Government Ownership and Trusteeship of Water," 45 Calif. L. Rev. 638, 643 (1957); Trelease, "Federal-State Relations," *supra* n.6, at 147b–i; Note, "Federal Nonreserved Water Rights," 48 U. Chi. L. Rev. 785, 770–71 (1981). In *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), the Supreme Court noted that concepts of ownership of or title to natural resources such as natural gas, minerals, landfill areas, birds, fish, and other wildlife is a "legal fiction" that merely expresses legitimate state regulatory interests in the conservation and protection of its natural resources:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.

441 U.S. at 334, quoting *Toomer* v. *Witsell*, 334 U.S. 385, 402 (1948). The Court made it clear that a state's power over wild animals, as over other natural resources, is based on the state's police powers and is subject to ordinary constitutional limitations—in that case, the Commerce Clause.[83]

Thus, claims of ownership of natural resources by the states or by the federal government are best understood as claims of regulatory jurisdiction over those resources, either under the states' police powers or under the federal government's constitutional powers. *See Kleppe* v. *New Mexico*, 426 U.S. 529, 537 (1976) (ownership of wild horses and burros on federal lands is irrelevant to the scope of the federal government's authority under the Property and General Welfare Clauses to protect those horses and burros). This interpretation of the nature of the states' and federal government's interests in unappropriated water is consistent with the approach taken by the Supreme Court in cases involving the use or disposition of water in the western states. The Court has consistently analyzed claims by the states and the federal government over navigable and nonnavigable waters as a question of competing regulatory authority, rather than as a question of property rights.[84] *See, e.g., United States* v. *Rio Grande Dam & Irrigation Co., supra*, 174 U.S. at 703; *Winters* v. *United States, supra*, 207 U.S. at 577; *Arizona* v. *California, supra*, 373 U.S. at 597–98; *California* v. *United States, supra*, 438 U.S. at 665–79; *United States* v. *New Mexico, supra*, 438

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[83] In *Hughes* v. *Oklahoma*, the Court overruled *Geer* v. *Connecticut*, 161 U S 519 (1896), which had sustained against a Commerce Clause challenge a Connecticut statute forbidding the transportation beyond the state of game birds that had been lawfully killed within the state The Court's decision in *Geer* rested on its conclusion that no interstate commerce was involved, because the state had the power as representative for its citizens, who owned all wild animals within the state, to control both the taking and ownership of game that had been lawfully reduced to possession in the state. *See* 441 U.S at 322. In *Hughes*, the Court noted that the *Geer* rationale had been considerably eroded and limited in subsequent decisions dealing with state authority over other natural resources *See* 441 U.S at 329–335. Faced with an Oklahoma statute prohibiting the transport or shipping outside the state of minnows procured from waters within the state, the Court explicitly overruled the holding in *Geer*, and concluded that the Oklahoma law unconstitutionally interfered with interstate commerce *Id.*

[84] In several cases in which the Court has been faced with claims of "ownership" of the unappropriated waters by the states or the federal government, it has refused to address the question, and found a narrower ground for its decision. *See, e g , Ickes* v *Fox*, 300 U S. 82, 96 (1937); *Nebraska* v *Wyoming*, 325 U.S 589, 615–16 (1945)

U.S. at 698. While some of these decisions made reference to the Property Clause, in each instance federally owned *land* was at the center of the controversy, and the references made to the Property Clause may be best understood as relating to an exercise of power over that property. The Court made the distinction between ownership and regulatory jurisdiction clear in a slightly different context in *United States* v. *California*, 332 U.S. 19, 36 & n.20 (1947). In that case, the Court found that California does not hold title to submerged lands off its coast by virtue of the equal footing doctrine, but that California could nonetheless exercise police powers over waters flowing over that land, limited by constitutional constraints such as the Commerce Clause or the war power. *See id.*

The question is not one of competing ownership, therefore, but of competing regulatory jurisdiction. As one commentator has noted:

> The state and federal governments share an interest in proper regulation of water. Neither "owns" unappropriated water but each has the power to use it and to regulate its use . . . . The important question is whether state or federal rules of capture apply to the United States. In other words, the issue is whether Congress has established a federal regulatory jurisdiction over federal appropriations, or has recognized the inherent regulatory jurisdiction of the states and adapted federal programs to it.

Note, "Federal Nonreserved Water Rights," 48 U. Chi. L. Rev. 758, 772 (1981) (footnotes omitted).

3. Effect of Mining Acts of 1866 and 1870 and the Desert Land Act

The major 19th century land acts—the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877 (*see* pp. 18–21 *supra*)—can thus best be understood as an allocation of jurisdiction to regulate the use of unappropriated water on federal lands between the states and the federal goverment, rather than a conveyance of property interests in that water. *See* Trelease, "Federal-State Relations," *supra* n.6, at 147; Morreale, "Federal-State Conflicts," *supra* n.17, at 432. Since Congress has the power to cede its constitutional authority over federal uses of such water to the states, the question is whether those acts divested the federal government of that authority.[85]

The Supreme Court's treatment of those acts, particularly the Desert Land Act, has been ambiguous and far from definitive. In *California Oregon Co.* v. *Beaver*

[85] At one time the Justice Department took the position that Congress could not provide for state administration of federal property rights because to do so would be in contravention of Article IV, § 3 of the Constitution and the separation of powers principle *See* Letter of Deputy Attorney General William P. Rogers to Sen. James E. Murray, Chairman, Senate Committee on Interior and Insular Affairs, dated March 19, 1956, *reprinted in* S. Rep No. 2587, 84th Cong , 2d Sess. 25 (1956) This Office has since rejected that position. *See* Memorandum for James W Moorman, Assistant Attorney General, Land and Natural Resources Division, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel (Jan 22, 1980), at 13 n 10 As we stated in that memorandum, "[t]he Supremacy Clause charges the States with protecting federal rights and, other than sovereign immunity limitations, we perceive no constitutional or common law limitations on state administration of those rights " *See generally United States* v *New Mexico*, 438 U S. 696 (1978); *California* v *United States*, 438 U.S. 645 (1978)

Portland Cement Co., supra, for example, the Court stated that, "[the Desert Land Act] . . . recognizes and gives sanction, *in so far as the United States and its future grantees are concerned,* to the state and local doctrine of appropriation." 295 U.S. at 164 (emphasis added). Even if that language could be interpreted as an unambiguous statement that the Desert Land Act applies to *federal* uses, the case involved only competing claims by private parties, not claims by the federal government, and the Court's statement must be regarded as *dictum. See* pp. 21–22 *supra.* In the *Pelton Dam* decision, which did involve, at least indirectly, claims by the federal government (*i.e.*, through its licensee), the Court characterized the Desert Land Act as severing, *"for purposes of private acquisition,* soil and water rights *on public lands." Federal Power Commission* v. *Oregon, supra,* 349 U.S. at 448 (first emphasis added; second emphasis in original). Again, however, the Court's statement is not definitive, because the Court refused to rule on the general question of the effect of the Desert Land Act or the 1866 and 1870 Acts on a state's exercise of jurisdiction over unappropriated water within its borders, holding only that the acts do not apply to federal reserved lands.[86] *Id.* In *Cappaert* v. *United States, supra,* the court characterized the Desert Land Act as "provid[ing] that patentees of public land [*i.e.*, private purchasers or grantees] acquire only title to land through the patent and must acquire water rights in nonnavigable water in accordance with state law." 426 U.S. at 143. Although that characterization appears to limit the effect of the Act (and, by implication, the preceding Mining Act of 1866 and 1870) to rights that may be acquired by private appropriators,[87] the Court rested its holding, as in the *Pelton Dam* decision, on the inapplicability of the Act to federal reserved lands. *Id.* at 144 & n.9.

Although the issue is not free from doubt, we believe that the sounder view is that the Mining Acts and Desert Land Act authorize state control only over appropriations by private individuals of unappropriated water on federal lands, and do not, by their terms, cede to the states control over the federal government's use of water for federal purposes and programs. That interpretation is suggested by the Supreme Court's language quoted above from the *Pelton Dam* decision and *Cappaert* v. *United States.* Moreover, it is consistent with the legislative background and history of the Acts. At the time the Mining Acts and Desert Land Act were passed, the concern at the state and federal level was not with possible federal-state conflicts over the use of water on the public lands, but rather with settlement of private disputes between private claimants. *See generally* 2 Clark, *supra,* § 102.5. The somewhat sparse legislative history of the acts suggests that the primary—if not the only—contemplated purpose of provisions of the acts dealing with water rights was to clarify that private patentees or users of federal lands would not acquire, by virtue of that ownership or use, any rights to

[86] In *Federal Power Comm'n* v. *Oregon, supra,* the state argued that the 1866, 1870, and 1877 legislation constituted express congressional conveyances to the states of the power to regulate the use of non-navigable waters The Supreme Court found it unnecessary "to pass upon the question whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State, because these Acts are not applicable to the reserved lands and waters here involved." 349 U S. at 448.

[87] *See Cappaert* v *United States, supra,* 426 U S. at 143 n.8.

unappropriated water except as recognized by state law. *See generally* Grow & Stewart, *supra* n.36, at 468–69.[88]

It was not until the end of the 19th century that federal users of water within the western states began to be of major concern. In *United States* v. *Rio Grande Dam & Irrigation Co.*, *supra*, one of the first cases to discuss a federal-state conflict over the use of water resources within those states, the Court noted that the Mining Acts and Desert Land Act must be interpreted "in the light of existing facts," *i.e.*:

> . . . that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries. *To hold that Congress, by these acts, meant to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable water course, and so destroy the navigability of that water course in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated.* It ignores the spirit of the legislation, and carries the statute to the verge of the letter, and far beyond what, under the circumstances of the case, must be held to have been the intent of Congress.

174 U.S. at 706–07 (emphasis added). The Court clearly affirmed that the intent of the Mining Acts and the Desert Land Act was to deal with issues of local concern—*i.e.*, private appropriations—and not to interfere with Congress' superior right, in the exercise of a constitutional power such as that over navigation, to use water within the western states.[89] *See, e.g.*, Colum. Note, *supra* n.5, at 980.

We believe the conclusion that the acts by their terms do not cede regulatory authority over federal uses to the states is consistent with the Supreme Court's holding in the *Pelton Dam* decision that the acts do not apply to federal reserved lands. In the *Pelton Dam* decision, the Court rested its conclusion on its

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[88] In particular, it is difficult to construe the Desert Land Act as ceding the federal government's control over its use of water on federal lands in the 17 western states, because the Act does not apply to all 17 states or to navigable waters within those states *See* n 38 *supra*

[89] This part of the Court's holding in *Rio Grande* cannot be dismissed as dealing only with the federal government's power over navigable waters and therefore inapplicable to the Desert Land Act, which applied by its terms only to non-navigable waters. As we noted *supra* at n.79, the federal government's authority to preserve the navigability of streams is not a source of federal power, but rather an example of federal power that can be exercised under the Commerce Clause Therefore, the Court's comments would be equally applicable if some other constitutional power—for example the Property or General Welfare Clauses—were the basis of the United States' attempt to enjoin diversion of the river by private appropriators. In any event, the Court's comments were directed not at state-approved diversions of navigable waters, but state-approved diversions of non-navigable waters, waters that are clearly within the scope of the Desert Land Act

interpretation of the term "public lands" in the Desert Land Act to include only public domain lands—*i.e.*, those open for settlement and disposition. *See* p. 27 *supra*. The Act therefore did not apply to reserved lands. At the time of the Court's decision, because the federal reservation in question had been made subsequent to passage of the Act, the relevant public domain was not the public domain as of the time the Act was passed, but the public domain as of 1954. The Court's decision has consistently been interpreted to mean therefore that the federal government can withdraw unappropriated water from the state appropriation system at any time by withdrawing appurtenant lands from the public domain for a particular federal purpose. *See, e.g., Cappaert* v. *United States, supra*, 426 U.S. at 145; Morreale, "Federal-State Conflicts," *supra* n.17, at 432.

The basis upon which the federal government can make such a withdrawal is not clear from the Court's discussion in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955). Commentators have suggested that the appropriate analysis is repeal-by-implication. The argument is that, although Congress granted the states plenary authority over unappropriated water within their borders by the 1866, 1870, and 1877 Acts (including authority over federal uses), the subsequent reservation of land for a specific federal purpose impliedly repeals those acts to the extent of the water rights involved. *See, e.g.*, Grow & Stewart, *supra* n.36, at 466–67. That argument is subject, however, to the serious objection that implied repeals are highly disfavored, particularly as many reservations may be made simply by executive order or administrative action. *See, e.g., TVA* v. *Hill*, 437 U.S. 153, 189–90 (1978); C. Sands, *Statutes and Statutory Construction*, § 23.09 (4th ed. 1973). We believe that the more tenable explanation is that the Acts gave the states authority only to control and administer *private* rights to water on federally owned lands, and did not grant away the federal government's power, if properly and clearly exercised, to use unappropriated water on federal lands without regard to state law. The significance of a reservation of land from the public domain is not that it repeals the effect of the Mining Acts or Desert Land Act, but that it is an exercise by Congress of that power and therefore, by reason of the Supremacy Clause, preempts inconsistent state control of federal uses.

B. Statutory Basis for Federal Claims

Although we do not believe that Congress ceded its regulatory authority over federal use of unappropriated water on federal lands to the western states by the Mining Acts and the Desert Land Act, Congress clearly recognized and indeed fostered, by those acts and subsequent land management statutes, the development of comprehensive state water codes and administrative systems applicable to unappropriated water on federal, as well as privately or state-owned land. It is clear that federal law may displace those state systems, however, at least with respect to unappropriated water on federal lands. *See, e.g., United States* v. *Rio*

Grande Dam & Irrigation Co., supra. What is not clear—and what we address here—is *when* and *how* federal law displaces state water law.

Because Congress has seldom directly regulated the acquisition or use of water by federal agencies or their licensees,[90] and has not enacted comprehensive legislation dealing with federal water rights in the western states,[91] the federal state conflicts that are of primary concern are conflicts between federal uses of water for the management of federal lands and state substantive or procedural law. For example, state law may not recognize certain federal uses as beneficial or in the public interest[92] or may deny a priority date to a federal use because of the

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[90] Exceptions include certain provisions of the reclamation laws, such as § 5 and § 8 of the Reclamation Act of 1902 and § 9 of the Reclamation Project Act of 1939, which prescribe terms upon which the Secretary of the Interior can use or dispose of water from federal reclamation projects (*see* pp. 22–23 *supra*); § 9 of the Rivers and Harbors Act of 1899, 33 U.S C. § 401, which requires the consent of Congress to construct dams and other obstructions on navigable waters, and the Federal Power Act, *supra* n.28, which provides for licensing of hydroelectric dams on navigable and some other waters (*see* p 23 *supra*).

[91] In the last 30 years, a number of "water rights settlement bills" have been introduced into Congress but have not been passed. For the most part, these bills would have given the states considerable control over federal uses of unappropriated water The "Barrett bill," introduced in 1956, for example, would have provided that:

> [A]ll navigable and non-navigable waters are hereby reserved for appropriation and use of the public pursuant to State law, and rights to the use of such waters for beneficial purposes shall be acquired under State laws relating to the appropriation, control, use, and distribution of such waters. Federal agencies and permittees, licensees, and employees of the Government, in the use of water for any purpose in connection with Federal programs, projects, activities, licenses, or permits, shall, as a condition precedent to the use of any such water, acquire rights to the use thereof in conformity with State laws and procedures relating to the control, appropriation, use, or distribution of such water.

S 863, 84th Cong , 2d Sess § 6 (1956), *reprinted in* Morreale, "Federal-State Conflicts," *supra* n.17, at 514 The "Kuchel bill," introduced in the 88th Congress, provided that

> Any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedures established by the laws of that State.

S. 1275, 88th Cong., 1st Sess § 3 (1962), *reprinted in* Morreale, "Federal-State Conflicts," *supra* n.17, at 494. Sponsors of bills granting control over water resources to the states generally have argued that such provisions would merely "confirm" the *status quo. See id* at 446. Hearings were held on various aspects of federal-state relations in the field of water rights in 1950, 1956, 1960–61, and 1964. *See Water Rights Settlement Act: Hearings on S 863 Before the Subcomm on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs,* 84th Cong., 2d Sess. (1956); *Water Rights Settlement Act of 1956. Hearings Before the House Comm. on Interior and Insular Affairs,* 84th Cong , 2d Sess (1956); *Federal-State Relations in the Field of Water Rights: Hearings Before the Subcomm on Irrigation and Reclamation of the House Comm on Interior and Insular Affairs,* 86th Cong., 1st Sess (1959), *Federal-State Water Rights: Hearings Before the Senate Comm. on Interior and Insular Affairs,* 87th Cong., 1st Sess. (1961), *Federal-State Water Rights· Hearings on S. 1275 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs,* 88th Cong , 2d Sess. (1964) For a detailed discussion of various water rights settlement bills, *see* Morreale, "Federal-State Conflicts," *supra* n.17, and 2 Clark, *supra,* § 107.

In 1973, the National Water Commission proposed a "National Water Rights Procedure Act," which would have required federal agencies to proceed in conformity with state laws and procedures relating to the appropriation or use of water and the administration and protection of water rights, except "where state law would conflict with the accomplishment of the purposes of a federal program or project " The Act would also have established a procedure for recording and quantifying existing non-Indian federal water uses and would have eliminated the non-compensation features of the reserved right doctrine and the navigation servitude *See* National Water Commission, *Water Policies for the Future* (Water Information Center, Inc. 1973), at 461–64.

[92] The Forest Service has expressed concern in the past, for example, that it might not be able to obtain state recognized rights for certain instream or in-situ uses such as livestock watering, recreation, or preservation of fish and wildlife, because applicable state law requires a diversion of water or does not recognize such uses as beneficial *See* Department of Agriculture Position Statement, submitted to Office of Legal Counsel on Nov. 5, 1981. An analogous problem has been identified by the Department of the Army with respect to water rights available for Fort Carson, in Colorado, which is located on acquired federal lands Concerns have been raised by the Army that Colorado law would not recognize the uses of water for military training and emergency preparedness. *See* Department of the Army, Legal Memorandum, "Federal Non-Reserved Water Rights" (Nov. 5, 1981).

failure of the agency to comply with state procedural or permitting requirements.[93] The question, therefore, is whether, by authorizing certain uses of federal lands, Congress intended also to authorize acquisition of water for those uses without regard to limitations imposed by state law. As the Supreme Court commented in *New Mexico* with respect to federal reserved rights, this "is a question of *implied intent* and not power." 438 U.S. at 698 (emphasis added).

Under the federal non-reserved right theory articulated by Solicitor Krulitz, the requisite intent to displace state control over the appropriation of unappropriated water could be inferred merely from Congress' authorization to federal agencies to manage federal lands; no specific congressional intent to displace state control over water would need to be shown. Thus, for example, a federal agency would be entitled to water necessary for preservation of minimum instream flows for stock watering, recreation, and fish and wildlife purposes whether or not state law recognized such uses as beneficial, and would not be bound by state permitting or other procedural requirements, so long as the agency was acting within its congressionally mandated authority. The contrary view is that, unless Congress has set specific conditions on the acquisition or use of water by federal agencies or has reserved the underlying land, federal agencies are limited to water rights obtainable under state substantive and procedural law. If, for example, applicable state law does not recognize minimum instream flows, Congress has not explicitly recognized a federal right to those flows, and the agency cannot claim an implied reserved right to such flows because the underlying land was not reserved from the public domain or the use is not a primary purpose of a reservation, the agency is not entitled to that water.[94] Similarly, except when the agency may be able to assert reserved rights (which have a priority date based on the date the land was reserved), the priority date of its water rights must be established in accordance with state substantive and procedural law.

As both Solicitor Krulitz and Solicitor Coldiron recognized, the Supreme Court's decisions in *California* v. *United States* and *United States* v. *New Mexico* are highly relevant to an analysis of the federal non-reserved water rights theory, both because those decisions are the most recent pronouncements of the Supreme Court on federal rights to unappropriated water in the western states and because the Court suggested in those opinions that there may be limitations on the federal government's ability to acquire or use water on federal lands without complying with applicable state laws. It is important to understand, however, that the

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[93] In many cases federal agencies have failed to apply for permits recognizing state appropriative rights at the time the water was first put to use because of inadvertence, policy decisions, or legal advice. In "permit" states, which award priority based on the date an application is filed, those agencies risk having their rights cut off by a junior appropriator who has complied with state procedural requirements. Assertion of federal non-reserved rights, if sustained, would allow the federal agencies to antedate their water rights—*i.e.*, to get the benefit of a priority date based on the first actual use of the water.

[94] The western states have argued that in those states that do not recognize minimum instream flows, the flows may nevertheless be preserved by the acquisition (by purchase or condemnation) and exercise of senior downstream state-awarded water rights, which will ensure the continued upstream flows. *See* Memorandum to Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, from the Honorable Mike Greely, Attorney General, State of Montana (Apr. 1, 1982).

holdings in those decisions were relatively narrow, limited to the effect of § 8 of the Reclamation Act of 1902 (*California* v. *United States*) and the scope of the Forest Service's reserved rights under its Organic Administration Act (*United States* v. *New Mexico*). Unfortunately, much of the debate about the meaning of *California* and *New Mexico* focuses on isolated language used by the Court, which is interpreted by critics of the non-reserved right theory to preclude assertion of any federal non-reserved rights and by proponents of the theory as limited to the narrow holdings in the cases before the Court. As we discuss now, both interpretations of the Court's language are selective and do not provide an entirely satisfactory rationale for either conclusion.

Critics of the non-reserved right theory argue that, in the following three passages from *California* and *New Mexico*, the Court definitively disposed of the contention that any federal non-reserved water rights exist:

> The Court noted [in *United States* v. *Rio Grande Dam & Irrigation Co.*] that there are two limitations to the State's exclusive control of its streams—reserved rights "so far at least as may be necessary for the beneficial uses of the government property," and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the States' power that, except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.

California v. *United States*, *supra*, 438 U.S. at 662 (citations omitted).

> Where water is only valuable for a secondary use of the reservation . . . there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. *New Mexico*, *supra*, 438 U.S. at 702.

> [T]he "reserved rights doctrine" is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas.

Id. at 715.

None of these statements, however, can be interpreted as conclusively as critics of the non-reserved rights theory urge, when read in context.[95] In the language

[95] Solicitor Coldiron concluded in his opinion that "this issue of 'non-reserved' federal water rights was definitively and directly addressed on July 3, 1978, by the Supreme Court in two separate opinions regarding the water rights of the United States [*United States* v *New Mexico* and *California* v. *United States*]." Coldiron Op at 9. The western states, relying primarily on the "contrary inference" language from *New Mexico*, argue that "*New Mexico* dictates that when the federal government claims water for a national forest (assuming the navigation servitude does not apply), it has only two mechanisms available to it. the reserved rights doctrine or the law of the state in which the reservation is located." *See* Memorandum to Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, from the Honorable Mike Greely, Attorney General of Montana (Apr 1, 1982) at 8–9

quoted from *California*, for example, the Court was merely characterizing its holding in the *Rio Grande* case.[96] The Court clearly recognized in the remainder of its opinion that there may be circumstances other than the navigation servitude or reserved rights doctrine under which a federal statute would preempt the state's exclusive control of its stream—*i.e.*, if conditions imposed by state law on the operation or construction of a federal reclamation project are "inconsistent with clear congressional directives respecting the project." *See* 438 U.S. at 672. Consequently, the Court could not have intended, by that language, to establish a rule of law applicable to all water rights that could be asserted by the federal government.

Likewise, the often-cited language in *New Mexico* that a "contrary inference" arises that the United States must acquire water "in the same manner as any other public or private appropriator," if reserved rights are not available, must be considered in context. The only issue before the Court in *New Mexico* was the scope of the Forest Service's reserved rights under its Organic Administration Act.[97] The Court did not have before it any argument or evidence relevant to rights that might have been asserted by the Forest Service on some other basis, such as appropriation under state law, or relevant to rights arising on public domain lands. Thus, the Court's statement about the ability of the Forest Service to obtain water in excess of its reserved rights was made only in the context of federal reserved lands; as we discuss *infra*, even with respect to reserved lands it can be argued that the language does not mean that federal agencies are necessarily bound by state law in acquiring water necessary only for "secondary" uses of the land. *See* p. 68 *infra*.

Finally, the Court's characterization of the reserved rights doctrine as an "exception" to Congress' explicit deference to state water law in other areas does not imply that reserved rights are the *only* exception. The Court clearly recognized in *California*, as we have discussed, that other exceptions may exist. *See* Part IIB(3)(b) *supra*.

While we believe that these selected passages from *California* and *New Mexico* do not therefore definitively dispose of the federal non-reserved water rights theory, we believe that they reflect the Court's view and its interpretation of Congress' intent over the years that substantial deference will be accorded to state water laws. We do not believe, therefore, that the decisions should be read as narrowly as has been suggested by proponents of the non-reserved theory. Solicitor Krulitz, for example, argued that when the Court suggested in *New*

[96] Arguably, this construction mischaracterizes the scope of the language used in *Rio Grande*, which was that a state cannot "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property." 174 U.S. at 703. It was not until nine years later, in *Winters* v. *United States*, *supra*, that the Court first used the term "reserved" rights to describe federal water rights. Furthermore, the Court's holding in *Rio Grande* rested on the federal government's navigation power under the Commerce Clause. Hence its holding is somewhat narrower than was described in *California* v. *United States*.

[97] The Court defined the question before it as "what quantity of water, if any, the United States reserved out of the Rio Mimbres when it set aside the Gila National Forest in 1899." 438 U.S. at 698. The briefs before the Court dealt only with the scope of reserved rights available under the Forest Service's Organic Administration Act, no evidence or argument was advanced to indicate that the Forest Service would not be able to acquire water necessary for the management of the national forests under applicable state law, if it did not have reserved rights to that water.

Mexico that, absent a reserved right the Forest Service should acquire water rights "in the same manner" as other appropriators, it intended only to draw a distinction between the rights that could be obtained by a reservation of land (which have priority as of the date of the reservation and are measured by reasonable present and future uses of the land) and rights obtained by appropriation (which have priority as of the date of actual use and are measured by the extent of that use). That is, when the Court stated that federal agencies must acquire water for secondary uses of federal reservations "in the same manner" as other appropriators, it meant only that the right must be acquired through "appropriation," or actual use of the water, rather than by "reservation" of the land. If a federal agency had actually appropriated water to fulfill an authorized agency function, Krulitz concluded that the Court would not hold that a state, by application of its substantive or procedural law, could deny a right to that water to the agency. *See* Krulitz Op. at 577.

While there is evidence to suggest that the Court was concerned with the possibility that reserved rights could cut off the rights of private appropriators because of their senior priority date,[98] we believe that the Court intended "in the same manner as any other public or private appropriator" to mean "under applicable state law." On three occasions, the Court referred expressly to congressional intent that water be acquired under state law. In the sentence immediately following the language quoted above, for example, the Court remarked that "Congress *indeed* has appropriated funds for the acquisition *under state law* of water to be used in federal reservations." 438 U.S. at 702 (emphasis added). Similarly, the Court noted that "[t]he agencies responsible for administering the federal reservations have also recognized Congress' intent *to acquire under state law* any water not essential to the specific purposes of the reservation," and that "the 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference *to state water law* in other areas." *Id.* at 703, 715 (emphasis added). Thus, the most logical reading of the Court's language is that water that is not necessary to carry out the particular primary purposes mandated by Congress for the federal reservation in question must be acquired in compliance with applicable state substantive and procedural law.[99]

With respect to the effect of *California* v. *United States*, Solicitor Krulitz argued that the Court's recognition that state law must fall if "inconsistent" with congressional directives supports the federal non-reserved rights theory. Krulitz

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[98] The Court noted that "[w]hen, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators" and suggested that "[t]his reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests." 438 U.S. at 705.

[99] It could be argued that the Court meant only that federal agencies should comply with state *procedural* law in the filing of claims or applications for water rights, but would not be bound by limitations imposed by state substantive law on water rights to carry out secondary uses of the reservation. The Court did not, however, draw any distinction between substantive and procedural law in its discussion. Moreover, the Court rejected a similar argument in *California* v *United States* with respect to the language of § 8 of the Reclamation Act, stating that limiting the effect of § 8 to compliance with only the form of state water law "would trivialize the broad language and purpose of § 8." 438 U.S. at 675.

Op. at 576. This argument requires that we construe the mere assignment of a land management function or delegation of responsibility for construction and operation of a federal project to a federal agency as a "congressional directive" within the Court's meaning. If so, any state laws or conditions that would prohibit the acquisition of water to carry out those responsibilities would fall.

Because the Court in *California* remanded the proceedings for a determination of whether the conditions imposed by *California* on the New Melones Dam would be "inconsistent" with authorization of the dam, it is difficult to speculate as to the type of conditions the Court would have found impermissible. Plainly, if a state-imposed condition would make the entire project impossible, it would be struck down. *See First Iowa Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946). If Congress specifically authorized construction of a dam of a certain size, placed express conditions on the use of water from the dam, or prescribed particular uses or purposes of the project, it is relatively clear that state-imposed conditions that are inconsistent with those provisions would be preempted. *See, e.g., California* v. *United States, supra*, 438 U.S. at 669 n.21; *Ivanhoe Irrigation District* v. *McCracken, supra*, and *City of Fresno* v. *California, supra*. However, we do not believe the Court intended that *any* conditions that might interfere with construction or operation of the project must fall. Such an interpretation would be inconsistent with the Court's analysis in *New Mexico*, in which the Court contemplated that state law might control some aspects of the operation of federal lands. We believe that, read in context and in light of *New Mexico*, the Court contemplated in *California* that "inconsistent" state conditions include those, for example, that would conflict with explicit statutory provisions directing a federal agency to acquire or dispose of water under certain conditions or limitations (such as the provisions of the reclamation laws discussed in *Ivanhoe*, *Fresno*, and *Arizona* v. *California*), conditions, or specifications established by Congress in the authorizing legislation for a federal project, or conditions that would entirely frustrate the purposes for which the project was authorized. This leaves open the possibility, for example, that the state may place conditions on secondary, or incidental, features of the project, or may impose conditions, for state purposes, that do not frustrate the specific federal purposes for which the project or management of the lands was authorized.

The primary importance of the Court's decisions in *California* and *New Mexico* to the federal non-reserved right theory lies in the Court's mode of analysis, particularly in the significance attributed by the Court to Congress' history of deference to state water law. As we discussed above, the constitutional basis for federal water rights, however denominated, is the Supremacy Clause coupled with a proper exercise of federal authority. Therefore the issues addressed by the Court in *California* and *New Mexico* are precisely those which must be addressed whenever federal water rights are asserted, whether the asserted rights arise under the Reclamation Act of 1902, the Forest Service's Organic Administration Act, or some other federal land management statute. The issues are (1) in an exercise of a constitutional grant of power, did Congress intend to preempt state laws governing the acquisition and use of unappropriated

water within the western states? and (2) if so, what is the scope of that preemption?

The Supreme Court made it clear in *California* and *New Mexico* that the existence of federal water rights depends on a finding of congressional intent to preempt state water law. That congressional intent cannot be analyzed without consideration of Congress' overall role in the development of water law in the western states and the importance to the western states of control over scarce water resources. The Court found the most significant aspect of Congress' role to be a negative one—*i.e.*, Congress' general deference to and acquiescence in the development of comprehensive water codes by the western states. For example, in *California* the Court interpreted the Reclamation Act of 1902 not only in light of its unique legislative history, but also in light of "the consistent thread of purposeful and continued deference to state water law by Congress." 438 U.S. at 653. In *New Mexico*, both the majority and the dissent agreed that the determination of reserved rights under a particular statutory scheme, such as the Forest Service's, requires a "careful examination" of the asserted right and the specific purpose for which the land was reserved, "both because the reservation [of water] is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." 438 U.S. at 701–02; *see also id.* at 718 (Powell, J., dissenting).

The deference to state water law found relevant by the Court includes both specific instances in which Congress directed federal agencies to abide by state water law, such as § 8 of the 1902 Reclamation Act and—perhaps more importantly—Congress' acquiescence in the development by the states of comprehensive procedural and substantive codes to recognize and enforce private rights to water, including water on federal lands. The significance of statutes such as the Mining Acts of 1866 and 1870, the Desert Land Act of 1877, the Reclamation Act of 1902, and the McCarran Amendment is thus not that they directly regulate federal uses of water, but that they demonstrate Congress' recognition that the allocation of water within the western states is primarily a matter of concern to the states, rather than a subject for uniform comprehensive federal regulation. *See United States* v. *New Mexico*, *supra*, 438 U.S. at 702 & n.5. Although Congress may in specific instances create federal water rights that do not depend on state law, such rights must be seen as the exception, rather than the rule, particularly as they could substantially disrupt or disturb expectations of private appropriators under existing state systems. *See United States* v. *New Mexico*, *supra*, 438 U.S. at 715.

The effect of Congress' deference to state water law can best be understood as establishing a "presumption" to be read into the language and legislative history of federal statutes that authorize the management of federal lands—*i.e.*, that in the absence of evidence to the contrary, it will be presumed that Congress did not intend to alter or affect its policy of deference to state water law. Therefore, as a general rule, it will be assumed that Congress intended federal agencies to acquire water rights in accordance with state law and contemplated that a state

could deny some federal uses of water. This is squarely inconsistent with the non-reserved water rights theory advanced by Solicitor Krulitz.

Solicitor Krulitz argued that the presumption of deference to state law is an unwarranted exception to the established doctrine that "federal activities are immune from state regulation unless there is a 'clear congressional mandate,' or 'specific congressional action.'" Krulitz Op. at 564 (citations omitted). The cases relied upon by Solicitor Krulitz in support of this argument, however, involve federal statutory schemes that are ill-adapted to state law,[100] or state statutes that operate to frustrate specific federal purposes.[101] If we look at other areas in which the Court has recognized that state rules may apply to federal programs, it is clear that the approach taken and result reached by the Court in *California* and *New Mexico* are not aberrations, but rather are consistent with the approach of the Court in those areas.

The Court's recent decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), is particularly instructive. In that case, the Court considered whether contractual liens arising from certain federal loan programs take precedence over private liens established under state commercial laws. The federal statutes in question, the Small Business Act and the Federal Housing Act, authorized federal agencies to secure certain loans and provided for liens arising out of those loans, but did not establish any priority for the liens. Analyzing the question as one of "federal common law,"[102] the Court refused to fashion specific federal rules governing the relative priority of private liens and liens arising under the government's lending program; it held that priorities should be determined under applicable state laws. The Court recognized that federal law governed the rights of the United States arising under the loan programs, because the lending agencies derived their authority from specific acts of Congress passed in the exercise of a constitutional power and "their rights, [therefore] should derive from a federal source," but held that application of federal law does not require, in every instance, the creation of uniform federal rules. 440 U.S. at 726, 728.[103]

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[100] *See, e.g., Hancock* v. *Train*, 426 U S 167 (1976) (Clean Air Act); *EPA* v. *State Water Resources Control Board*, 426 U S. 200 (1976) (Clean Water Act); *Kleppe* v *New Mexico*, 426 U S. 529 (1976) (Wild Free-Roaming Horses and Burros Act).

[101] *See, e.g . United States* v *Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1973) (Louisiana statute governing mineral rights in land conveyance to the United States is "hostile" to federal interests under the Migratory Bird Conservation Act and discriminates against federal interests).

[102] The Supreme Court has generally not characterized questions of federal water rights as involving federal common law *See, e.g., United States* v *New Mexico, supra, but see Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U S. 92 (1938) (federal common law applied to reverse a decision of the Colorado Supreme Court concerning the appropriation of water in an interstate stream). However, as at least two commentators have noted, the analogy is apt. *See* Grow & Stewart, *supra* n.36; Note, "Federal Nonreserved Water Rights," 48 U. Chi. L. Rev. 758 (1981) That is, the task undertaken by the courts in the name of federal common law is to fill interstices left by congressional authorization of a federal program that fails to deal specifically or comprehensively with rights and liabilities that may arise under that program *See Clearfield Trust Co* v. *United States*, 318 U.S. 363, 367 (1943) ("In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards"); *see generally* P. Bator, P Mishkin, D Shapiro, and H. Wechsler, *The Federal Courts and the Federal System*, 691–708 (2d ed. 1973). An analysis of federal water rights similarly requires the courts or administrative agencies to determine what rules should apply to water necessary to carry out congressionally authorized programs, where Congress has expressly authorized only the use of the underlying land

[103] The Court's use of the term "federal law" in this context connotes only that the federal judiciary is competent to determine rights arising under the federal programs *See* 440 U.S. at 727

In some cases, federal law may require no more than the adoption or borrowing of rules created by state law:

> Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law."

440 U.S. at 728, quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 310 (1947); *see also United States* v. *Little Lake Misere Land Co.*, *supra*, 412 U.S. at 594–95.

The Court identified three considerations relevant to the choice of federal or state rules:

> (1) the need, if any, for uniform nationwide rules governing implementation or administration of federal programs;
> (2) the extent to which application of state law would frustrate specific objectives of the federal program; and
> (3) the extent to which application of a federal rule would disrupt relationships predicated on state law.

See 440 U.S. at 728–29. In the circumstances presented in *Kimbell*, the Court concluded that none of these considerations required fashioning of specific federal rules governing the priority of liens under the SBA or FHA.

The Court's reasoning in *Kimbell* is analogous in several respects to its reasoning in *California* and *New Mexico*. For example, in rejecting the government's contention that administration of the SBA and FHA programs required a uniform national rule of priority, the Court found it significant that the practice and policies of the responsible agencies in administering the loan programs were in many respects adapted to state law, with apparently little disruptive effect on the accomplishment of the goals of the program. *See* 440 U.S. at 730–33. Similarly, in *California* and *New Mexico*, the Court found it relevant that the Bureau of Reclamation and the Forest Service had in the past conformed their acquisition of water rights to state law as a matter of administrative practice and interpretation. *See California* v. *United States*, *supra*, 438 U.S. at 675–76; *United States* v. *New Mexico*, *supra*, 438 U.S. at 717 n.24. In *Kimbell*, as in *New Mexico* and *California*, the Court recognized that creation of special federal rules would substantially disrupt expectations built on established state law. The Court's comments in *Kimbell* in that regard are equally applicable to the potentially disruptive effect of federal water rights that could be asserted without regard to state substantive or procedural law:

> In structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved. However, subjecting federal contractual liens to the doctrines developed in the lien area

> [giving such liens priority] could undermine that stability. Creditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence.

440 U.S. at 739 (citations omitted).

Most importantly, the Court indicated in *Kimbell* that it would be willing to fashion special federal rules of priority only if application of state rules would frustrate the specific purposes for which Congress had authorized the loan programs. The Court concluded that the interest of the United States as a "quasi-commercial lender" did not require the same sort of extraordinary priority that had been accorded other liens created under federal programs, such as tax liens, which are intended to secure adequate revenues in order that the United States can discharge its obligations. In reaching this conclusion, the Court found it highly relevant that Congress had recognized by statute that state claims may in some instances have priority even over federal tax liens:

> We do not suggest that Congress' actions in the tax lien area control our choice of law in the commercial context. But in fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy. To ignore Congress' disapproval of unrestricted federal priority in an area as important to the Nation's stability as taxation would be inconsistent with this function.

440 U.S. at 738 (citations omitted). The significance attributed by the Court to such expressions of congressional policy and its unwillingness to create federal rules of priority absent a showing that application of state rules will frustrate specific federal interests echoes the reasoning of the Court in both *California* and *New Mexico*. Thus, where application of state law will not frustrate specific federal purposes or interests, where the federal program has been and can be adopted to state law, and where implication of federal rights would substantially disrupt expectations of private individuals based upon an existing comprehensive state regulatory scheme, the teaching of *Kimbell*, *California*, and *New Mexico* is that state law may control federal rights and liabilities arising under federal programs.

The next step of the analysis is to determine whether, in a particular statutory scheme authorizing the management of federal lands or federal water projects, Congress intended to carve out an exception in that instance to its general policy of deference to state water law. This is precisely what the Court did in *California* and *New Mexico*. In both cases, the Court looked in detail, on a case-by-case basis, at the statutes in question and their legislative history to determine whether, or under what circumstances, Congress intended that the Bureau of Reclamation or the Forest Service could use water without regard to state water laws.

Because *California* and *New Mexico* dealt only with two particular statutes, they do not provide a definitive answer as to federal rights that can be asserted

under other statutes. That determination can be made only by examining each statute in light of its legislative history and the possible conflicts that could be created by application of state law. Nonetheless, the Court's reasoning in *New Mexico* and *California* provides the relevant framework for that examination.

We believe that *California* and *New Mexico* must be read to limit the bases upon which federal water rights may be asserted without regard to state law to specific congressional directives or authorizations that override inconsistent state law, and the establishment of primary purposes for the management of federal lands or construction and operation of federal projects that would be frustrated by the application of state law. As we noted *supra*, we believe that specific congressional directives must be construed narrowly, and do not include all authorized functions or uses of federal property. The clearest example of such directives would be provisions that place express limitations or conditions on the use or distribution of water from federal projects or express conditions or specifications included in congressional authorizations of federal projects. In the abstract, pending clarification by the Court of its holding in *California*, however, it is difficult for us to provide more detailed guidance.

The determination of whether there has been a sufficient manifestation of federal power in order to invoke the Supremacy Clause is difficult to make in the abstract, and may be clarified only through administrative interpretation or litigation. The starting point, however, is unquestionably the content and the context of the act, usually a statute, but occasionally an executive order, expressing the exercise of a constitutional federal power. As we have discussed above, the Court's analysis of federal-state conflicts in other areas may provide some guidance in determining the validity of the exercise of the power. In particular, the Court has found relevant such factors as: the extent to which federal programs can be or have been adapted to state law;[104] the role played by the federal government, the significance of the federal interests at stake, and the risk to federal goals and interests posed by application of state law;[105] and the extent to which application of federal rules will disrupt private expectations.[106] *See United States* v. *Kimbell Foods, Inc.*, *supra*, 440 U.S. at 728–29; *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 671–74 (1979). These factors, together with the legislative history of the statute in question, must be weighed in determining the basis for federal water rights.

We do not view the Court's discussion in *New Mexico* of primary purposes and secondary uses as necessarily limited to federal lands that have been formally withdrawn from the public domain. We believe, for example, that the implied right analysis used by the Court in *New Mexico* and other reserved right cases supports a parallel implication on "acquired" lands that have been set aside for specific federal purposes, for example, national forest lands acquired under the

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[104] *See, e g., United States* v. *Yazell*, 382 U S 341, 354–57 (1966), *United States* v *Standard Oil Co.*, 332 U.S. 301, 311 (1947)

[105] *See, e g., RFC* v *Beaver County*, 328 U.S. 204, 209–10 (1946), *United States* v *Little Lake Misere Land Co.*, *supra* n 101, 412 U.S at 595–97, *United States* v. *Yazell*, *supra* n 104, 382 U S. at 352–53

[106] *See, e.g., United States* v *Brosnan*, 363 U S. 237, 241–42 (1960), *Wallis* v *Pan American Petroleum Corp*, 384 U S 63, 68 (1966)

provisions of the Weeks Act, 16 U.S.C. § 515.[107] Much of the language used by the Court to describe the scope of the reservation doctrine, in fact, is broad enough to cover all lands set aside for a particular federal purpose, regardless of the prior ownership of the land. For example, in *Arizona* v. *California*, *supra*, in which the Court recognized that the reserved right doctrine applies to non-Indian lands, the Court agreed with the conclusion of the Master "that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to *other federal establishments* such as National Recreation Areas and National Forests." 373 U.S. at 601 (emphasis added). In *Cappaert* v. *United States*, *supra*, the Court noted that the reserved right doctrine "applies to Indian reservations and *other federal enclaves*." 426 U.S. at 138 (emphasis added). Finally, in *New Mexico*, the Court did not suggest that the reserved right doctrine applies only to lands that may be formally reserved from the public domain; it recognized rather that the doctrine applies to any land that has been set aside as a national forest (which could be reserved or acquired lands). *See* 438 U.S. at 698–99.[108]

Similarly, we believe that Congress could establish "primary purposes" for the management of public domain lands that could be the basis for federal water rights. As we have noted, the reservation of land for a federal purpose does not, in and of itself, create federal water rights. It is rather the specification of particular purposes for which the lands should be maintained and managed and the implicit intent that water be available for those purposes that give rise to those rights.[109] It may be possible to argue, therefore, that in the relevant statutes Congress intended that the public domain be managed for specific purposes that cannot be accomplished without implication of federal water rights.[110] However, as Solicitor Martz concluded, given the language and legislative history of the Taylor Grazing Act and FLPMA, it is highly doubtful that those statutes could be read to reflect the requisite congressional intent to displace existing state water laws. *See*

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[107] The implied water rights that could be asserted on acquired federal lands that have been, in effect, "withdrawn" from the public domain under a particular statutory scheme would theoretically be the same in all respects as reserved rights that could be asserted under that scheme, unless the statute itself sets out different purposes or different conditions for the use of acquired lands. Most importantly, a priority date for implied water rights on such acquired lands could be asserted based on the date the lands were set aside for federal purposes, whether or not the water was actually put to use at that time. However, we understand that, in general, priority dates for water rights on acquired lands have been claimed in the past only based on the date of first use. As a matter of policy, federal agencies could, of course, continue to assert priority for water rights on acquired lands based on the date of first use, in order to minimize dislocation or disruption of state and private expectations.

[108] The forest lands comprising the Gila National Forest were, insofar as we are aware, all reserved lands. As we pointed out in Part IIB(1) *supra*, in other contexts the Supreme Court and lower federal courts have generally recognized a clear distinction between lands that are open to acquisition, use, and settlement under the public land statutes and lands that have been set aside for particular federal purposes, including lands acquired or reacquired from private ownership.

[109] The reservation of land, however, may be probative evidence of congressional intent, because it demonstrates that Congress intended that the land should be managed for particular purposes *to the exclusion of other purposes*—a showing which would buttress the argument that Congress did not contemplate that state law could defeat those purposes.

[110] Nothing in the recent decision in *Sierra Club* v. *Watt*, 659 F.2d 203 (D.C. Cir. 1981), in which the court held that no federal reserved rights could be created under FLPMA, necessarily precludes this argument, because the court's conclusion rested only on whether the land in question had been withdrawn from the public domain. Since it had not been withdrawn, the court found no reserved rights had been created. The court did not consider whether, independent of the reserved rights doctrine, FLPMA provides a basis for other federal water rights. 659 F.2d at 205.

Martz Op. at 257–58; *see generally Sierra Club* v. *Watt*, 659 F.2d 203, 206 (D.C. Cir. 1981). While we believe it is theoretically possible for federal water rights to exist on public domain lands, such rights probably cannot be asserted under the current statutory schemes authorizing management of the public domain. We have not, however, undertaken an independent analysis of those statutes.

IV. Conclusion

We conclude that the rationale of *California* and *New Mexico* must be applied to any assertion of federal water rights in the western states. To the extent the federal non-reserved water rights theory would suggest that federal water rights are created merely by the assignment of land management functions to a federal agency or authorization of a federal project, we believe that it does not have a sound legal or constitutional basis and does not provide an appropriate legal basis for assertion of water rights by federal agencies. *New Mexico* and *California* make it clear that the federal constitutional authority to preempt state water law must be clearly and specifically exercised, either expressly or by necessary implication. Otherwise, the presumption is that the western states retain control over the allocation of unappropriated water within their borders. Although we have not undertaken an independent analysis of the various federal land management statutes, we believe that, as a practical matter, because statutes authorizing management of the public domain probably do not provide a basis for assertion of federal water rights, the federal rights that can be asserted are limited to federal reserved rights and rights implied from specific congressional directives, if the concept of "reserved" rights is understood to apply as well to acquired federal lands that are part of a federal reservation. This does not mean that the federal government is helpless to acquire the water it needs to carry out its management functions on federal lands. If that water cannot be acquired under state law or by purchase or condemnation of existing rights, the remedy lies within the power of Congress. The Supremacy Clause provides Congress ample power, when coupled with the commerce power, the Property Clause, or other grants of federal power, to supersede state law. The exercise of such power must be explicit or clearly implied, however, and federal rights to water will not be found simply by virtue of the ownership, occupation, or use of federal land, without more.

The next logical step, to the extent it is necessary in order to apply this analysis to particular statutes, lands, or claims, is for the agencies with responsibility for enforcement and administration of the various land management statutes to review their statutory authority and water needs in light of the principles we have outlined here. We have not attempted that task here, because of its scope and because those agencies are more familiar with the scope and administration of those statutes and the possible problems presented by application of state law.

THEODORE B. OLSON
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Funding an Agency's Functions from Its Working Capital Fund

The Secretary of Commerce may designate certain agency functions now funded out of his Department's General Administration (GA) appropriation as "central services" and transfer responsibility for their funding to the working capital fund, 15 U.S.C. § 1521, so that they will henceforth be paid for with funds appropriated to the various component bureaus of the Department of Commerce. The Secretary may thereby avoid exhaustion of the GA account, the likely consequence of a ruling of the Comptroller General disallowing direct reimbursement of the GA by the bureaus on grounds that it would unlawfully augment the GA appropriation.

The authority for a working capital fund in 15 U.S.C. § 1521 constitutes an exception to the Comptroller General's rule prohibiting an agency from switching responsibility for funding a particular service from one appropriation account to another.

June 16, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF COMMERCE

This responds to your request for an opinion on whether any of the services now paid out of the Department of Commerce's General Administration (GA) appropriation[1] may be transferred to its working capital fund, 15 U.S.C. § 1521, where they will be paid for out of the appropriations of the various components of the Department. The issue has arisen because of a recent Comptroller General's opinion, B-206669 (Mar. 15, 1982), disallowing direct reimbursement of three services by the components to the GA account.[2] Failure to reimburse the GA account will result in its rapid exhaustion, necessitating the furlough of a substantial number of employees for the remainder of the fiscal year. We believe that the problem can be resolved by the application of a statute that the Comptroller General did not consider—15 U.S.C. § 1521.

I. Background

Commerce's divisions are funded by several lump sum appropriations covering the Office of the Secretary and the various components, such as the Bureau of

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[1] *General Administration*
Salaries and Expenses
For expenses necessary for the general administration of the Department of Commerce, including not to exceed $2,000 for official entertainment, $28,407,000.
H.R. 4169, 97th Cong., 1st Sess. at 2 (1981).

[2] The Comptroller General, reviewing Commerce's proposal, held that the budgetary transfers suggested were an unlawful augmentation of the GA appropriation. 31 U.S.C. §§ 628, 628-1 (1976). He argued that the funds for the GA account constitute a "specific" appropriation for general, department-wide administration, slip op. at 2, which, once exhausted, cannot be supplemented by transfers from other appropriations. *Id.* at 4. The three services proposed for reimbursement were (1) the cost of Assistant Secretaries and their immediate staffs, (2) the Office of Personnel Policy, and (3) Special Projects. You have indicated that you will be choosing from a much wider variety of services, totaling over $18,000,000, for transfer under 15 U.S.C. § 1521.

the Census. The present continuing appropriation for fiscal year 1982, H.R.J. Res. 370, 97th Cong., 1st Sess., Pub. L. No. 97–92, 95 Stat. 1183, 1190 (1981), appropriated funds "at the rate provided in H.R. 4169," which was passed by the House of Representatives last fall. In H.R. 4169, 97th Cong., 1st Sess. (1981), the GA account received $28,407,000, a reduction of $5,618,000 from fiscal year 1981, and $7,315,000 below the budget request submitted by the President. H.R. Rep. No. 180, 97th Cong., 1st Sess. 8 (1981). Because of this reduction in funding, it was decided to charge to the bureaus' appropriations certain activities formerly charged to the central GA.

The appropriations for the GA, *see* n.1, and the various bureaus are broadly worded,[3] and would appear to fall into the category known as lump sum appropriations. As a general rule, money in a lump sum appropriation can be spent on anything within the purview of an appropriations act, regardless of the congressional intent indicated in reports, debates, or hearings. *In re Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812, 819–20 (1976); *In re LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975).[4] Congress can and does place restrictions on an agency's funds when it wants to remove that discretion. *Id.* at 318–19. Resort to legislative intent is only used to discover whether a particular item is within an appropriation's general language—*i.e.*, whether certain kinds of planes fall within the meaning of an appropriation for "military aircraft." *Id.* at 325.

II. Discussion

The issue in this discussion is whether the bureaus' appropriations may be used to pay for services that have heretofore been paid from the GA account. We believe that they may.

First, the appropriations for most of Commerce's bureaus are lump sum appropriations, *see, e.g.*, n.2, whose monies may be expended on anything within the scope of the appropriation.[5] We believe that you may properly

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[3] For example, the appropriation for the Patent and Trademark Office states: "For necessary expenses of the Patent and Trademark Office, including defense of suits instituted against the Commissioner of Patents and Trademarks, $118,961,000, to remain available until expended." H.R. 4169, 97th Cong., 1st Sess., at 8 (1981). Other Commerce units include the Economic Development Administration, the International Trade Administration, the Minority Business Development Agency, the United States Travel and Tourism Administration, the National Oceanic and Atmospheric Administration, the National Bureau of Standards, the National Technical Information Service, and the National Telecommunications and Information Administration.

[4] "The realities of the annual appropriations process, as well as nonstatutory arrangements such as reprogramming, provide safeguards against abuse." 55 Comp. Gen. at 820.

[5] The absence of specific limitations or prohibitions in the terms of an appropriations statute implies that Congress did not intend to impose restraints upon an agency's flexibility in shifting funds within a particular lump sum account among otherwise authorized activities or programs—unless of course Congress has in some other law specified that funds from the appropriation in question should be spent (or not, as the case may be) in a particular manner. By the same token, an agency's legal authority to fund an authorized program from its general operating funds does not depend upon its being able to point to some references to that program in its budget justification or elsewhere in the appropriations process. This is because the lawfulness of an expenditure is tested by the terms of the appropriations statute and any other relevant law, and not with reference to legislative history. Thus, inclusion of an activity or function in the "class of objects" for which an agency's general funds may be spent does not depend upon Congress' affirmative acknowledgement in the appropriations process that the activity or function will be funded or even its being explicitly so informed by the agency. If the activity or function is one which Congress has elsewhere given the agency authority to perform, its funding does not depend upon its being singled out for specific mention each year in the appropriation process.

determine that there are services listed in your submission that are covered by the language of the bureaus' appropriations.

Second, Commerce's working capital fund provides a statutory mechanism for the transfer of funds. 15 U.S.C. § 1521.[6] The Secretary may charge services to the fund which he determines, and the Office of Management and Budget agrees, "may be performed more advantageously as central services." The fund is kept whole through reimbursement from the relevant bureaus which pay in funds for their proportion of the services.[7]

Discretion in determining what is a "central" service lies with the Secretary,[8] and he may designate as "central" any service that he believes will be performed more advantageously on a department-wide rather than a bureau basis. The bureaus may then use their general appropriations to pay for those services pursuant to 15 U.S.C. § 1521.[9]

Since soon after its passage, 15 U.S.C. § 1521 has been used to transfer functions from the Office of the Secretary, where they were paid out of the GA account, to the working capital fund, where they were paid out of the bureaus' appropriations. For example, in 1947 the Secretary asked that the departmental stockroom be transferred to the working capital fund.[10] "The original purchases for stock are made from the appropriation 'Salaries and Expenses, Office of the Secretary, Department of Commerce' [the GA account], with the appropriation

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[6] Section 1521 provides as follows (emphasis added):

> *There is established a working capital fund* of $100,000, without fiscal year limitation, *for the payment of salaries and other expenses necessary to the maintenance and operation of* (1) central duplicating, photographic, drafting, and photostating services and (2) *such other services as the Secretary, with the approval of the Director of the Office of Management and Budget, determines may be performed more advantageously as central services;* said fund to be reimbursed from applicable funds of bureaus, offices, and agencies for which services are performed on the basis of rates which shall include estimated or actual charges for personal services, materials, equipment (including maintenance, repairs, and depreciation) and other expenses: *Provided*, That such central services shall, to the fullest extent practicable, be used to make unnecessary the maintenance of separate like services in the bureaus, offices, and agencies of the Department *Provided further*, That a separate schedule of expenditures and reimbursements, and a statement of the current assets and liabilities of the working capital fund as of the close of the last completed fiscal year, shall be included in the annual Budget.

See Department of Commerce Appropriation Bill for 1945. Hearings Before the Subcomm. of the House Comm on Appropriations, 78th Cong., 2d Sess. 33–35 (1944), H R. Rep. No. 1149, 78th Cong., 2d Sess. 19 (1944)

[7] Approximately $30,000,000 in services are now funded annually through the working capital fund

[8] It is essential, of course, that such services fall within the statutory intent of 15 U.S.C. § 1521, and that they offer truly department-wide benefits. Prior uses of the statute have included designation of fiscal, travel, audio visual, messenger, and laundry services as "central " Services that are of particular use only to a single bureau, or which properly fall only within the scope of that bureau's activities, do not fall within the intent of 15 U S C § 1521.

If a service does not fall within the intent of 15 U S C. § 1521, your Office can provide advice on alternative sources of funding, such as through the transfer of personnel Reorg. Plan No 5 of 1950, § 4, *reprinted in* 5 U.S C , App.

[9] We are aware that the Comptroller General has articulated a general rule that where an agency has chosen to pay for an item out of one of two generally available appropriations, the agency must continue to use the first appropriation for the item and cannot decide at some later date to use the second instead. *See* 59 Comp Gen. 518, 520–21 (1980); 23 Comp. Gen 827, 828 (1944); 10 Comp Gen. 440, 443 (1931); 15 Comp. Gen. 101, 102 (1908). *But see* 12 Comp. Gen 331, 333 (1932), 5 Comp. Gen. 479, 480 (1926). We need not examine the ramifications of the rule in this context—or, indeed, whether it can be reconciled with the flexibility the Comptroller General has given the agencies in the lump sum context—because we believe that 15 U S.C § 1521 provides a statutory exception to this general rule of construction. To the extent that this general rule is an interpretation of 31 U S.C § 628-1, which forbids a transfer of funds from one appropriation to another except as specifically authorized, 15 U.S.C. § 1521 provides the necessary authorization

[10] Letter for Hon. James E Webb, Director, Bureau of the Budget, from Acting Secretary Foster, June 30, 1947.

being reimbursed by the bureaus upon the receipt of a billing based on their respective withdrawals."[11] The request was approved by the Bureau of the Budget.[12] Likewise, in 1951, the Secretary asked permission to transfer the expenses of the Department's health unit to the working capital fund.

> For some years the Office of the Secretary has been purchasing supplies and providing funds for the necessary maintenance of the Health Unit.[13]

Approval was promptly granted.[14] The same exchange of letters asked for and approved the transfer of payments for transcripts of Loyalty Board hearings, from the same GA account, which was being used as a "suspense account" until the bureaus paid their bills, to the working capital fund.[15] In 1962, the Bureau of the Budget approved a request that Accounting Operations funded out of the GA account be transferred to the working capital fund, where the bureaus could be charged for its services.[16] Therefore, we believe the Secretary can designate services as "central" and to be paid out of the working capital fund by the bureaus regardless of the appropriation out of which they have traditionally been paid.[17]

We do not believe that it is proper for this Office to outline what can or cannot be designated as a central service. The decision is for the Secretary, who is in the best position to determine what services may be performed more advantageously centrally, informed by prior administrative practice and subject to the approval of the Office of Management and Budget.

Since the Comptroller General did not consider use of 15 U.S.C. § 1521, we do not believe that his opinion should interfere with your implementation of any payments under it.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[11] *Id* at 1

[12] Letter for Acting Secretary Foster from Assistant Director Bailey, Bureau of the Budget, Aug 21, 1947.

[13] Letter for Hon Frederick J. Lawton, Director, Bureau of the Budget, from Assistant Secretary Osthagen, Department of Commerce, Aug. 24, 1951

[14] Letter for Secretary Sawyer, Department of Commerce, from Director Lawton, Bureau of the Budget, Sept. 20, 1951.

[15] Letter, *supra* n. 13, at 1–2.

[16] Letter for Hon David E. Bell, Director, Bureau of the Budget, from Assistant Secretary Koltz, Department of Commerce, Oct 25, 1962; Letter for Secretary Hodges, Department of Commerce, from Bell, Bureau of the Budget, Nov. 9, 1962

[17] The bureaus' payments for services heretofore paid for out of the GA do not constitute a transfer between appropriations in contravention of 31 U S C § 628-1, since the money goes into the working capital fund, not the GA account Services will be billed retroactively directly to the bureaus for the entire fiscal year

Paperwork Reduction Act of 1980

The provisions of the Paperwork Reduction Act of 1980 giving the Office of Management and Budget authority to review and approve agency "information collection requests" do not apply to reporting and recordkeeping requirements contained in agency regulations which came into existence prior to the effective date of the 1980 Act. However, new regulations containing reporting or recordkeeping requirements must be developed in accordance with the procedures set forth in 44 U S.C. § 3504(h).

Section 3504(h) provides the exclusive procedure for OMB review and possible disapproval of information collection requirements contained in or specifically required by agency regulations; the more stringent procedures for OMB review set forth in 44 U.S C. §§ 3504(c) and 3507 apply only to agency information collection requests issued pursuant to or deriving from regulations.

The language and history of other provisions of the Paperwork Reduction Act, as well as its general scheme, support the conclusion that OMB has no authority under either § 3504(h) or § 3507 to review and disapprove existing agency regulations. Nonetheless, OMB is given substantial authority over existing regulations by other provisions of the Act, including § 3504(b).

June 22, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE VICE PRESIDENT AND FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

This responds to your request for our opinion concerning the application of the Paperwork Reduction Act (the Act) to regulations that impose paperwork burdens.[1] This question has arisen, you have explained, because the Department of the Treasury has taken the position that Internal Revenue Service (IRS) regulations which impose paperwork burdens are not subject to those provisions of the Act directing the Office of Management and Budget (OMB) to review and approve an "information collection request." That term is defined by the Act as covering "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, or other similar method calling for the collection of information."[2] Under the Act, OMB is directed to review and

[1] The Paperwork Reduction Act, Pub. L No. 511, 96th Cong., 2d Sess (1980), 94 Stat. 2812, 44 U.S C §§ 3501–3520, took effect on April 1, 1981 In this opinion, the words "regulation" and "rule" will be used interchangeably. *See* 5 U.S C § 551(4).

[2] Section 3502(11) of the Act, 44 U S C. § 3502(11) (Supp. V 1981). Further citations to the Act will exclude the additional reference to Title 44 of the 1981 Supplement to United States Code Annotated, which includes the same section numbers as the Act itself.

approve each "information collection request," and to assign to each a control number that signifies OMB approval.[3] The Act provides that no person shall be subject to any penalty for failing to maintain or to provide information pursuant to an information collection request that has not itself been assigned the necessary control number.[4] In the present case, the Treasury Department argues that the portion of any regulation which imposes a paperwork burden is not an "information collection request" for purposes of the Act. In response, you have argued that the portion of a regulation imposing a paperwork burden is an "information collection request," and therefore is subject to OMB review and approval, and the assignment of a control number under the Act.

In addressing this issue, our analysis will proceed in four sections. First, we will summarize the Act's provisions that are relevant to this dispute. Second, we will set forth the central arguments of the Department of the Treasury, on the one hand, and OMB, on the other hand, as advanced in several memoranda addressed to this office.[5] Third, we will set forth our own analysis of the statute and its legislative history. Fourth, we will discuss in particular the additional arguments advanced on behalf of OMB's position in your memorandum of April 23, 1982.

As we will explain in considerably more detail in the balance of this memorandum, we have concluded that requirements for the maintenance and provision of information contained in regulations that came into existence prior to the effective date of the Act are not subject to the information collection request approval procedures contained in §§ 3504(c) and 3507 of the Act, but that new regulations must be developed in accordance with the OMB coordination process created by § 3504(h). OMB is, however, given broad powers by the Act to initiate and review proposals for changes in existing regulations and to coordinate and improve agency information practices whether contained in regulations or elsewhere. The IRS is subject to OMB's authority in this regard to the same extent as other Executive Branch agencies. The Paperwork Reduction Act is a broad charter for OMB to manage, coordinate and improve federal information practices limited, of course, by existing agency authority over the substantive content of policies and programs.

I. Summary of the Act

The Paperwork Reduction Act of 1980 supplanted the Federal Reports Act of 1942.[6] The purpose of the 1942 statute was to minimize the burdens of furnishing "information" that were placed by the federal government on business enterprises and others.[7] "Information" was defined in the 1942 statute as "facts obtained or solicited by the use of *written report forms, application forms, schedules,*

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[3] *See* §§ 3504(c)(3)(A) (the OMB Director's information collection request clearance functions "shall include . . . ensuring that all information collection requests . . . display a control number") & 3507(f)

[4] *See* § 3512

[5] For the sake of convenience, we will refer to the position expressed in your memoranda as "OMB's position," for those memoranda are concerned primarily with the powers that may be exercised by OMB under the Act

[6] The latter statute was 56 Stat 1078, 44 U S C §§ 3501–3511 (1976)

[7] *See* 44 U.S C § 3501 (1976).

questionnaires, or other similar methods calling either for answers to identical questions from ten or more persons other than agencies . . . of the United States or for answers to questions from agencies . . . of the United States which are to be used for statistical compilations of general public interest." (Emphasis added.)[8]

The Paperwork Reduction Act is described in the report of the Senate Committee on Governmental Affairs as a "rewrite" of the 1942 statute in response to renewed concerns in the late 1970s about the burdens imposed on the private sector by the government in its collection of information.[9] One of the specific changes made by the 1980 Act is its elimination of an exemption for the IRS—and certain other agencies—that had existed under the Federal Reports Act.[10] This is one of the chief reasons why the issue before us has arisen at this time. The 1980 Act's general purposes are to minimize "the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons," minimize the cost to the federal government of collecting, maintaining, using and disseminating information and "make uniform Federal information policies and practices." § 3501. The term "burden" is defined as "the time, effort, or financial resources expended by persons to provide information to a Federal agency."[11]

Many of the 1980 Act's key provisions apply to an "information collection request." The definition of an "information collection request" covers not only the items covered by the 1942 statute, such as a written report form, application form, schedule, questionnaire, or other similar method for collecting information, but also a "reporting or recordkeeping requirement." Thus, as noted earlier, the 1980 statute defines an "information collection request" as "a written report form, application form, schedule, questionnaire, *reporting or recordkeeping requirement*, or other similar method calling for the collection of information." (Emphasis added.)[12] The Act defines the "collection of information" as the use of any of the foregoing methods to obtain facts or opinions in response to "identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies . . . of the United States" or "answers to questions posed to agencies . . . of the United States which are to be used for general statistical purposes." (Emphasis added.)[13] A "recordkeeping requirement" is defined as "a requirement imposed by an agency on persons to maintain specified records."[14] The term "reporting requirement" is not separately defined.

In addition to including a "reporting or recordkeeping requirement" in the definition of an "information collection request," the Paperwork Reduction Act

[8] 44 U.S C. § 3502 (1976) *See* H R Rep No 2722, 77th Cong., 2d Sess (1942), S Rep. No 1651, 77th Cong., 2d Sess (1942); 88 Cong. Rec 9165 (1942). *See also Emerson Electric Co* v *Schlesinger*, 609 F 2d 898, 905 (8th Cir. 1979) (the "two-fold purpose" of the Federal Reports Act was to "eliminate unnecessary duplication of effort by federal agencies in collecting information and to reduce the paperwork burden on persons supplying the information"), *Shell Oil Co* v *Department of Energy*, 477 F Supp. 413, 419–20 (D Del. 1979)

[9] S. Rep No 930, 96th Cong , 2d Sess 13 (1980)

[10] *See* 44 U.S C § 3507 (1976)

[11] Section 3502(3)

[12] Section 3502(11).

[13] Section 3502(4).

[14] Section 3502(16)

strengthened considerably the role of OMB in overseeing agencies' information collection activities.[15] Under § 3504(a), the OMB director "shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests" and "the reduction of the paperwork burden." The general information policy functions of the Director are set forth in § 3504(b). These functions include, *inter alia*, "*developing and implementing uniform and consistent information resources management policies* and overseeing the development of information management principles" (§ 3504(b)(1)), as well as "*initiating and reviewing proposals for changes in* legislation, *regulations*, and agency procedures to improve information practices . . ." (§ 3504(b)(2)) (emphasis added). Also, the Director is charged with "coordinating, through the review of budget proposals and as otherwise provided in this section [§ 3504], agency information practices" (§ 3504(b)(3)) and "evaluating agency information management practices to determine their adequacy and efficiency, and to determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director" (§ 3504(b)(5)).

Under § 3504(d), the Director is assigned certain statistical policy and coordination functions, including the development of "long range plans for the improved performance of Federal statistical activities and programs," "developing and implementing Government-wide policies, principles, standards, and guidelines concerning statistical collection procedures and methods" and "evaluating statistical program performance and agency compliance with Government-wide policies, principles, standards, and guidelines." Section 3504(e) assigns to the Director broad records management functions, which include promoting the coordination of records management with the information policies, principles and guidelines established by OMB under this Act. Section 3504(f) assigns to the Director certain privacy functions, which involve the development and implementation of policies and guidelines regarding information disclosure and confidentiality in compliance with the Privacy Act, 5 U.S.C. § 552a. Section 3504(g) assigns to the Director functions involving automatic data processing and telecommunications, including the development of federal policies and guidelines to govern the federal activities in these areas. Taken as a whole, this array of explicit powers granted to OMB under § 3504 is a formidable expression of Congress' intent to give OMB the tools necessary to act as the central authority in the oversight of the federal government's information management processes.

Of particular importance to the issues considered in this opinion are the authorities granted the OMB Director under §§ 3504(c) and 3507, including, *inter alia*, the power to review and approve "information collection requests proposed by agencies" under § 3504(c)(1), to determine whether the collection of information is "necessary for the proper performance of the functions of the agency" under § 3504(c)(2), and to ensure that all information collection

[15] *See* § 3504

requests, among other things, "display a control number" assigned to them by OMB under §§ 3504(c)(3)(A) and 3507. In addition, the OMB Director was required, upon enactment of the statute, to "set a goal to reduce the then existing burden of Federal collections of information by 15 per centum by October 1, 1982," and "for the year following, [to] set a goal to reduce the burden which existed upon enactment by an additional 10 per centum. . . ."[16]

The Act's "control number" requirement in §§ 3504(c)(3)(A) and 3507 assumes special significance in light of two additional provisions. Under § 3507(f), an agency "shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request." Also, under § 3512, "no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject" to the Act.

The statute specifically directs that "[e]ach agency shall be responsible for . . . complying with the information policies, principles, standards, and guidelines prescribed by the Director."[17] More particularly, the Act requires that an "agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information," the agency has, *inter alia*, "submitted to the Director [of OMB] the proposed information collection request [and] copies of pertinent regulations and other related materials" and the Director "has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) [60 days, with a possible additional 30 days] has elapsed."[18]

In addition to these provisions pertaining to an "information collection request" as defined in the Act, there is a provision, § 3504(h), dealing specifically with regulations. Since the relationship between § 3504(h) and the procedures set forth in §§ 3504(c) and 3507 regarding an "information collection request" is the major issue in the present dispute, we will explain the requirements of § 3504(h) in some detail.

Each agency is directed to forward to the OMB Director a copy of "any proposed rule which contains *a collection of information requirement*" as soon as practicable, and no later than the publication of a notice of proposed rulemaking in the Federal Register. (Emphasis added.)[19] Within 60 days after the notice of proposed rulemaking is published in the Federal Register, the OMB Director "may file public comments pursuant to the standards set forth in section 3508 on *the collection of information requirement* contained in the proposed rule." (Emphasis added.)[20] When a final rule is published, "the agency shall explain

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[16] Section 3505(1)

[17] Section 3506(a).

[18] Sections 3507(a)(2) & (3)

[19] Section 3504(h)(1)

[20] Section 3504(h)(2). Section 3508 provides that "[b]efore approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility . . . "

how *any collection of information requirement*" contained therein responds to any comments made by the Director or the public, or explain why the agency rejected those comments. (Emphasis added.)[21]

The OMB Director is not authorized to disapprove any collection of information requirement contained in an agency rule if he received notice of the rule and if he failed to comment on it within 60 days of publication of the notice of proposed rulemaking.[22] However, "[n]othing in this section" may be read as barring the Director, in his discretion:

> (A) from disapproving any *information collection request* which was not specifically required by an agency rule;
>
> (B) from disapproving any *collection of information requirement* contained in an agency rule, if the agency failed to comply with the requirements of paragraph (1) of this subsection; or
>
> (C) from disapproving any *collection of information requirement* contained in a final agency rule, if the Director finds within sixty days of the publication of the final rule that the agency's response to his comments filed pursuant to paragraph (2) of this subsection was unreasonable; [or]
>
> (D) from disapproving any *collection of information requirement* where the Director determines that the agency has substantially modified in the final rule the collection of information requirement contained in the proposed rule where the agency has not given the Director the information required in paragraph (1), with respect to the modified *collection of information requirement*, at least sixty days before the issuance of the final rule. (Emphasis added.)[23]

The subsection requires the OMB Director to "make publicly available any decision to disapprove a collection of information requirement contained in an agency rule, together with the reasons for such decision."[24] Furthermore, § 3504(h)(8) states that the subsection "shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments." Although, as noted earlier, the phrase "information collection request" is defined in § 3502(11), the recurring phrase in § 3504(h), "collection of information requirement," is not separately defined in the statute.

II. Arguments Advanced by the Treasury Department and OMB

We have received a number of memoranda setting forth both the Treasury Department's and OMB's positions regarding the Paperwork Reduction Act's

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[21] Section 3504(h)(3)
[22] *See* § 3504(h)(4).
[23] Section 3504(h)(5).
[24] Section 3504(h)(6)

application to regulations that impose paperwork burdens.[25] In general, the Treasury Department's view is that the only provision in the Act setting forth procedures for OMB review and possible disapproval of informational aspects of regulations is § 3504(h). In contrast, OMB's position is that not only § 3504(h), but also provisions dealing with an "information collection request," including § 3507, set forth procedures for OMB review of regulations that impose paperwork burdens. We will summarize in turn each of these opposing interpretations.

A. Treasury Department Position

The Treasury Department argues that the only provision in the Act setting forth specific procedures for OMB review and possible disapproval of aspects of regulations imposing paperwork burdens is § 3504(h).[26] If Treasury is correct in this regard, the exclusive, specific procedural mechanism establishing OMB's responsibilities for the review of regulations would be that created by § 3504(h), as opposed to the mechanism for OMB's review of forms and questionnaires established by §§ 3507 and 3504(c).[27]

The Treasury Department advances three major arguments on behalf of its interpretation. The first argument rests on the language and purposes of § 3504(h) itself. Treasury notes that § 3504(h) establishes a detailed procedural scheme for OMB review of collection of information requirements in regulations, and that no other provision in the statute deals in such a way with regulations. Treasury contends that this fact supports the inference that Congress intended § 3504(h) to provide the exclusive set of specified procedures for OMB

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[25] We have received the following memoranda from Treasury: (1) Memorandum from Cora Beebe, Assistant Secretary, Department of the Treasury, to Christopher DeMuth, Administrator for Information and Regulatory Affairs, OMB, dated Dec. 24, 1981, (2) Memorandum from Kenneth Gideon, Chief Counsel, IRS, to Cora Beebe, dated Dec 23, 1981, (3) Memorandum from Arnold Intrater, Assistant General Counsel, Treasury Department, to Cora Beebe, dated Dec. 29, 1981, (4) Letter to Assistant Attorney General Theodore B. Olson from Peter Wallison, General Counsel, Treasury Department, dated Feb 8, 1982; (5) Memorandum to Assistant Attorney General Theodore B Olson from Peter Wallison, General Counsel, Treasury Department, also dated Feb. 8, 1982, and (6) undated staff memorandum, received in March 1982, responding to certain questions we asked at a meeting with Treasury representatives on March 9, 1982.

We have received the following memoranda setting forth OMB's position (1) Memorandum from C. Boyden Gray, Counsel to the Vice President, and Michael J. Horowitz, Counsel to the Director, Office of Management and Budget, to Assistant Attorney General Theodore B Olson, dated Jan. 15, 1982, containing your opinion request, (2) a draft staff memorandum dated March 1, 1982, responding to Treasury's letter and memorandum of Feb 8, 1982; and (3) Memorandum from C Boyden Gray, Counsel to the Vice President, and Michael J. Horowitz, Counsel to the Director, Office of Management and Budget, to Assistant Attorney General Theodore B. Olson, dated April 23, 1982, responding to a memorandum from Assistant Attorney General Olson to Robert Bedell, Deputy General Counsel, OMB, dated April 5, 1982, which identified certain issues raised in various submissions this office had received

In addition, we have received a memorandum generally supporting the Treasury position from Eric Fygi, Deputy General Counsel, Department of Energy, dated Mar. 26, 1982.

[26] Section 3504(b)(2) provides that the "general information policy functions" of the OMB Director shall include "*initiating and reviewing proposals for changes in* legislation, *regulations*, and agency procedures to improve information practices . . . ." (Emphasis added.) Thus, Treasury could not—and does not—argue that § 3504(h) is the only provision dealing at all with regulations. Rather, Treasury contends that the only specific procedures governing OMB review and possible disapproval of informational aspects of regulations under the Act are those set forth in § 3504(h). As discussed earlier, § 3504(b) gives OMB rather broad review, oversight, and coordination powers with regard to regulations.

[27] There are a number of differences in the two sets of procedures Section 3504(h), for instance, does not provide for the assignment of control numbers to regulations Section 3507, along with § 3504(c), does require OMB to review and approve information collection requests and to ensure that such requests display control numbers.

review and possible disapproval of informational aspects of regulations under the Act. This inference is also said to be supported by the notion that if § 3504(h) were not the exclusive set of specified procedures for OMB review of regulations, but that instead §§ 3504(c) and 3507 also could apply to regulations imposing paperwork burdens, § 3504(h) would be rendered essentially superfluous.

In support of this conclusion, Treasury relies in addition on the statement by Senator Kennedy when he introduced on the Senate floor an amendment to § 3504(h) that ultimately was enacted. Under § 3504(h) of the bill as reported out of the Senate Committee on Governmental Affairs, OMB was directed to ensure that agencies, in developing rules and regulations, used efficient methods for collecting information.[28] Senator Kennedy expressed concern about § 3504(h) as reported out of the Committee because it "would permit the Director of OMB to overturn a rule which was adopted by an agency without providing any procedural rights for the people affected by the rule or for the agency that promulgated the rule."[29] Accordingly, Senator Kennedy introduced an amendment to § 3504(h) containing the detailed set of procedures that we summarized in the previous section. In view of this history, the Treasury Department contends that if a provision of the Act which lacks the procedural formalities set forth in § 3504(h)—namely, § 3507—were available for use as the mechanism for OMB review and potential disapproval of informational aspects of regulations, the fundamental purpose of the amendment to § 3504(h) would be frustrated.

Treasury's second major contention is that the statute's provisions other than § 3504(h) support its reading of § 3504(h). Section 3507(a)(2)(A) provides that no agency shall conduct or sponsor the collection of information unless "the agency . . . has submitted to the Director [of OMB] the proposed information collection request, *copies of pertinent regulations* and other related materials as the Director may specify." (Emphasis added.) Treasury suggests that this language establishes a clear distinction between an "information collection request," on the one hand, and "related materials" such as "pertinent regulations," on the other hand. This distinction is said to buttress the idea that regulations should be treated as entirely separate from an "information collection request" subject to review under § 3507.

Furthermore, Treasury's argument depends on a comparison of the first and last sentences of § 3507(c), as follows:

> *Any disapproval by the Director, in whole or in part, of a proposed information collection request of an independent regulatory agency, or an exercise of authority under section 3504(h) or 3509 concerning such an agency, may be voided, if the agency by a majority vote of its members overrides the Director's disapproval or exercise of authority.* The agency shall certify each override to the Director, shall explain the reasons for exercising

[28] *See* S Rep No 930, 96th Cong., 2d Sess. 88 (1980).

[29] 126 Cong. Rec 30178 (1980). The language of § 3504(h) as contained in the predecessor Senate bill is quoted at pages 18 and 19 *infra*.

> the override authority. *Where the override concerns an information collection request, the Director shall without further delay assign a control number to such request, and such override shall be valid for a period of three years.* (Emphasis added.)

Section 3507(c) was included in the Act to provide a means by which so-called independent agencies could preserve a measure of their "independence" by overriding OMB disapprovals of their actions under the Act.[30] In the first sentence of § 3507(c), reference is made to a "disapproval . . . of a *proposed information collection request . . ., or* an exercise of authority under *section 3504(h) or 3509. . . .*" (Emphasis added.)[31] In the last sentence, only a disapproval of an information collection request is referred to: "*Where the override concerns an information collection request,* the Director shall without further delay assign a control number to such request. . . ." (Emphasis added.) The omission in the last sentence of any reference to exercises of authority under § 3504(h) or § 3509 is viewed by Treasury as supporting its position that Congress never intended that control numbers should be assigned to regulations under § 3504(h), or, indeed, § 3509. Under this interpretation, the last sentence of § 3507(c) is a purposeful reflection of Congress' intent to keep entirely separate the procedures governing regulations set forth in § 3504(h), on the one hand, and the procedures governing an "information collection request" set forth in § 3507 (including the control number requirement), on the other hand.[32]

Treasury's third main argument rests on certain passages in the legislative history. For instance, Treasury finds support in the explanation of an "information collection request" in the Senate Committee report, which states that the term "refers to the actual instrument used for a collection of information."[33] Treasury argues that a form or questionnaire issued pursuant to a regulation could be an "actual instrument" for the collection of information, but that it is an unduly strained use of words to say that a portion of a regulation itself could be such an "actual instrument."

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[30] *See* H.R. Rep No. 835, 96th Cong , 2d Sess 21–22 (1980), S. Rep No. 930, 96th Cong., 2d Sess 14–15, 47 (1980)

[31] Section 3509 provides that the OMB Director "may designate a central collection agency to obtain information for two or more agencies if the Director determines that the needs of such agencies for information will be adequately served by a single collection agency, and such sharing of data is not inconsistent with any applicable law."

[32] Treasury also argues that certain language in § 3504(h) supports its position For instance, Treasury notes that § 3504(h)(2) states that within 60 days after publication in the Federal Register of a notice of proposed rulemaking, the OMB Director "may file public comments pursuant to the standards set forth in section 3508 on the collection of information requirement contained in the proposed rule " The standards set forth in § 3508 apply when the Director is deciding whether to approve a proposed "information collection request " Treasury argues that if a collection of information requirement for purposes of § 3504(h) were to be treated in the same manner as an information collection request under § 3507, as OMB suggests, it would have been unnecessary for Congress to cross-reference § 3508 in § 3504(h)(2).

In addition, Treasury notes that § 3504(h)(5)(A) specifically provides that nothing in § 3504(h) prevents the OMB Director "from disapproving any information collection request which was not specifically required by an agency rule " Treasury suggests that by including this provision in § 3504(h), Congress reaffirmed that the disapproval of an "information collection request" is an entirely separate matter from the review of a "collection of information requirement" under § 3504(h)

[33] S Rep No 930, 96th Cong , 2d Sess. 39 (1980)

In addition, Treasury relies on a statement by Congressman Horton during debate on the bill shortly before it passed the House of Representatives. Congressman Horton's comments focused on § 3504(h), as follows:

> *OMB's authority to review and comment on portions of proposed regulations which require the collection of information is supplemental to that agency's authority to approve or reject specific information collection requests.* No matter what its action may have been with regard to a proposed regulation, OMB may freely approve or reject any specific collection request deriving from such a regulation. (Emphasis added.)[34]

Treasury stresses that Congressman Horton apparently distinguished between OMB's authority "to *review and comment on* portions of proposed regulations" under § 3504(h), on the one hand, and OMB's authority "to *approve or reject* specific information collection requests," on the other hand (emphasis added). This distinction is said to support Treasury's basic position that provisions authorizing OMB to "approve or reject" an information collection request, including § 3507, are necessarily separate from and should not be confused with the procedures for OMB "review and comment" on regulations under § 3504(h).

B. OMB Position

The position of the Office of Management and Budget and the Office of the Vice President, as reflected in your memoranda to us, is that Treasury wrongly interprets the Act when it concludes that § 3504(h) is the only provision setting forth specific procedures governing OMB review of regulations imposing paperwork burdens.

A central argument supporting OMB's position is that the statute's definition of an "information collection request" is broad enough to encompass portions of regulations that impose reporting or recordkeeping requirements. The definition is as follows:

> . . . a written report form, application form, schedule, questionnaire, *reporting or recordkeeping requirement,* or other similar method calling for the collection of information. (Emphasis added.)[35]

OMB argues that a regulation which contains a "reporting or recordkeeping requirement" by definition contains an "information collection request" subject to the procedures of § 3507.[36]

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[34] 126 Cong Rec 31228 (1980).

[35] Section 3502(11)

[36] Assuming *arguendo* that a regulation could contain an "information collection request" as defined in § 3502(11) of the Act, a question would arise whether the entire regulation should be deemed such a "request," or whether only some segregable portion of a regulation containing the request, if any, should be so viewed For purposes of this opinion, we will speak about the possibility of a regulation "containing" an "information collection request" (when describing OMB's position) without deciding this additional question, which we need not decide for purposes of our analysis

OMB buttresses its position by referring to a statement in the Senate Committee report that "[t]he imposition of a federal paperwork burden does not depend on how the questions are asked of the respondent, but rather on the fact the Federal government has asked or sponsored the asking of questions."[37] This statement is said to support the view that the "actual instrument" used for the collection of information need not be a form, but could be an oral comment, a regulation, or any other means of communicating the request.

Furthermore, OMB contends that an interpretation of the Act which does not treat reporting or recordkeeping requirements in regulations as information collection requests subject to § 3507 would frustrate the Act's underlying purpose, namely, the reduction of the paperwork burden imposed by the federal government. One of the ways the Paperwork Reduction Act sought to achieve this purpose was to eliminate the exemption that had applied to the IRS and certain other entities under the Federal Reports Act.[38] OMB argues that the elimination of the IRS exemption is inconsistent with Treasury's view that IRS regulations may be reviewed by OMB only under § 3504(h).

In support of its view that all regulations containing reporting or recordkeeping requirements must be assigned control numbers under § 3507, OMB refers to passages in the legislative history stating that each "information collection request" should be assigned a control number. For example, OMB refers to a statement in the Senate Committee report that "no agency shall engage in a collection of information without obtaining from the Director a control number to be displayed upon *the information collection request*." (Emphasis added.)[39] Another passage in the report relied upon by OMB states:

> The Director's responsibility to ensure all collections of information display a control number corresponds to the requirement of section 3507(f) which states *an agency shall not engage in a collection of information without obtaining a control number from the Director.* (Emphasis added.)[40]

In response to Treasury's discussion of the Senate's amendment to § 3504(h), OMB suggests that the amendment's purposes can be achieved under its interpretation of the Act. OMB argues that all that § 3504(h) requires is that once new rulemaking commences, the procedures of § 3504(h) are to be followed. This is consistent, OMB suggests, with its view that under § 3507 OMB can review and approve (or not approve) information collection requests contained in regulations that already were in existence when the Act became effective. If OMB disapproves such a request in such a regulation, under OMB's view the agency has two choices: it could either revise the information collection request in accordance

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[37] S. Rep. No 930, 96th Cong., 2d Sess 39 (1980). As we discuss later in this memorandum, this statement is taken somewhat out of context by OMB In context, it appears to relate exclusively to the distinction between oral and written requests for information

[38] *See* S. Rep. No 930, 96th Cong , 2d Sess. 13 (1980); H R. Rep. No. 835, 96th Cong., 2d Sess. 19 (1980).

[39] S Rep. No 930, 96th Cong , 2d Sess 48 (1980).

[40] *Id* at 42

with OMB's concerns, assuming that this could be done without altering the underlying regulation, or initiate new rulemaking to change the regulation in order to accommodate OMB's position.[41] Under OMB's interpretation, only the latter action would trigger the procedures of § 3504(h).

In addition, OMB disputes the Treasury Department's reading of the last sentence of § 3507(c), which provides that "[w]here the override concerns an information collection request, the Director shall without further delay assign a control number to such request, and such override shall be valid for a period of three years." As noted earlier, the first sentence of the subsection refers to OMB disapprovals of a proposed information collection request *or* an exercise of OMB's authority under §§ 3504(h) *or* 3509. OMB argues that the introductory phrase in the last sentence, "[w]here the override concerns an information collection request," implicitly distinguishes between OMB disapproval of an information collection request—*whether or not subject to §§ 3504(h)*—and an exercise of authority under § 3509, which pertains to the designation of a central collection agency and thus has no bearing on the clearance of information requests. In short, OMB's position is that § 3507(c) lends no support to Treasury's view that the Act distinguishes between the review of information collection requests (and the assignment of control numbers thereto), on the one hand, and exercises of authority under § 3504(h), on the other hand.[42]

III. Analysis of the Act's Language and Legislative History

Before developing our own analysis of the statute, it appears necessary to clarify precisely the issue before us. As we understand the fundamental dispute presented to us for resolution, Treasury and OMB are not in disagreement about the status of forms, schedules, or questionnaires which are issued pursuant to statutes or regulations and which impose paperwork burdens. Both appear to be in agreement—and we concur—that such forms, schedules, or questionnaires in general are "information collection requests" under the Act subject, among other things, to § 3507.[43] Furthermore, Treasury does not contend that regulations imposing paperwork burdens are not subject to any of the Act's requirements. Rather, Treasury argues, as stated above, that regulations are subject to the OMB review-and-possible-disapproval mechanism stated in the Act in § 3504(h), not to the mechanism set forth in §§ 3504(c) and 3507. That is the specific issue we must address.

In analyzing this issue, we will turn first to § 3504(h) and its legislative history. We then will discuss other provisions of the statute. Finally, we will examine the Act's general scheme.

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[41] *See* Memorandum from C Boyden Gray and Michael Horowitz, entitled "Paperwork Reduction Act," at page 4 (Jan. 15, 1982) This memorandum also argues that regulations proposed and promulgated after the Act's effective date ultimately are to be assigned control numbers under § 3507 after the regulations have been promulgated in a manner consistent with § 3504(h).

[42] The arguments set forth in the memorandum of C Boyden Gray and Michael Horowitz dated April 23, 1982, will be discussed in greater detail in section IV below.

[43] The ultimate decision, of course, whether or not a *particular* form is an "information collection request" will turn on the facts of each case as analyzed in light of the Act's provisions.

A. Section 3504(h)

(1) The House and Senate bills. A full understanding of § 3504(h) requires knowledge of the provision's history. Both of the bills reported out of the responsible committees of the House of Representatives and the Senate contained a § 3504(h), which in both cases granted OMB broad powers to review regulations imposing paperwork burdens. Section 3504(h) of the House bill, H.R. 6410, provided:

> (h) Other functions of the Director shall include ensuring that, *in developing rules and regulations*, agencies—
>
> (1) utilize efficient methods to collect, use, and disseminate necessary information;
>
> (2) provide an early and substantial opportunity for the public to comment on proposed means of collecting information related to such rules and regulations; and
>
> (3) make assessments of the consequences of alternative methods of implementing the statutory goals of such rules and regulations (including alternative methods of collecting information). (Emphasis added.)[44]

Section 3504(h) of the Senate bill, S. 1411, provided:

> (h) The Director shall, subject to section 3507(c) of this chapter,[45] ensure that, *in developing rules and regulations*, agencies—
>
> (1) utilize efficient means in the collection, use, and dissemination of information;
>
> (2) provide an early and meaningful opportunity for the public to comment on proposed means for collection of information; and
>
> (3) assess the consequences of alternative means for the collection, use, and dissemination of information. (Emphasis added.)[46]

The meaning of these predecessor provisions may be confirmed by reference to the relevant committee reports. Both reports explained that § 3504(h) in the respective bills constituted a general authorization for OMB to assure that agencies, in developing regulations, minimized the paperwork burden imposed by the federal government. As the report of the House Committee on Government Operations put it:

> *Under H.R. 6410, the OMB Director is to ensure that the agencies, in developing rules and regulations, use efficient meth-*

[44] H R Rep. No. 835, 96th Cong , 2d Sess 44 (1980).

[45] Section 3507(c), which gives independent regulatory agencies the power to override OMB disapprovals under the Act, is quoted above

[46] S. Rep No. 930, 96th Cong., 2d Sess. 88 (1980).

ods to collect, use, and disseminate the necessary information. The Committee views this function as similar to the present OMB function of overseeing agency activities under Executive Order 12044 [which was the Carter Administration Executive Order dealing with regulatory reform].[47]

A question was raised during the hearings as to whether the bill's language meant the OMB office was to have a regulatory reform function. *Regulatory reform is a separate issue from the function assigned by H.R. 6410.* Under the bill, OMB is assigned the responsibility for reviewing, [sic] reporting and recordkeeping requirements imposed on the public by regulations. Regulatory reform, on the other hand, deals with major modifications in agency responsibilities. *The Committee intends that OMB continue its effort in overseeing the information aspects of Government regulations. However, the assignment of regulatory reform to the Office of Federal Information Policy would dilute the information functions assigned under this bill.* (Emphasis added.)[48]

As the report of the Senate Committee on Governmental Affairs explained:

Section 3504(h) of the bill mandates the Director to ensure that in developing rules and regulations agencies take steps to minimize the information burden of regulations. The Committee views this function as similar to the present OMB function to

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[47] Executive Order No. 12044, 43 Fed Reg. 12661 (1978), entitled *Improving Government Regulations*, contained a number of provisions calling upon agency heads to improve the analysis underlying new regulations, particularly regulations that met the order's criteria of "significant" regulations in economic or other terms (§ 2(e)) For instance, a regulatory analysis was required for significant regulations Such an analysis was to include a careful examination of possible alternatives to the approach ultimately proposed by the agency and a justification of the choice that was made (§§ 2 & 3). In addition, the order required agencies periodically to review their existing regulations to determine whether they were achieving the order's goals, which included, among other things, minimizing compliance costs, paperwork and other burdens on the public (§§ 4 & 1(e)) Section 5 gave general powers of oversight of the order's provisions to OMB Sections 5(a) and 5(b) required agencies to prepare reports for implementing the order and to submit the reports to OMB for review and approval. Section 5(c) provided that OMB "shall assure the effective implementation of this Order." Accordingly, Executive Order No 12044 required agencies to review new and existing regulations in terms of such goals as minimizing paperwork and other burdens on the public, and it assigned to OMB general authority to assure the achievement of these goals The Order did not set forth specific procedures by which OMB was to conduct its oversight activities.

[48] H.R. Rep. No 835, 96th Cong , 2d Sess. 9 (1980) A later passage in the House Committee report underscored that the bill was intended to cover regulations imposing paperwork burdens This point was made in the context of a discussion of the bill's definition of the "collection of information," which included a reference to a "reporting and recordkeeping requirement." The report noted that the Securities and Exchange Commission had strongly recommended that the bill "be amended to narrow the definition of 'collection of information' to exclude reporting required in connection with statutorily authorized [sic] regulatory, enforcement, or oversight efforts " The Committee agreed with the SEC about the close relationship between policymaking and information management issues, but added that regulatory agencies in the Executive Branch, such as the Environmental Protection Agency, "have been able to justify to OMB their need for information used to establish policy or for other purposes." The Committee concluded that the independent regulatory agencies "should also be capable of doing so." The Committee confirmed that its broad definition of a "collection of information" was intended to clarify the term's coverage "to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements. The Committee fully expects [the] SEC to comply with the 'more extensive' definition of collection of information as contained in H R 6410 " *Id* at 23

oversee agency activities under Executive Order 12044.[49] The importance of this linkage between OMB's existing responsibility for overseeing the regulatory process with the closely related information management functions assigned by the bill was stressed by the Comptroller General in his comments to the Committee[:]

> This relationship between the regulatory process and information management is reflected in OMB's existing Office of Regulatory and Information Policy. We believe this combination of functions has worked well. *The principal areas of growth in Federal paperwork burdens are associated with new regulations.* Therefore, it seems appropriate to retain the existing link between the functions for controlling both regulatory and paperwork burdens.

The Committee intends that the Director of OMB continue efforts to oversee the information management and burden aspects of government regulations. *This emphasis has great promise for minimizing the explosion of paperwork demands on the public because new regulations are causing the greatest growth in information requirements. However, the Committee does not intend that 'regulatory reform' issues which go beyond the scope of information management and burden be assigned to the office by the Director.* Recent initiatives such as the trucking and airline deregulations are examples of regulatory reform issues whose assignment to the Office would dilute the information function assigned by this bill. (Emphasis added.)[50]

Accordingly, both the House and the Senate Committees confirmed that § 3504(h) in the House and Senate bills was designed to ensure that agencies, *in developing* regulations, minimized the paperwork burden associated with the regulations. Although OMB's function under § 3504(h) was acknowledged to have some similarities with the oversight role performed during the Carter Administration under Executive Order No. 12044, it was sharply distinguished by both Committees from general "regulatory reform" activities. It is noteworthy that the Senate Committee report specifically referred to the burdens imposed by "new" regulations as the principal problem to be addressed.

(2) Debate in the Senate and House: the amendment of § 3504(h). If § 3504(h) had been enacted as it was reported out of the Senate and House Committees, it not only would have authorized OMB to review the development of agency rules in terms of paperwork considerations, but also would have done so without specifying in any detail the procedural steps to be taken in the course of such review. However, § 3504(h) was significantly amended on the Senate floor on November 19, 1980. Senator Kennedy provided the following statement of

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[49] For a description of Executive Order No. 12044, *see* note 47, *supra*

[50] S. Rep No 930, 96th Cong., 2d Sess. 8–9 (1980); *see also id.* at 15.

reasons for his amendment, which passed the Senate in the form in which he proposed it and finally was enacted:

> *As reported out of the Governmental Affairs Committee, the legislation raises some serious concerns about the role of the Office of Management and Budget (OMB) in overseeing the information collection activities of Federal agencies.* While I certainly support strong executive management of the Federal regulatory system, this management objective should be tempered by other legitimate public policy concerns. *This legislation would permit the Director of OMB to overturn a rule which was adopted by an agency without providing any procedural rights for the people affected by the rule or for the agency that promulgated the rule.* Thus, even if any agency has complied with all the appropriate procedural requirements for public notice and comment, and has spent years compiling an adequate agency record, this legislation would permit OMB to overturn that agency decision without even requiring OMB to justify its decision publicly. *This violates basic notions of fairness upon which the Administrative Procedure Act is based, as well as concepts of due process embodied in the U.S. Constitution.*
>
> Mr. President, I have proposed several amendments, accepted by the Governmental Affairs Committee, which deal with this, and other concerns. . . . Most importantly, *I have sponsored an amendment which limits the authority of OMB to overturn reporting, recordkeeping, and other information collection requirements adopted by a Federal agency in a rulemaking proceeding. This amendment establishes a procedural scheme which governs OMB's relationship with the Federal agencies.*
>
> First, an agency is required to notify OMB as soon as possible, but no later than the date upon which a notice of proposed rulemaking is published in the Federal Register, of a proposed information collection requirement.
>
> Second, the Director of OMB is required to comment on the agency's information collection requirements in the proposed rule within 60 days or forfeit its rights to review those requirements at a later time. In these comments, the Director of OMB would suggest alternative methods of collecting information more efficiently.
>
> Third, when the agency adopts its final rule, it must respond to those comments by modifying the information collection requirements or by explaining why it rejected OMB's suggestions.
>
> If the agency does not forward a copy of its proposed information collection requirements to OMB, OMB retains its right to review that request even though it has not filed comments during

> the rulemaking proceedings. Moreover, if an agency intends to modify substantially the information collection requirements which were in the proposed rule, this amendment insures that OMB has at least 60 days to comment on these modified requirements before the final rule is issued.
>
> *This amendment would provide the final power to OMB to overturn an agency's recordkeeping or reporting requirements only if it made a public finding that the agency's response was 'unreasonable.'* . . .
>
> *This amendment would not affect OMB's right to review forms or other information collection requests which were not specifically required by an agency rule.*
>
> *In essence, this amendment is designed to force the agency and OMB to consider information collection requirements early in the process with a meaningful opportunity for public comment on OMB's alternatives.* (Emphasis added.)[51]

Several aspects of the foregoing explanation are worthy of note. First, the amendment to § 3504(h) was specifically designed to establish a set of procedures by which OMB would review and comment on information collection requirements in proposed rules. The amendment was offered in response to the concern that, absent such procedures, OMB could "overturn a rule which was adopted by an agency without providing any procedural rights for the people affected by the rule or for the agency that promulgated the rule."[52]

A central aspect of the amendment's procedural scheme was the requirement that OMB state publicly any decision to overturn an information collection requirement in a proposed rule in order to be consistent with what Senator Kennedy described as "basic notices of fairness upon which the Administrative Procedure Act is based, as well as concepts of due process embodied in the U.S. Constitution." 126 Cong. Rec. 30178 (1980). Also, under the amended § 3504(h), OMB's power ultimately to overturn an agency's recordkeeping or reporting requirement in a proposed rule is limited to certain circumstances, such as when OMB makes a public finding that the requirement is "unreasonable."

In addition, Senator Kennedy distinguished OMB's power to review regulations under § 3504(h) from OMB's power to review "forms or other *information collection requests* which were *not specifically required by an agency rule*." (Emphasis added.) This distinction supports the proposition that the review under § 3504(h) of collection of information requirements required by, or contained in, a rule should not be confused with the review under other provisions of the statute of an "information collection request" not specifically required by a rule. This distinction also is reflected in a statement supporting Senator Kennedy's amendment made by Senator Danforth, who, after noting that the amendment's purpose was to "prevent OMB from undoing a collection of information

[51] 126 Cong. Rec 30178 (1980)
[52] *Id*

requirement specifically contained in an agency rule after that requirement has gone through the administrative rulemaking process if the OMB Director ignores the rulemaking process," added:

> *I note, however, that this limitation on OMB's authority is confined to requirements specifically contained in agency rules. It does not disturb OMB's authority to block information collection requests issued pursuant to rules*, neither is it license to agencies to avoid OMB review of paperkeeping requirements bootstrapped to vague requirements in agency rules. (Emphasis added.)[53]

As Senator Danforth thus confirmed, § 3504(h) as amended does not disturb OMB's power to reject information collection requests issued *pursuant to* rules, as distinct from information collection requirements specifically *contained in* rules.

On December 1, 1980, the House of Representatives debated the bill as amended by the Senate.[54] The most extensive explanation offered on the House floor of the amended § 3504(h) was the following by Congressman Horton:

> The most significant difference between the two measures [the Senate and House bills] is the inclusion of a new subsection 3504(h) in the Senate version. *The Senate provision is innovative in that it attempts to link the regulation-writing process with the collection of information by the Federal Government. The provision does this by mandating that OMB review and comment on each proposed regulation which contains a requirement for the collection of information.*
>
> Because subsection 3504(h) which the Senate has added to the bill is extremely complex, I think it is essential to clarify three points about it:
>
> *First, OMB's authority to review and comment on portions of proposed regulations which require the collection of information is supplemental to that agency's authority to approve or reject specific information collection requests. No matter what its action may have been with regard to a proposed regulation, OMB may freely approve or reject any specific collection request deriving from such a regulation.*
>
> Second, in reviewing proposed regulations, OMB may disapprove any collection requirement which it finds 'unreasonable'—which is to say, not of sound judgment in the opinion of the OMB Director. The purpose of § 3504(h)(5)(C) [the provision empowering OMB to disapprove "unreasonable" requirements] is

[53] 126 Cong. Rec 30179 (1980)

[54] *See* 126 Cong Rec. 31227 (1980) (remarks of Chairman Brooks) (noting that one of the major respects in which the Senate bill differed from the House bill was that the former "insures that OMB's review of agency information collection requests will be coordinated with agency rulemaking procedures established by the Administrative Procedure Act or other similar legislation .")

not to restrict unduly the ability of OMB to act, but to insure that in acting, OMB [does] have justification for what it does.

Third, decisions by OMB under this provision are not reviewable in court. Section 3504(h)(9) states that there shall be no judicial review of any OMB decision to approve or not act upon a proposed regulation; because the power to approve implies the power to disapprove, this paragraph in effect forbids court challenge of any decision to pursue any of the options open to OMB—approval, disapproval, or inaction. (Emphasis added.)[55]

Of particular significance in Congressman Horton's explanation of § 3504(h) is the distinction between OMB's authority to "review and comment" on portions of regulations specifically requiring the collection of information under § 3504(h), on the one hand, and OMB's authority to "approve or reject" information collection requests deriving from regulations, on the other hand. As Congressman Horton observed: "No matter what its action may have been in regard to a proposed regulation, OMB may freely approve or reject any specific collection request deriving from such a regulation."

This legislative history of § 3504(h) as amended strongly suggests that it was intended as the exclusive mechanism for OMB review of regulations containing information collection requirements. If this were not so, the provision's amendment by itself would not have been sufficient to assure that OMB would follow certain prescribed procedures when reviewing rules under the statute. It seems clear from the legislative record that the amendment's sponsor, Senator Kennedy, considered that the amendment of § 3504(h) would be sufficient to achieve this purpose.

Furthermore, the remarks of Senator Kennedy, Senator Danforth, and Congressman Horton—who provided the most extensive comments on the amended § 3504(h) in the legislative history—all draw a distinction between OMB review under § 3504(h) of information collection requirements *contained in* or specifically *required by* regulations, on the one hand, and OMB's approval or disapproval of information collection requests issued *pursuant to* or *deriving from* regulations, on the other hand. This distinction supports the notion that § 3504(h) was intended as the exclusive mechanism for OMB review and possible disapproval of aspects of regulations specifically imposing information burdens, as distinguished from OMB review of information collection requests issued under, pursuant to, or entirely apart from regulation.

Finally, this history strongly suggests that § 3504(h) and only § 3504(h)—*not* § 3507—sets forth the procedures governing regulations for purposes of this Act. It would be entirely inexplicable for Congress on the one hand to establish a detailed and specific process for OMB participation in developing new regulations based on a manifest concern with fairness, due process, and APA procedures, while on the other hand allowing existing and longstanding regulations

[55] 126 Cong. Rec. 31228 (1980)

to be swept aside or partially overturned without any of the same procedural safeguards. The amendment to § 3504(h) does not make sense if § 3507 could be used with respect to either "new" or "old" regulations.

(3) The language of § 3504(h) as enacted. Even though nothing in § 3504(h) specifically states that it provides the exclusive procedure for OMB review of collection of information requirements in rules, the provision's language, in our view, confirms that view. First, although the Act gives OMB broad powers of a general nature over federal information practices, § 3504(h) is the only provision in the statute explicitly establishing a process for OMB review and possible disapproval of collection of information requirements in rules. It would be anomalous for Congress to set forth such a detailed procedure and, at the same time, to permit OMB to follow an entirely different procedure under another provision, such as § 3507, without cross-referencing this possibility in § 3504(h). Although not dispositive, the principle of statutory construction, "expressio unius est exclusio alterius," has some application here. This principle may be translated as "the expression of one thing is the exclusion of another." Black's Law Dictionary 521 (5th ed. 1979). Under this maxim, when a statute or other legal instrument expressly includes certain things in one provision—such as the procedure in § 3504(h)—the drafters usually may be understood to have intended to exclude other things not expressly addressed—such as a parallel but markedly different procedure for OMB review of regulations under § 3507—from the coverage of that provision. *Id.* Although the maxim is by no means conclusive, such a result is normally presumed, absent affirmative contrary indication in a statute's language or legislative history.[56] The application of the maxim is more persuasive when the language of the statute, its legislative history, and other factors point to the same result.

Furthermore, § 3504(h) establishes a relatively detailed set of procedures for OMB review of portions of regulations containing collection of information requirements. These procedures would be rendered essentially superfluous if OMB could, at its option, review any given regulation under § 3507, which lacks the procedural requirements of § 3504(h). If this were possible, it is difficult to understand why Congress would have included § 3504(h) in the statute.

In addition, certain details of the language of § 3504(h) buttress the conclusion that it provides the exclusive procedural mechanism for OMB review of regulations expressly stated in the Act. Section 3504(h)(2) provides that within 60 days after a notice of proposed rulemaking is published in the Federal Register, the OMB Director "may file public comments *pursuant to the standards set forth in section 3508* on the collection of information requirement contained in the proposed rule" (emphasis added). The standards set forth in § 3508 are the ones applied by OMB before approving a proposed "information collection request,"

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[56] *See, e.g., Morris* v. *Gressette*, 432 U.S. 491, 506 n 22 (1977); *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F2d 342, 354–55 (D C Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), 2A. C Sands, Sutherland Statutory Construction § 47.25 (4th ed. 1973)

such as under § 3507.[57] If the drafters of § 3504(h) had intended that OMB could review regulations under § 3507, it would have been unnecessary for them to include in § 3504(h)(2) a specific reference to the standards contained in § 3508, for in that case, the standards set forth in § 3508 would have applied automatically.

It also is noteworthy that under § 3508, the OMB Director "may give the agency and other interested persons an opportunity to be heard or to submit statements in writing." Section 3508 also contains no requirement that OMB provide a public statement of its views. In contrast, § 3504(h)(2) authorizes the OMB Director only to file public comments about a collection of information requirement in a proposed rule. This contrast further indicates that the procedures of § 3504(h) are fundamentally distinguishable from those applying under other provisions of the Act, including §§ 3507 and 3508.

Also, § 3504(h)(5)(A) provides that nothing in § 3504(h) prevents the OMB Director, in his discretion, "from disapproving *any information collection request which was not specifically required by an agency rule*" (emphasis added). This subsection thus distinguishes between a collection of information requirement reviewed by OMB under § 3504(h), on the one hand, and OMB approval or disapproval of an "information collection request" that is not "specifically required" by an agency rule, on the other hand. As noted earlier, such a distinction supports the conclusion that § 3504(h) applies to collection of information requirements required by or contained in regulations, whereas other provisions of the Act, including § 3507, apply to an "information collection request" made pursuant to (or entirely apart from) a regulation.

B. Other Provisions of the Act

The foregoing interpretation of § 3504(h), which in our view is most consistent with its language and legislative history, appears consistent with the statute's other major provisions, which we will discuss in numerical sequence.

(1) Section 3501: "Purpose." Section 3501 states in general terms the Act's basic purpose, which includes minimizing the federal paperwork burden and coordinating, integrating, and making more uniform federal information policies and practices. OMB argues that the Act's purpose would be undercut by an interpretation of the Act which construed § 3504(h) as the exclusive mechanism for OMB review of regulations containing collection of information requirements.

We have several difficulties with this argument. First, it is exceedingly general. Although the statement of the Act's purpose is quite broad and sweeping

[57] Section 3508 provides

> *Before approving a proposed information collection request*, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. *Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing*. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information. (Emphasis added.)

and would support an expansive role for OMB, the broad purpose cannot serve to overcome the specific procedures in the Act itself. In fact, the Act has multiple aims, including that of providing in § 3504(h) for a set of procedures that will structure OMB's review of proposed regulations in a manner consistent with the public procedures governing rulemaking. That particular end must be respected along with the general purpose of reducing federal paperwork burdens and coordinating federal information practices.

Furthermore, it does not appear that an interpretation of § 3504(h) as providing the exclusive procedures for OMB's review of regulations would prevent OMB from effectively discharging its duties of reducing federal paperwork burdens. First, OMB retains full authority under § 3507 to review all forms, questionnaires, and similar information collection requests issued pursuant to rules without having to follow the procedures set forth in § 3504(h). Second, under § 3504(h) itself, OMB ultimately can disapprove a collection of information requirement in certain circumstances.[58] Third, as noted above, OMB is given additional, general authorities under other provisions of the Act, including the other subsections of § 3504, to initiate and review proposals for changes in regulations and agency procedures in order to improve government information practices.

OMB's primary concern may be that Treasury's interpretation of § 3504(h) as the exclusive set of procedures for OMB review of regulations effectively would mean that OMB cannot review regulations such as those promulgated by the IRS that were already in existence when the Act became effective. This would be the case because § 3504(h) rather clearly applies only to rules proposed and promulgated after the Act became effective.[59] If § 3504(h) is the only provision specifying procedures for OMB review of regulations, it follows that the Act does not establish an express procedural mechanism for OMB review and potential disapproval of regulations already in existence when the Act became effective.

OMB objects to an interpretation leading to such a "gap" in the Act's coverage. However, to the extent that this is a "gap" in coverage, it is not inconsistent with legislative history. As noted above, the Act's legislative history supports the proposition that Congess believed that "new" regulations caused the greatest paperwork burdens.[60] For that reason, it is neither surprising nor anomalous for Congress to have concentrated on fashioning a specific procedure for OMB review of regulations proposed and promulgated after the Act's effective date. If, on the other hand, Congress has intended to reopen existing regulations—or at

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[58] *See* §§ 3504(h)(5)(B), (C) and (D)

[59] This is so because § 3504(h) only deals with rules once they are "proposed " "This subsection shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments " § 3504(h)(8) Furthermore, there would be no practical way for § 3504(h) to apply retroactively to rules already promulgated in final form when the Act became effective That would require submitting all existing rules that impose paperwork requirements to a new notice and comment process. This is simply not contemplated by § 3504(h). Thus, we agree with OMB that § 3504(h) establishes a set of procedures that applies only to rules proposed and promulgated after the Act's effective date

[60] *See* S. Rep. No. 930, 96th Cong , 2d Sess. 8–9 (1980). In the passage from the Senate Committee report quoted above, it is stated that the bill's emphasis on OMB oversight of the *development* of regulations "has great promise for minimizing the explosion of paperwork demands on the public because *new* regulations are causing the greatest growth in information requirements" (emphasis added).

least those that contained some reporting or recordkeeping requirements—with the attendant uncertainty that that would cause regarding the legal status of those regulations during the process contemplated by the Act, we would have expected to find express legislative history on the subject.

Moreover, OMB does have the authority under § 3504(b)(2) to initiate and review proposals for changes in regulations and to develop some orderly process for such an examination. OMB simply may not employ with respect to existing regulations the procedures, including the disapproval mechanisms, contained in § 3504(h) or § 3507.

Finally, we must bear in mind the late Judge Jerome Frank's admonition: "The legislative process is inherently such that, on occasions, the applications of a statute in practice disclose inconsistencies. While the literal meaning of a statute must yield to its evident purpose or policy, where a statutory provision accords with that purpose, the courts should seldom enlarge that provision, in the interest of symmetry or uniformity, in order to supply an omission."[61] In this case, the literal terms of § 3504(h)—which apply to regulations proposed and promulgated after the Act's effective date—are in accord with the provision's stated purpose of addressing the major increases in the federal paperwork burden deriving from new regulations. In such a situation, it would be inappropriate to "supply an omission" in § 3504(h) in "the interest of symmetry or uniformity" by reading this or another provision as applying to regulations that were already proposed and promulgated at the time the Act became effective.[62] Such a reading also would conflict with the customary canon of statutory construction that, unless there is clear indication to the contrary, a statute should be read as applying prospectively to conditions or events occurring after the statute becomes effective.[63]

Accordingly, it does not appear that the Act's general purpose would be undermined or violated by an interpretation of § 3504(h) as the only provision setting forth procedures for OMB review of regulations under the Act.

(2) Section 3502: "Definitions." One of the Act's critical definitions is that of an "information collection request," which includes, in addition to a "written report form," "application form," "schedule," and "questionnaire," a "reporting or recordkeeping requirement . . . calling for the collection of information."[64] There can be little doubt that, on its face, this definition could be read to apply to portions of regulations imposing reporting or recordkeeping requirements. The question is whether it must or should be read in such a manner.

Although we acknowledge the breadth of the definition of an "information collection request," we do not believe that it must be read to cover portions of

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[61] *Guiseppi* v. *Walling*, 144 F.2d 608, 614 (2d Cir. 1944). *See also Addison* v *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944) ("Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive").

[62] Again, we note that forms issued pursuant to regulations may well be subject to § 3507 Also, if regulations were to be newly proposed or revised, the rulemaking proceedings would also be subject to § 3504(h)

[63] *See generally* 2A, C. Sands, Sutherland Statutory Construction, ch. 41 (4th ed 1973). *See also* note 93 *infra*.

[64] Section 3502(11)

regulations imposing paperwork burdens. This conclusion rests in part on the fact that the actual method by which information is collected would be embraced by § 3507 in a manner which could not conveniently cover existing regulations, and on the fact that § 3504(h), the Act's only provision setting forth specific procedures for OMB review of regulations, speaks not of an "information collection request" but rather of "collection of information requirements" contained in regulations. Even though it might be possible to view this difference in terminology as highly technical and merely the result of inadvertence, it is more in accord with the canon of construction of giving effect to every word, clause, and sentence in a statute[65] to take seriously the difference in terms used by Congress.

Congress spoke about an "information collection request" as being subject, *inter alia*, to § 3507 on the one hand, and about "collection of information requirements" in regulations as being subject to § 3504(h) on the other hand. If Congress had sought to make information burdens imposed by regulations subject to § 3507, it could have so provided in § 3507, either directly or by means of a cross-reference in that section to the provisions in § 3504(h) governing review of collection of information requirements in regulations. That Congress not only did not do so but also used a different, albeit quite similar, term in speaking about regulations strengthens the conclusion that Congress intended collection of information requirements in regulations to be subject to the procedures of § 3504(h) alone.

Furthermore, we do not believe that the Act's definition of an "information collection request" should be read as necessarily including "collection of information requirements" contained in regulations.[66] To do so would, in our view, undermine the intended function of § 3504(h), which was to provide a specific set of procedures to structure OMB review and potential disapproval of collection of information requirements in proposed regulations. If regulations also could be reviewed under § 3507—a provision that lacks the procedures of § 3504(h)—there would be no apparent purpose for including § 3504(h) in the statute.

Moreover, a construction of the term "information collection request" as applying to the portion of a regulation that imposes a collection of information requirement would appear inconsistent with the major discussion of the definition of an information collection request in the Senate Committee report. That report explains:

> The term 'information collection request' refers to *the actual instrument used for a collection of information*. It is the informa-

[65] *See* 2A, C. Sands, Sutherland Statutory Construction § 46 06 (4th ed 1973)

[66] We note that the term "collection of information requirement" is not defined in the Act, although a "collection of information" is defined in § 3502(4) as,

> . . the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—
>
> (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States, or
>
> (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes . .

> tion collection request which must be submitted to the Director in accordance with the clearance requirements of Section 3507. (Emphasis added.)[67]

The phrase, "actual instrument used for a collection of information," is not defined in the statute and thus is to be interpreted in light of its ordinary meaning. An "instrument" is generally understood as the means by which, the tool or device by which, something is to be accomplished—that is, in this context, the form or questionnaire or schedule on which information is supplied or submitted.[68] In contrast, a "regulation" is defined as "an authoritative rule or principle," or "a rule . . . having the force of law issued by an executive authority of a government."[69] Accordingly, we believe that the term "actual instrument" refers to the form or some similar reporting or recordkeeping instrument pursuant to which information is transmitted by the citizen to the government, and not the portion of a regulation imposing the information requirement itself. It would appear to strain common usage to assert that such a portion of a regulation is itself an "actual instrument" for the collection of information. Such usage is not strained by speaking of a form issued pursuant to a regulation as an "actual instrument" for the collection of information.

Accordingly, we conclude that the term "information collection request" need not and should not be construed as synonymous with the term "collection of information requirement" in § 3504(h). In our view, the Act's requirements applying to an "information collection request"—including those in § 3507—do not apply as a definitional matter to a "collection of information requirement" in a regulation.

(3) Section 3507: "Public information collection activities—submission to Director; approval and delegation." Section 3507 requires agencies to obtain OMB approval of a proposed "information collection request" before conducting or sponsoring the collection of information.[70] Having discussed the definition of an "information collection request," we must now consider whether the language of § 3507 is consistent with an interpretation of § 3504(h) as providing the only express set of procedures for OMB review of rules under the Act. We believe that it is.

First, § 3507(a)(2)(A) requires an agency, before making an information collection request, to submit to OMB "the proposed *information collection request, copies of pertinent regulations* and other related materials as the Director may specify . . ." (emphasis added). It seems noteworthy that the reference here to "pertinent regulations" is separated by a comma from the reference to an "information collection request." This separation is consistent with the view that

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[67] S Rep No 930, 96th Cong., 2d Sess. 39 (1980).

[68] *See* Webster's Third New International Dictionary 1172 (1976).

[69] *Id* at 1913; *see also* Black's Law Dictionary 1156 (5th ed. 1979) (defining a regulation as "a regulatory principle" or a "precept" or "rule . prescribed for management or government").

[70] *See also* § 3504(c) (providing that the information collection request clearance and other paperwork control functions of the OMB Director "shall include . . reviewing and approving information collection requests proposed by agencies" and "ensuring that all information collection requests are inventoried, display a control number and, when appropriate, an expiration date").

portions of regulations which impose paperwork burdens are not themselves information collection requests for purposes of § 3507. If a portion of a regulation imposing a paperwork burden were an information collection request, the list in § 3507(a)(2)(A) of items to be submitted to OMB would appear redundant, for the same item—that is, part of a regulation imposing a paperwork burden—would be referenced twice, once as an "information collection request" and once as a "pertinent regulation."[71] We believe that the reference to "pertinent regulations" means that OMB, in evaluating an information collection request under the criteria specified in the Act, should be furnished all material, including in particular regulations in light of which a form itself must be assessed.

Second, § 3507(b) directs OMB, within 60 days of the receipt of a proposed information collection request, to notify the agency concerned of its decision "to approve or disapprove the request." OMB's decision is to be made "publicly available," but is not required to be published or to be accompanied by a statement of reasons. *Id.* This procedure is sharply distinguishable from that provided for by § 3504(h). Section 3504(h) requires OMB to file public comments on a proposed collection of information requirement in an agency rule (§ 3504(h)(2)), and to make publicly available its reasons for any disapproval of such a requirement (§ 3504(h)(6)). In view of these differences and the canon of construction that statutes should be read to give effect to each provision in them,[72] the most natural reading of § 3507(b) is that it must apply in different situations than does § 3504(h). If this were not the case, then as a practical matter the less formal procedures of § 3507 could be expected to supplant the more formal procedures of § 3504(h).

Third, in our view § 3507(c) does tend to confirm that OMB is not to assign control numbers to regulations reviewed under § 3504(h). Section 3507(c) provides in pertinent part:

> *Any disapproval by the Director, in whole or in part, of a proposed information collection request of an independent regulatory agency, or an exercise of authority under section 3504(h) or 3509 concerning such an agency, may be voided,* if the agency by a majority vote of its members overrides the Director's disapproval or exercise of authority. . . . *Where the override concerns an information collection request, the Director shall without further delay assign a control number to such a request,* and such override shall be valid for a period of three years. (Emphasis added.)

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[71] It could be argued that the reference to "pertinent regulations" should be read as referring to regulations *other than* the one containing a particular information collection request. This gloss on the statute, however, finds no specific support in the language of § 3507(a)(2)(A). In any event, if Congress intended that portions of regulations could themselves be information collection requests, it chose a most indirect and awkward way of phrasing its intent when it directed an agency to submit to OMB "the *proposed information collection request, copies of pertinent regulations* and other related materials as the Director may specify, . . " (emphasis added)

[72] Statutory construction must start with the language of the statute concerned. *See, e g , Detroit Trust Co* v *The Thomas Barlum,* 293 U S 21, 38 (1934) (a court is not "at liberty to imply a condition which is opposed to the explicit terms of the statute. . . To [so] hold . . . is not to construe the Act but to amend it."), *Fedorenko* v *United States,* 449 U.S. 490, 513 (1981)

The commas after "agency" at two places in the first sentence of § 3507(c)—which deals with any disapproval "of a proposed information collection request of an independent regulatory agency, or an exercise of authority under section 3504(h) or 3509 concerning such an agency, may be voided . . ."—serve to distinguish between OMB disapprovals of an information collection request, on the one hand, and actions under §§ 3504(h) and 3509, on the other hand.[73] The last sentence of § 3507(c) provides that where "the override concerns an information collection request," OMB shall without further delay assign a control number to such a request. The absence in the last sentence of any reference to § 3504(h) or § 3509 suggests that OMB is not to assign control numbers under those provisions. If it were otherwise, one would expect Congress to have included some reference to § 3504(h) in the last sentence of § 3507(c).

This analysis of the language of § 3507(c) supports the notion that the Act should be read as providing for two different sets of procedures for OMB review: those in §§ 3504(c) and 3507 (including the assignment of control numbers), which apply to information collection requests (forms, questionnaires and the like), and those in § 3504(h) (not including the assignment of control numbers), which apply to collection of information requirements in regulations. That interpretation of § 3507(c) is sustained by a passage in the Senate Committee report, which distinguishes between an independent agency's override of an OMB disapproval of an "information collection request" and its override of an exercise of authority under § 3504(h) "concerning rules and regulations":

> An independent regulatory agency may be [sic] a majority vote of its members *override any disapproval* of the Director *of an information collection request. The override authority also applies to an exercise of the Director's authority under section 3504(h) (concerning rules and regulations)* and under section 3509 (designation of a central collection agency). (Emphasis added.)[74]

If the term "information collection request" included an information requirement in a regulation, there would have been no reason to add to the statement that an independent agency may override an OMB disapproval of an information collection request the statement that the override authority "also" applies to OMB action relative to "rules and regulations" under § 3504(h).

Fourth, § 3507(d) provides that the OMB Director "may not approve an information collection request for a period in excess of three years." If this provision applied to portions of regulations containing collection of information requirements, the result would be that at least those portions of regulations containing collection of information requirements could be effective for no more than three years without subsequent OMB approval. Such an arrangement would have major effects on the administrative process that has been in existence at least

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[73] Under § 3509, the OMB Director "may designate a central collection agency to obtain information for two or more agencies if the Director determines that the needs of such agencies for information will be adequately served by a single collection agency, and such sharing of data is not inconsistent with any applicable law."

[74] S Rep. No. 930, 96th Cong., 2d Sess 15 (1980).

since the enactment of the Administrative Procedure Act in 1946. In effect, such an arrangement would involve the operation of a kind of "sunset" provision for agency regulations, under which regulatory provisions would automatically lapse after a certain time unless affirmative steps were taken to renew a regulation.

Without expressing any view regarding the merits of such a provision or its legality if it were enacted by Congress, we must approach with a sense of caution an interpretation of the Act that would require such a far-reaching result in the absence of any clear expression by Congress that this was its intent. We have not been referred to, nor have we found, any provision or statement indicating specifically that Congress sought, in passing the Act, to subject agency regulations to such a "sunset"-type provision. This is of special significance because a wide class of "sunset" provisions, usually involving a lapse of statutory authority after a certain number of years absent affirmative re-authorization by Congress, has been the subject of the contemporary debate about "regulatory reform."[75] The Act's legislative history specifically and clearly states that Congress did not intend for the statute to be used as a vehicle for "regulatory reform" in any broad sense.[76] These factors, taken together, support the view that § 3507(d) should not be read as applying to portions of regulations which contain collection of information requirements.

In short, we believe that the language of § 3507 is consistent with the interpretation of § 3504(h) as providing the only set of procedures for OMB review of regulations under the Act.

(4) Section 3512: "Public Protection." Section 3512 provides that "no person shall be subject to any penalty for failing to maintain or provide information to any agency" pursuant to an information collection request made after December 31, 1981, if the request does not "display a current control number assigned by the Director [of OMB], or fails to state that such request is not subject to this chapter." The purpose of this provision is to provide an effective incentive for agencies to comply with the Act's requirement that a control number be displayed on each "information collection request."[77] The question here is whether § 3512 was intended to apply in the context of regulations containing collection of information requirements.

Although the legislative history is not necessarily conclusive on this point, it does suggest that § 3512 was intended to apply to forms, questionnaires, or similar methods of collecting information, not to regulations as such. For instance, in the report of the House Committee on Government Operations, the following explanation of § 3512 is provided:

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[75] *See, e g* . Federal Regulation· Roads to Reform, Final Report of the American Bar Association's Commission on Law and the Economy, 105–111 (1979).

[76] *See* H R Rep. No 835, 96th Cong., 2d Sess. 9 (1980) ("Regulatory reform is a separate issue from the function assigned by H.R. 6410. . . . [T]he assignment of regulatory reform to the Office of Federal Information Policy would dilute the information functions assigned under this bill"), S. Rep. No. 930, 96th Cong . 2d Sess 8–9 (1980) ("[T]he Committee does not intend that 'regulatory reform' issues which go beyond the scope of information management and burden be assigned to the Office by the Director")

[77] *See* H R Rep. No 835, 96th Cong . 2d Sess 20 (1980), S Rep No 930, 96th Cong . 2d Sess. 2, 52 (1980)

> [T]he bill stipulates that no penalty may be imposed on a person who fails to respond to an information collection request which was not approved in accordance with the law's provisions. . . . *H.R. 6410 would allow the public, by refusing to answer these questionnaires, to help control "outlaw forms"* (emphasis added).[78]

Similarly, Senator Chiles, a sponsor of the Senate bill, stated during hearings before his subcommittee in 1979 that "*[f]orms without an OMB number on them will be 'bootleg forms'* that the public can ignore." (Emphasis added.)[79] During the same hearing, Senator Bellmon explained: "Under S. 1411 [a] businessman, *when he gets all these forms, unless they have that OMB stamp in the upper right-hand corner,* that stamp of approval, he will know that *that is a bootleg form* that he can throw away" (emphasis added).[80]

Although other statements in the legislative history refer more generally to § 3512's coverage of "information collection requests,"[81] the emphasis on "bootleg forms" in much of the legislative record strongly suggests that Congress particularly had in mind § 3512's application to forms and similar methods of collecting information. Although this fact alone does not necessarily establish that only forms and similar items—as distinct from regulations—are subject to the control number requirements of §§ 3507 and 3512, it is entirely consistent with such an interpretation of the Act.

(5) Section 3518: "Effect on existing laws and regulations." Section 3518(e) provides that "[n]othing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices . . . ."[82] This provision evidently distinguishes between the "substantive policies and programs of departments, agencies and offices," which are not to be affected by the Act, and the procedural requirements governing paperwork imposed by the Act. We grant that this distinction may be a difficult one to maintain in practice. Nonetheless, Congress required that it be maintained. This fact casts doubt on an interpretation of the Act that would effectively shift, without any clearly expressed intent to do so, a measure of substantive control over rulemaking from an agency to OMB.[83]

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[78] H.R. Rep. No 835, 96th Cong., 2d Sess. 20 (1980)

[79] *Paperwork and Redtape Reduction Act of 1979, Hearings before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm on Governmental Affairs*, 96th Cong , 1st Sess. 7 (1979) (remarks of Sen. Chiles).

[80] *Id.* at 12

[81] *See, e g* , S. Rep No. 930, 96th Cong., 2d Sess 52 (1980). "*Information collection requests* which do not display a current control number or, if not, indicate why not, are to be considered *'bootleg' requests* and may be ignored by the public " (Emphasis added)

[82] Section 3518(a) states that "[e]xcept as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter " Although this provision confirms that the Act applies to regulations, it does not provide guidance regarding the question whether § 3504(h) sets forth the only procedures for OMB review of regulations under the Act.

[83] *See* 126 Cong. Rec. 30178 (1980) ("Section 3518 specifically states that this bill does not change existing relations of the President and OMB with respect to the substance of agency programs.") (Remarks of Sen Chiles.)

As noted earlier, one of the chief consequences of OMB's interpretation is that portions of regulations imposing paperwork burdens would be "approved" by OMB for no more than three years. After expiration of the approval period, they would lapse and require new approval to remain effective. This would arguably give OMB a much greater measure of control over the rulemaking process. Although by itself this point is not particularly definitive, it certainly is not inconsistent with the view set forth above that § 3504(h) provides the exclusive set of procedures for OMB review of regulations under the Act.

C. General Scheme of the Act

We have concluded that an interpretation of § 3504(h) as providing the only express procedures for OMB review and disapproval of informational portions of regulations, as stated in A above, appears consistent with each of the Act's major provisions in addition to § 3504(h). We believe that such an interpretation also is consistent with the statute's general scheme.

One general argument against such an interpretation that is implicit in OMB's position rests on the fact that the foregoing interpretation would divide the world of paperwork burdens into basically two categories—those imposed by regulations and those imposed by forms or similar documents—and would control each category with a different set of OMB review procedures. This division, it might be contended, seems at odds with the Act's general aim of reducing all federal paperwork burdens, not just those imposed by forms, questionnaires or similar methods of information collection.

A significant weakness of this argument, however, is that it essentially assumes its own conclusion, namely, that the Act does not distinguish for purposes of OMB review between paperwork burdens imposed by regulations and such burdens imposed by forms of questionnaires. That, of course, is the central question to be resolved here.

In addition, this argument presumes that the practical effect of an interpretation of § 3504(h) as providing the only express procedures for OMB review of regulations would be substantially to undermine OMB's efforts to reduce the federal paperwork burden. However, as an empirical matter, it has not been demonstrated that such an interpretation of § 3504(h) would so constrict OMB's effectiveness under the Act. OMB is given broad general powers under § 3504(b). Also, § 3504(h) itself authorizes OMB ultimately to disapprove collection of information requirements contained in proposed regulations enacted after the effective date of the Act.[84] Moreover, there is no dispute that forms or questionnaires issued pursuant to regulations are subject to OMB review under § 3507.

Furthermore, this argument fails to take account of a number of passages in the legislative history indicating generally that Congress was especially concerned with the paperwork burden imposed by agency forms, questionnaires, or similar

[84] *See* § 3504(h)(5).

items. This is not to say that Congress was not also concerned with regulations, as it clearly was. However, Congress was particularly concerned about forms. This emphasis is reflected at several points in the legislative history.

For instance, the House Committee report described the Act as strengthening the Federal Reports Act of 1942 by requiring OMB "to review and approve most of *the forms and questionnaires* used by the Federal agencies to collect information from the public." (Emphasis added.)[85] In another passage, the House report described the basic problem addressed by the Act as follows: "Inefficiencies in current Federal information practice drastically reduce the effectiveness of the Government while, at the same time, *drowning our citizens in a sea of forms, questionnaires, and reports.*" (Emphasis added.)[86]

In a similar vein, the Senate Committee report stated:

> *Federal paperwork requirements, whether they are tax forms, medicare forms, financial loans, job applications, or compliance reports, are something each individual touches, feels, and works on.* The cumulative impact is excessive. . . .
>
> Several small business counselors testified that many clients refuse to expand their business because of the added paperwork they would face. *One counselor taped together the forms any potential small business person must know just to think about getting into business. They stretched across an entire room.* (Emphasis added.)[87]

Such references to "something each individual touches, feels, and works on" and taped-together forms stretching across an entire room are vivid reminders that Congress sought, by passing the Act, particularly to control the paperwork burden imposed by forms, questionnaires, and similar instruments for information collection.

The emphasis on forms also is reflected in testimony during hearings on the relevant bills. Of particular interest is the explanation by the former Associate Director of OMB of the elimination of the exemption for the IRS that had been contained in the Federal Reports Act:

> *The arguments that were made on behalf of IRS were basically that new tax forms have to be prepared within extremely short time limits.* The delays would be extremely important and costly to taxpayers.
>
> *They also raised the argument that the tax form is extremely complex and technical and there was not very much that you could do to improve the forms as a result*[,] and the third argument . . . is that the collection of revenue is a unique function and unlike

[85] H.R. Rep No 835, 96th Cong , 2d Sess. 18 (1980).
[86] *Id.* at 3
[87] S Rep. No. 930, 96th Cong , 2d Sess. 3 (1980).

> anything else the Federal Government does and, therefore, nobody outside that function should have a role in deciding what information goes in it.
>
> We viewed those arguments as not persuasive. (Emphasis added.)[88]

At another point in this testimony, the OMB representative further highlighted the underlying importance of the IRS' forms:

> From the beginning, OMB's ability to control reporting burdens has been limited from exemptions to the Federal Reports Act. *All of the forms of the Internal Revenue Service* and most of the reports of the bank regulatory agencies *have not been reviewed by any unit outside that agency . . . . Because of these provisions, almost three-quarters of the public reporting burden is excluded from OMB review.* (Emphasis added.)[89]

These and other statements in the legislative history[90] confirm that Congress' attention was drawn particularly to the problem of controlling the paperwork burden imposed by government forms, questionnaires, and similar items. This special concern is consistent with our conclusion that Congress set forth a particularly rigorous mechanism for OMB review of forms under the Act. This does not deny that Congress also was concerned with regulations. However, the many passages indicating Congress' special concern with forms does establish that Congress did not always consider forms and regulations together and inseparably. Thus, it is not surprising that the Act sets forth two different procedural mechanisms for the review of forms and regulations, respectively.

We conclude that the Act's general scheme, as reflected in its legislative history as well as language, is consistent with the view that § 3504(h) provides the only procedures for OMB review of regulations.

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[88] *Paperwork and Redtape Reduction Act of 1979, Hearings before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs*, 96th Cong , 1st Sess. 31–32 (1979) (testimony of Wayne Granquist, Associate Director, OMB)

[89] *Id.* at 25

[90] *See Paperwork Reduction Act of 1980, Hearings before a Subcommittee of the House Committee on Government Operations*, 96th Cong., 2d Sess 2 (1980) ("While the Government needs a great deal of information from its citizens, a lot can be done to cut down on the number and length of *questionnaires, forms and reports*, and to eliminate duplication and inefficiencies") (emphasis added) (statement of Chairman Brooks), *id* at 89 ("Currently almost 81 percent of the Federal paperwork burden is exempt from OMB review Without the authority to review the *reports and forms* required by the independent regulatory commissions and associated with tax, education and health manpower programs, there is little we can do to reduce the public burden imposed by these requirements") (emphasis added) (statement of Wayne Granquist, Associate Director, OMB). *See also Paperwork and Redtape Reduction Act of 1979, Hearings before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs*, 96th Cong , 1st Sess. 11 (1979) ("Past attempts to arrest the proliferation of paperwork have included requirements for Office of Management and Budget and GAO approval of *reporting forms*. Obviously, this has not been effective in holding down reporting requirements Each and every Federal agency seems to continue to be able to argue that they have unique needs which can only be met by creating their own new forms") (emphasis added) (statement of Senator Bellmon), *Privacy and Confidentiality Report and Final Recommendations of the Commission on Federal Paperwork, Hearings before Subcommittee of the House Committee on Government Operations*, 95th Cong., 1st Sess. 7 (1977) ("We recommended the elimination of all agency exemptions from the requirement for a central review of all planned reports the government uses to collect information from the public. Currently, the IRS with its multitude of *tax forms*, as well as the bank regulatory agencies and others are not subject to review by a central management agency such as OMB . to reduce duplication or unnecessary data collections") (emphasis added) (statement of Chairman Horton)

IV. Response to Arguments in the OMB Memorandum of April 23, 1982

In this section, we address certain particular aspects of the memorandum of April 23, 1982, setting forth OMB's position. That memorandum clarified some of the issues about which OMB and Treasury are in disagreement and forcefully stated the arguments in favor of OMB's view. Some of the arguments contained in that memorandum already have been addressed in this opinion. This section will briefly respond to the remaining issues and seek to dispel any confusion about some of the more important details presented by this dispute.

A. The Question to Be Resolved

At the outset, it is important to recognize that, in our view, the central question we must address is *not* the coverage of regulations by the Act as such. We stress this because the April 23, 1982, memorandum suggests that that is the basic question. For example, on pages 1 and 2, in discussing the Senate amendment to § 3504(h), the memorandum states that "[t]he [Kennedy] Amendment neither brought new 'information collection requirements' within the Director's approval responsibilities nor exempted 'information collection requests' already covered by the Act. *This is the issue* . . ." (emphasis added). In fact, there is no doubt that regulations are "covered" by the Act. They would have been "covered" without the Kennedy amendment and they are covered by the version of the Act actually passed. The question is to what extent and in what manner regulations are covered by the Act.

B. The Procedures Governing OMB Review of Regulations

It should be recalled, as discussed above, that the Act gives OMB broad powers to review and initiate proposals for changes in regulations wholly apart from the collection of information clearance procedures which are the central focus of the dispute between Treasury and OMB. OMB has the authority conferred on it by § 3504(b), including "initiating and reviewing proposals for changes in . . . regulations" (§ 3504(b)(2)), and "coordinating, through the review of budget proposals . . . agency information practices" (§ 3504(b)(3)). We discuss here only the specific interrelationship between the explicit and distinct procedures established by § 3504(h) on the one hand, and §§ 3504(c) and 3507 on the other hand.

Before considering in detail the April 23, 1982, memorandum's discussion of the procedures governing OMB's review of regulations, we will set forth in a somewhat schematic manner the four major possibilities in this regard. First, it could be argued that only the procedures set forth in §§ 3504(c) and 3507 could apply to regulations. Second, it might be asserted that only the procedures set forth in § 3504(h) could apply to regulations. Third, it is possible that both sets of procedures—those in § 3504(h) *and* those in §§ 3504(c) and 3507—could apply in any particular case to regulations. Fourth, it is possible that each set of

procedures could apply to regulations, but only in mutually exclusive sets of circumstances.

The first alternative has no support and contradicts the explicit terms of § 3504(h). The April 23, 1982, memorandum squarely rejects the second possibility, which is the one embraced by the Treasury Department and is most reasonable in our view. Thus, the OMB memorandum could have adopted the third or the fourth alternative. In fact, it would appear that the memorandum, at different points, embraces both possibilities.

For instance, at pages 16 and 17, the memorandum asserts that an agency has a "degree of latitude" in deciding whether to have a regulation that imposes a paperwork burden reviewed by OMB under § 3504(h), or under §§ 3504(c) and 3507:

> *[A]s a practical matter, the Kennedy amendment* [§ 3504(h)] *accords each agency a degree of latitude with regard to the procedures by which the Director [of OMB] will review information collection requests in regulations* which are the subject of notice and comment procedures. If the agency wants OMB to proceed under 3504(h), it submits the NPRM [notice of proposed rulemaking] and related material in accordance with the procedures of section 3504(h). OMB will then process the request according to 3504(h). *If the agency wants OMB to process the request pursuant to the procedures of 3504(c) and 3507, nothing in the law would prevent it from completing its rulemaking and then submitting the rule containing the request to OMB for review.* (Emphasis added.)

However, the OMB memorandum states that this latter process "would run the very risk that the Kennedy amendment was designed to minimize, and should be avoided." Thus, the OMB memorandum acknowledges that its interpretation of the statute allows for the very problem which § 3504(h) was enacted to prevent. Moreover, OMB practice may have initially insisted upon it, as the memorandum indicates at page 17:

> The Memorandum submitted by Eric Fygi [Deputy General Counsel, Department of Energy] contends that OMB operates as though it has the power to decide which procedures apply. OMB does not have that authority, although it may well be that during the early months of implementation, it has at times operated as though it did. OMB has taken steps to ensure that the agencies and not OMB make the "choice" and our new procedures . . . will unambiguously so provide.

This passage evidently assumes that it is now up to an agency to decide in any particular case whether to have a regulation reviewed by OMB under § 3504(h) *or* under §§ 3504(c) and 3507.

On the other hand, at pages 11 and 12, the April 23, 1982, memorandum explains the Senate's amendment to § 3504(h) as an attempt to "harmonize" the Act's procedures with the Administrative Procedure Act (APA) in order to "accommodate . . . two potentially conflicting responsibilities." To accommodate this potential conflict, the memorandum suggests, § 3504(h) applies to regulations during the period in which they are subject to notice-and-comment procedures under the APA, whereas §§ 3504(c) and 3507 apply to regulations imposing information requirements in other circumstances. This is also the position taken in the memorandum to us dated January 15, 1982, discussed above.[91] Under this view, "[i]f 3504(h) does not apply, then the procedures of 3504(c) and 3507 do . . ." (page 12). A key premise of this interpretation evidently is that both sets of procedures do not apply to any given regulation at the same time. The provisions, in short, are mutually exclusive on this view.

Accordingly, the April 23, 1982, memorandum appears to embrace two different and evidently inconsistent positions: first, that in a particular case, both § 3504(h) *and* §§ 3504(c) and 3507 may apply to a regulation (the third possibility above) and the choice is up to the agency; and second, that in any particular case, either § 3504(h) or §§ 3504(c) and 3507 (but not both) may apply to a given regulation (the fourth possibility above). We responded to the third possibility in section III, where we noted that under such an interpretation, § 3504(h) would be rendered relatively redundant. This is so, in sum, because the purpose of § 3504(h) was to establish a procedural system under which OMB would review regulations under the Act. If it were possible for OMB to review regulations under other provisions—including §§ 3504(c) and 3507—which lack the procedural formalities of § 3504(h), there would be no definite function left for § 3504(h) to fulfill.[92] We also note that the optional character of this interpretation flies in the face of the mandatory language of § 3504(h) ("each agency shall forward").

The fourth possibility also is subject to the response that it ignores the exclusive role assigned to § 3504(h) under the statute. The fourth possibility adds the significantly anomalous result that "new regulations proposed after the Act's effective date are subject to § 3504(h), with the procedural checks it was intended to provide, whereas "old" or "existing" regulations promulgated before the Act's effective date are subject to §§ 3504(c) and 3507 and could be overturned without any of the procedural safeguards of § 3504(h). Our concern with this interpretation is heightened by the fact that it does not give any weight to the longstanding canon of interpretation that statutory provisions should normally be read as applying prospectively to events and conditions occurring after the law's effective date: "[t]he rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[93] The language of

[91] *See* note 41 *supra* and accompanying text.

[92] Elaborations on this argument appear *supra*.

[93] This canon is stated in *Bauer Grocer Co.* v. *Zelle*, 172 Ill. 407, 50 N E. 238, 241 (1898); *see also* 1 Kent, *Commentaries* 454 (3d ed. 1836); Smead, *Rule Against Retroactive Legislation*, 20 Minn. L. Rev. 775 (1936); *Brewster* v. *Gage*, 280 U.S. 327 (1930), 2A, C. Sands, Sutherland Statutory Construction § 41.04 (4th ed. 1973).

§§ 3504(c) and 3507 does not clearly express the intention that it should be applied to regulations already promulgated at the time the Act became effective.

C. Additional Points

Several additional comments may be made regarding the April 23, 1982, memorandum.

(1) Page 2 of the memorandum relies on a passage in the Senate Committee report stating that the "imposition of a federal paperwork burden does not depend on how the questions are asked of the respondent, but rather on the fact the Federal government has asked or sponsored the asking of questions." This is said to support the proposition that such requests could be made by regulations as easily as by forms, questionnaires, or similar items.

We discern little guidance in this passage. It does not discuss regulations at all, but rather is directed at explaining that the phrase, "or other similar methods," in the definition of a "collection of information" covers oral as well as written requests. The passage's meaning may be best understood by considering it as a whole:

> [T]he Director of OMB has historically included oral techniques as instruments for collecting information. Federal agencies have increasingly been collecting information from the public through the use of telephone surveys and personal interviews. These techniques are used either independently or in conjunction with other information collection techniques such as mail questionnaires. The imposition of a federal paperwork burden does not depend on how the questions are asked of the respondent, but rather on the fact the Federal government has asked or sponsored the asking of questions. In concept, oral data collections are the same as those conducted through written requests for written responses. They should be reviewed under the same standards as written requests.[94]

It appears to be an unduly strained reading of the foregoing passage to view it as supporting more than the proposition it advances, namely, that oral as well as written requests are covered by the Act's definition of the "collection of information."

(2) At page 2, the memorandum argues that the Kennedy amendment was "clearly premised on the understanding that all reporting and recordkeeping requirements contained in regulations were required to be routinely approved by the Director" of OMB. In support of this argument, comments by Senators Kennedy and Danforth during Senate debate on the bill are quoted at page 3 of the memorandum.

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[94] S. Rep. No 930, 96th Cong , 2d Sess 39 (1980)

In our view, the quoted comments do not support the proposition advanced. The Senators' comments deal with the procedural requirements under § 3504(h) governing OMB review of regulations during the process of *the development of* regulations. This is not the same as the review of existing regulations. Furthermore, the Senators do not refer generally to OMB power to approve regulations, as OMB suggests. Rather, Senator Kennedy's comments, in discussing § 3504(h) as reported to the Senate floor and before amendment, concern the power of OMB to "overturn" a rule. Similarly, Senator Danforth, in discussing the Kennedy amendment to § 3504(h), speaks of OMB's power of "undoing a collection of information requirement" in a rule. To overturn or undo an informational requirement is not the same as routinely to approve such a requirement. These points may be confirmed by viewing in context the Senators' remarks. As Senator Kennedy is quoted at page 3:

> This legislation [as then drafted] would permit the Director of OMB to *overturn* a rule which was adopted by an agency without providing any procedural rights for the people affected by the rule or for the agency that promulgated the rule. Thus, even if an agency has complied with all the appropriate procedural requirements for public notice and comment, and has spent years compiling an adequate agency record, this legislation would permit OMB to *overturn* that agency decision without even requiring OMB to justify its decision publicly. I have sponsored an amendment which *limits the authority of OMB to overturn* reporting, recordkeeping, and other information collection requirements adopted by a Federal agency in a rulemaking proceeding. (Emphasis added.)[95]

As Senator Danforth is quoted:

> I am willing to accept the Kennedy amendment, which is intended to clarify the authority of the Director of the OMB to review Federal rules and regulations to determine their impact on Federal paperwork. Essentially, as I understand it, *the purpose of the Kennedy amendment is to prevent OMB from undoing a collection of information requirement specifically contained in an agency rule after that requirement has gone through the administrative rulemaking process* if the OMB Director ignored the rulemaking process. This seems fair enough.
>
> I note, however, that this limitation on OMB's authority is confined to requirements specifically contained in agency rules. (Emphasis added.)[96]

[95] 126 Cong. Rec. 30178–79 (1980)
[96] *Id.*

In context, both of these statements about OMB's ability to "overturn" an agency decision, or to "undo" a collection of information requirement, relate only to the provisions of § 3504(h) that give the Director a voice in the process of "developing rules and regulations." They do not suggest that the legislation, either before or after the amendment to § 3504(h), provided a procedure for the review of existing regulations.

(3) At page 4 of the April 23, 1982, memorandum, reliance is placed on a passage in the House Committee report explaining that the Paperwork Reduction Act covers "recordkeeping" requirements, which had not been clearly covered under the Federal Reports Act.[97] Although this statement does appear in the House report, it does not answer the question whether pre-existing regulations were to be covered or whether regulations were to be reviewed by OMB under § 3504(h) alone.

(4) At page 5, the memorandum states that the Senate amendment to § 3504(h) "did not create an exemption for [information] requests in existing regulations." We agree. However, this is beside the point, for before it was amended, § 3504(h) applied only to the process of *developing* regulations.[98] In fact, the Senate Committee report noted that *new* regulations caused the greatest paperwork burden, thus explaining the provision's emphasis on such regulations.[99] Accordingly, § 3504(h), before it was amended in the Senate, applied only to regulations under development, not to "old" or "existing" regulations. After it was amended, § 3504(h) retained this focus.

(5) At page 6, the memorandum contends that the Treasury Department's interpretation in effect would continue the exemption for the IRS that had been eliminated by the 1980 statute. We do not agree. The legislative history appears to make clear that Congress' attention was focused on the exemption of IRS forms from the Federal Reports Act.[100] That exemption was eliminated. The Act was intended to and does cover the IRS in the same manner as other agencies covered by the Act.

(6) At page 10, the memorandum argues that the Treasury Department's interpretation would "exempt" from coverage by the Act reporting and recordkeeping requirements "in bulletins, instructions, manuals, or guidelines, oral questionnaires, and in any other instrument other than a written form or like document." We do not agree. Treasury is arguing that only § 3504(h) governs OMB review of regulations under the Act. This argument does not deal with the additional questions of which kinds of documents or whether oral requests would be covered by §§ 3504(c) and 3507. We do not interpret Treasury's argument as attempting to establish that bulletins, instructions, manuals or guidelines, or oral requests, could not be covered by the Act.

(7) At page 13, the memorandum concedes that "[s]ection 3504(h) admittedly does not provide by its terms for the assignment [by OMB] of a control number"

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[97] *See* H.R. Rep No. 835, 96th Cong , 2d Sess 19 (1980).
[98] *See* pages 400 to 403 *supra*
[99] *See* pages 401 to 402 *supra*
[100] *See* pages 418 to 419 *supra*.

to a regulation containing a collection of information requirement. However, the memorandum argues that this fact does not weaken the OMB position because the requirement of a control number for regulations is made implicit by the Act's other provisions.

This argument, however, begs the main question, namely, whether a collection of information requirement in a regulation is synonymous with an information collection request for purposes of OMB review. We believe that the absence of any statement in § 3504(h) that control numbers should be assigned to regulations is simply one additional indication that Congress did not intend to treat regulations in the same manner as information collection requests subject to § 3507. Congress apparently envisioned that a form, questionnaire, or other instrument by which a citizen provides information to the government should have an OMB control number on it. The number's absence would alert a citizen to the fact that the required process had not been followed, thus allowing the citizen to assist, in a sense, in enforcing the Act's provisions. There is no specific indication that Congress contemplated the assignment of control numbers to regulations.[101]

V. Conclusion

After a thorough analysis of the arguments by all parties to this dispute in light of the language and history of § 3504(h), the language and history of the Act's other provisions, and the statute's general scheme, we conclude that § 3504(h) establishes a procedure which is mandatory for new regulations but which does not include a process for routine review of, and a disapproval mechanism for, existing regulations. We also conclude that the information collection request procedure set out in § 3507 does not apply to existing regulations.

A contrary conclusion, in our view, cannot be reconciled with the Act's language, the statute's overall scheme, or its legislative history. Of particular

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[101] We recently have received from OMB copies of two letters from Congress dealing with the general question of the coverage of the IRS by the Paperwork Reduction Act. One is a letter to the President signed by the members of the Senate Committee on Government Affairs, dated May 14, 1982, expressing opposition to S 2198, the Taxpayer Compliance Improvement Act of 1982, on the ground that it contains a provision (§ 202) that would exempt the IRS from the Paperwork Reduction Act. We express no view about the bill, but would observe that the points made in the members' letter do not deal directly with the issue before us.

The second letter, dated May 20, 1982, is to the Secretary of the Treasury from Senator Lawton Chiles, a member of the Senate Governmental Affairs Committee and a sponsor of the Act before its passage in 1980. Senator Chiles takes the position that the Act was intended to empower OMB to review collection of information requirements in existing regulations under § 3507 We have two responses to this letter First, Senator Chiles acknowledges that § 3504(h) has a narrower scope than § 3507. His letter attempts to explain § 3504(h)'s operation by arguing that its intent is "to proceduralize the requirements of the Paperwork Act, in particular those of Section 3507, with those of the Administrative Procedure Act. . . " The letter does not deal in specific terms with the basic issue of how the procedures of § 3504(h) relate to the procedures of § 3507, which is the question with which we must deal

Second, in any event, in interpreting the provisions of the Act, we must focus on the written legislative history expressed in Committee reports and floor debate prior to the Act's passage. It is a firmly established principle that subsequent views of individual Congressmen are to be approached with great caution, for they are not the primary expressions of legislative intent existing at the time a statute was actually passed *See generally NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974); *see also United States* v *Rutherford*, 442 U S. 544, 553–54 (1979); *Board of Governors* v *First Lincolnwood Corp.*, 439 U S. 234, 248 (1978). In our view, the effects of the Senate amendment to § 3504(h) were much more significant than apparently Senator Chiles would agree, for the reasons stated in this opinion. We would observe, however, that if our interpretation of the Act as passed is inconsistent with the present intent of Congress, it is, of course, free to enact corrective legislation.

importance is the clearly expressed intent in both the Senate and the House regarding the amendment and subsequent enactment of § 3504(h). Careful analysis of the Act's other major provisions and of its legislative history further supports our conclusion that § 3504(h) provides the exclusive mechanism for OMB review of regulations.

Nonetheless, OMB is given substantial authority over existing regulations by other provisions of the Act, including § 3504(b). We see no insuperable barrier that would prevent OMB from initiating proposals for changes in existing regulations that it deems appropriate under the powers given to it by the Act, which include authority over the IRS and virtually all other agencies of the federal government.

THEODORE B. OLSON
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Office of Legal Counsel

Delegation of Authority to Approve Suspension of Securities Trading on a National Market

The President is authorized by the general delegation authority in 3 U.S.C. § 301 to delegate to the Secretary of the Treasury his authority to approve the suspension of securities trading by the Securities and Exchange Commission under § 12(k) of the Securities Act of 1934, since nothing in that section affirmatively prohibits delegation or specifically designates another officer to receive delegation of the function.

Nothing in the legislative history of § 12(k) suggests that Congress expected the President to exercise his approval authority personally. Indeed, Congress may have felt it necessary to make explicit the § 12(k) approval authority at all only because of the independence otherwise given the SEC. Thus the congressional intent could have been simply to give the President the option, which he might not otherwise have enjoyed, to supervise the agency's decisions in this important area.

June 23, 1982

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

You have requested the views of this Office regarding the President's power to delegate to the Secretary of the Treasury his responsibility, under § 12(k) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*l*(k) (1982) (the Act), to approve the agency's summary suspension of securities trading on a national market for periods of up to 90 days.[1] For the reasons set forth below, we conclude that the President may delegate his § 12(k) approval authority to the Secretary of the Treasury.[2]

The President is generally authorized under 3 U.S.C. § 301 to delegate functions to "the head of any department or agency in the executive branch,"[3]

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[1] Section 12(k) provides in pertinent part as follows

> If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, *or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days.* (Emphasis added)

[2] We have not considered the legal issues raised by delegation to other government officials.

[3] Section 301 provides in full:

> The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: *Provided*, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part.

including, of course, the Secretary of the Treasury. This general authorization, however, is qualified in 3 U.S.C. § 302, which provides that:

> The authority conferred by this chapter shall apply to any function vested in the President by law *if such law does not affirmatively prohibit delegation of the performance of such function as herein provided for, or specifically designate the officer or officers to whom it may be delegated.* This chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President. (Emphasis added.)

The issue, therefore, is whether § 12(k), the law investing the approval authority in the President, either "affirmatively prohibit[s] delegation" or "specifically designate[s] the officer or officers to whom [the function] may be delegated." Nothing in § 12(k) specifically designates a subordinate officer to receive delegation of the function. Nor, we believe, does § 12(k) affirmatively prohibit delegation.

The category of statutes which affirmatively prohibit delegation is very narrow. Statutes may prohibit delegation either by their terms or by express statements in the legislative history. In addition, in extremely limited circumstances, the function involved might be of such fundamental gravity as to render inescapable the conclusion that Congress would not have created the function but for the assumption that the President would exercise it personally. Although the congressional purpose underlying § 301 was primarily to relieve the President of routine paperwork, the Congress rejected a proposal to limit the delegable functions to administrative duties[4] and chose instead generally to permit delegation of even sensitive and discretionary matters.[5] The bill's sponsor stated that delegation would be permitted except when a function or responsibility was "especially imposed by law" upon the President.[6]

The power to suspend trading on a national market is of course a grave responsibility with important economic, political, and diplomatic consequences. The Supreme Court has characterized as "awesome" the narrower authority under § 12(k) summarily to suspend trading in a single security for up to 10 days. *SEC* v. *Sloan*, 436 U.S. 103, 112 (1978). The authority to suspend trading on an entire market for up to 90 days is obviously of far greater magnitude.

Nevertheless, § 12(k) does not on its face preclude delegation. Nor have we found any indication in the legislative history that Congress would not have provided for a market suspension power but for the assumption that the President

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[4] 95 Cong. Rec. 11396 (1949)

[5] *See* 3 U.S.C. § 303, defining delegable functions to include "any duty, power, responsibility, authority or discretion vested in the President or other officer concerned."

[6] 95 Cong. Rec. 11395–96 (1949) (remarks of Rep. McCormack). *See also id.* ("the President's express duty"); *id.* at 11396 ("expressly delegated to the President")

would personally exercise his approval authority.[7] It is significant in this regard that Congress established the agency to be relatively free of executive oversight or supervision. Congress could well have believed that, without the explicit § 12(k) approval authority, the President would have had no power to disapprove the agency's decision to suspend market trading. The congressional intent could have been simply to give the Executive the option, which he might not otherwise have enjoyed, to supervise the agency's decisions in this important area. Such an intent would not be frustrated by the President's determination not to exercise the approval power personally but to delegate it elsewhere within the Executive Branch, especially to an officer intimately involved with monetary and financial matters. Because § 12(k) is silent regarding the President's authority to delegate his approval authority, and because a plausible explanation for a congressional decision to vest approval authority in the President exists apart from the possibility that Congress would not have created the suspension power but for the assumption that the President would exercise it personally, we conclude that § 12(k) is not a statute that affirmatively prohibits delegation. The President is therefore empowered to delegate that authority to the Secretary of the Treasury under § 301.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[7] Section 12(k) was originally enacted as §§ 15(c)(5) and 19(a)(4) of the Act and was recodified, with insubstantial changes, by the Securities Acts Amendments of 1975, 89 Stat. 118

Acquisition of Land by the Department of the Air Force

The requirement in 40 U.S.C. § 255 that the Attorney General review and approve the sufficiency of title to land prior to its acquisition by the government applies to all federal land acquisitions, except those specifically exempted from it, including the acquisition of land proposed by the Air Force in this case. The statutory provision which allows the Air Force to begin construction on land before its title is approved does not create an exception to the generally applicable requirement in 40 U.S.C. § 255, but is merely intended to allow military construction projects to get underway pending a determination on the validity of title.

Under regulations promulgated by the Attorney General, which are binding on agencies to which he had delegated his authority to approve title, less than fee simple title may not be approved for lands on which the United States is placing permanent improvements, except where Congress has authorized a lesser estate. Even where Congress arguably authorized acquisition of a lesser estate, the Attorney General and his delegees are still responsible for determining whether the title to be acquired in a particular case is sufficient for the intended government purposes.

The title proposed to be acquired from the Colorado State Board of Land Commissioners in this case—a right-of-way subject to a reversion interest—is not sufficient under Colorado law to protect the interests of the federal government where the Air Force intends to build a multimillion dollar military complex on the land.

June 28, 1982

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

This responds to your request for advice on several issues arising out of the Department of the Air Force's proposed acquisition of land in Colorado for construction of a Consolidated Space Operations Center (CSOC). You have asked whether the Attorney General must review the sufficiency of the title to the land in Colorado on which the CSOC will be based. We agree with your determination that the Attorney General must review the sufficiency of the title to the land, and would further advise that the title is not sufficient for the purposes for which it is being acquired.

We should state at the outset that the Land and Natural Resources Division has been delegated the authority to exercise the Attorney General's discretion in matters of title approval. 28 C.F.R. § 0.66 (1981). Our comments concerning the exercise of that discretion should not be viewed in any sense as a preemption of your duty to make the final decision.

I. Background

The CSOC is planned as a center for Air Force activities involving military operations in space. The land in question consists of 640 acres in Colorado presently owned by the State of Colorado. The Air Force plans to spend approximately $150 million constructing the CSOC, as well as additional sums over the years on maintenance and expansion. The deed between the state and the Air Force, as presently drafted, would give the United States a "right-of-way in perpetuity" over the 640 acres.[1] The right-of-way would revert to the state if it were no longer used for governmental purposes. Draft Agreement, ¶ 7. Colorado would retain mineral and water rights, and the land would be subject to existing easements and rights-of-way. *Id.*, ¶¶ 5, 6, 9.

II. Sufficiency of the Title Must Be Reviewed by the Attorney General or His Designee

Since at least 1841,[2] one of the Attorney General's formal functions has been to examine and approve the sufficiency of land titles prior to federal land purchases. The relevant statute presently provides:

> Unless the Attorney General gives prior written approval of the sufficiency of the title to land *for the purpose for which the property is being acquired* by the United States, public money may not be expended for the purchase of the land or any interest therein.

40 U.S.C. § 255 (emphasis added).[3] This approval requirement, *see, e.g.*, 6 Op.

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[1] The Draft Agreement states:

> 4. NOW, THEREFORE, THESE PRESENTS WITNESSETH, that the said party of the first part, in consideration of the premises, and in the further consideration of the sum of $48,000 lawful money of the United States, by the second party to the first party in hand paid, the receipt whereof is hereby confessed and acknowledged, has granted and by these presents does grant unto the party of the second part, its successors and assigns, a right-of-way in perpetuity for the purpose of constructing, reconstructing, operating and maintaining a Consolidated Space Operations Center and for other governmental purposes, upon, over, under and across the surface of those certain portions of school lands described as follows. All of Section 26, Township 14 South, Range 64 West of the Sixth Principal Meridian, El Paso County, Colorado. Containing 640.00 acres, more or less.

[2] *See* 5 Stat 468 (1841). *See also* 39 Op. Att'y Gen. 73 (1937); 39 Op. Att'y Gen 56 (1937); 35 Op. Att'y Gen. 183 (1927), 28 Op Att'y Gen. 463 (1910), 28 Op. Att'y Gen. 413 (1910); 10 Op. Att'y Gen. 353 (1862); 10 Op Att'y Gen. 34 (1861); 9 Op. Att'y Gen 100 (1857). The provision also appears at 33 U S.C. § 733 and 50 U.S.C § 175.

[3] Attorney General Cushing outlined the policy reasons for requiring such title approval at some length:

> I have acted, in all these references, under the conviction that the tenor of the law requires that all titles which the United States may take by purchase shall be perfect ones. The Government needs the land for the purpose of the public buildings to be erected on it, and needs, therefore, to hold it against all suit. Damages on a warranty will not suffice to indemnify the Government for the inconveniences following ejectment, even if, which would rarely happen, such damages could be recovered. . . And, in all these respects, the Government buys in order to own for the public service, not to hold temporarily as a proprietor buying and selling for the chances of gain, and so taking the risk of any defects of title A private person may buy a piece of land of dubious title, and consider that in the price Not so in the case of the United States.
>
> In addition to all these considerations, leading to the same conclusion, is another one of importance If there be a flaw in the title of a private person, he can defend it on equal terms with any adverse claimant, and in due time obtain adjudication of the matter in the courts of justice, with

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Att'y Gen. 432 (1854), provides a decisionmaker who, applying uniform rules, is responsible for ensuring that the United States' interests are protected.

In 1970, the Department of Justice proposed that the authority to approve land titles be given to the heads of all departments and agencies. 116 Cong. Rec. 10602 (1970). After study, the House rejected this approach and adopted a revised version that retained primary responsibility in the Attorney General.[4] *See* H.R. Rep. No. 970, 91st Cong., 2d Sess. (1970); S. Rep. No. 1111, 91st Cong., 2d Sess. (1970). This version became the present law. 40 U.S.C. § 255. The Attorney General was given the discretion to delegate the authority, and the Attorney General has in fact delegated it to several agencies, including the Corps of Engineers.[5] The delegation is, however, subject to the Attorney General's general supervision and regulations, which are discussed *infra*.[6]

The Air Force has asked the Corps of Engineers to acquire the land in Colorado without obtaining the Attorney General's written approval based upon the belief that the title need not be approved by anyone. The Air Force bases its argument on language in the statute authorizing acquisition of the CSOC land.

> The Secretary of each military department may proceed to establish or develop installations and facilities under this Act. . . . The authority to place permanent or temporary improvements on land includes authority for surveys, administration, overhead, planning, and supervision incident to construction. *That authority may be exercised before title to the land is approved under section 355 of the Revised Statutes (40 U.S.C. 255),* and even though the

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vindication of the title if it be a valid one, or compromise on fair conditions; and so the question ends. But if there be any flaw in the title of property held by the Government, the most exaggerated demands are made as the condition of release; the actual defects of title are magnified by ingenious self-interest; the pretensions of the adverse claimant are plausibly brought before Congress, the members of which are surprised into erroneous views of the question by *ex parte* showings; favorable reports of committees are obtained, by local interest or the partiality of friends, in one House or the other. and thus, even where the adverse claim is a bad one, enormous expense and trouble will come to be devolved on the Government.

8 Op Att'y Gen. 405, 406–07 (1857).

[4] The committee concluded that the Attorney General as the chief law officer of the United States should be charged with the primary responsibility for the approval of land titles. While it is clear from the executive communication and the testimony produced at the hearings on both bills that this authority can be properly exercised by other departments and agencies in many instances, the committee felt that there should be a determination of whether an individual department or agency in fact had the capability of exercising this authority or, has an actual need for such authority in terms of its operation. Accordingly, instead of making the grant of this authority by legislative determination, it was felt that the Attorney General would be in a better position to determine whether a delegation of the authority should be made. It was also felt that the Department of Justice would be in a better position to supervise the exercise of the authority if it was clear that the primary responsibility was lodged in the Attorney General.

116 Cong. Rec. 10602 (1970).

[5] *See* Letter for Secretary of the Army Resor from Acting Assistant Attorney General Kiechel, Oct 14, 1970.

[6] The Attorney General may delegate his responsibility under this section to other departments and agencies, subject to his general supervision and in accordance with regulations promulgated by him.

Any Federal department or agency which has been delegated the responsibility to approve land titles under this section may request the Attorney General to render his opinion as to the validity of the title to any real property or interest therein, or may request the advice or assistance of the Attorney General in connection with determinations as to the sufficiency of titles.

40 U.S.C. § 255. *See* 28 C F R § 0 66 (1981) (Land and Natural Resources Division to pass on land titles and exercise delegation authority)

> land is held temporarily. The authority to acquire real estate or lands includes authority to make surveys and to acquire land and interests in land (including temporary use), by gift, purchase, exchange of Government-owned land, or otherwise.

Military Construction Authorization Act, § 701, Pub. L. No. 97–99, 95 Stat. 1359, 1375 (1981) (emphasis added). We concur with your judgment that this language permits the Corps, on behalf of the Air Force, to begin work on the land before title has been approved under 40 U.S.C. § 255. We also agree that § 701 does not remove the requirement that the Attorney General or his designee approve the sufficiency of the title.

The language italicized above is not a complete exemption from 40 U.S.C. § 255—it is a descendant of statutes, dating back at least to World War II, that are designed to give the military the flexibility to start work on a needed project before every last step in the process of acquiring title has been formally approved. There are only a few statutes that grant a complete exemption to 40 U.S.C. § 255,[7] and their existence and language make clear that Congress knows how to draft a statute providing a complete exemption.[8] The Air Force's statute is one of a similarly small number of statutes, generally related to military operations, which, in the interests of efficiency grant a limited exception to the requirement that the review be done *before* work can be started.[9] "In the absence of emergencies, the Congress has shown extreme reluctance, in the matter of land acquisitions, to dispense with the opinion of the Attorney General upon the validity of the title." 39 Op. Att'y Gen. 73, 79–80 (1937).

Because of the Air Force's concern with this issue, we have carefully reviewed the material which it forwarded to you outlining the legislative history of similar provisions found in earlier military construction statutes.[10] The emphasis on ensuring that urgent military projects can be started as soon as possible is a repeated theme in that material, but there is nothing in it that casts doubt on the continued applicability of 40 U.S.C. § 255.

> Section [701] . . . in connection with the construction for the special-weapons project, authorizes the commencement of construction prior to approval of title to such lands by the Attorney General as normally required by [40 U.S.C. § 255]. These exemptions . . . would where time factors dictated immediate action, expedite the acquisition of land and commencement of construction.

S. Rep. No. 923, 81st Cong., 1st Sess. 21–22 (1949). The same concerns were echoed a few years later.

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[7] *See* 48 U.S.C. § 1409b, 42 U.S.C § 1502(b); 36 U.S.C. § 138b; 22 U.S.C § 1471(3) (Supp III 1979); 16 U.S.C § 571c; 16 U.S.C § 343b, 7 U S.C. § 2250a.

[8] *See, e.g* , 48 U S.C. § 1409b ("Projects authorized by this subchapter may be constructed without regard to the provisions of Section 255 of title 40").

[9] *See* 50 U.S.C. App § 2281(h); 50 U S.C. App. § 460(b)(9); 42 U.S C. § 2224, 42 U.S.C. § 1594a(d); 40 U.S.C. § 356(j)(1).

[10] Letter from Assistant General Counsel Reynolds, Department of the Air Force to Deputy Assistant Attorney General Liotta, Land and Natural Resources Division, Mar. 3, 1982

> Section [701] also *softens the effect of [40 U.S.C. § 255]* when military requirements call for immediate construction. It does not avoid the requirement of the Revised Statutes that title to land be approved by the Attorney General, but it does avoid the necessity of condemning land and filing a declaration of taking, which of itself may be time-consuming, in every case in which construction is required on an urgent basis.

S. Rep. No. 1707, 83d Cong., 2d Sess. 13–14 (1954) (emphasis added).[11] Given this legislative history, the traditional importance assigned to title approval under 40 U.S.C. § 255, and the fact that exceptions to the statute are clearly drafted, *see* n.8, *supra*, we cannot agree with the Air Force that § 701 completely exempts its projects from any review under 40 U.S.C. § 255.[12] Rather, we concur in your judgment that § 701 permits the military to begin construction on the land prior to title approval—but still subjects it to the Attorney General's final determination as to the sufficiency of the title.[13]

III. The Effect of the Attorney General's Regulations

The Attorney General has delegated to the Corps of Engineers his authority to approve land titles.[14] This authority is "subject to his general supervision and in accordance with regulations promulgated by him." 40 U.S.C. § 255. The Attorney General has promulgated such regulations, which state clearly which land titles may be approved. *Regulations of the Attorney General Promulgated in Accordance With the Provisions of Public Law 91–393*, Oct. 2, 1970 (Regulations). These Regulations state, in relevant part:

> 5. CHARACTER OF TITLE WHICH MAY BE APPROVED
>
> (a) The agency must determine that the proposed interest in property is in accord with the authorizing legislation and that such interest is sufficient for the purposes for which the property is being acquired—also that the purchase price is commensurate with such interest.
>
> (b) Frequently vendors desire to convey lands to the Govern-

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[11] *See also Military and Naval Construction. Hearings on H R. 7130 and H R 8240 Before the House Comm. on Armed Services*, 85th Cong., 1st Sess 2249 (1957) The Chairman of the Committee, Rep Vinson, questioning whether a 99-year lease for a base had ever been approved, said, "Of course, the policy of the committee and the policy of the Congress has been not to make any permanent installations on land unless the fee is in the Government"

[12] The GAO has also noted that the Attorney General's approval is necessary *See* GAO Final Report on CSOC Acquisition, Ch 3, at 12 ("the Air Force must still obtain approval by the U S. Attorney General before funds can be spent to acquire the right-of-way to use Colorado lands") *See also* 47 Comp Gen 61, 64 (1967).

[13] If the Attorney General does find the title insufficient, and negotiations are inadequate to acquire a better title, the government's interests can still be protected by its ultimate authority to have the property condemned and taken for a governmental purpose. *See, e.g., United States* v *South Dakota*, 212 F.2d 14 (8th Cir 1954) (Rapid City Air Force Base) Of course, the government must have sufficient money appropriated to cover the cost of just compensation

[14] *See* n.5, *supra*

ment by deeds which contain provisions for the reversion of the title when the property ceases to be used for a specified purpose. Also there may be restrictive covenants or agreements in conveyances to prior owners under which the title might revert to the grantors in such deeds upon the use of the property for an unauthorized purpose or for other reasons. *When permanent type improvements or improvements of substantial value are to be erected on lands, a defeasible title to such lands is not acceptable and must not be approved, unless the estate is clearly authorized by the Congress.*

(c) Other covenants and conditions in the deeds to the United States or in prior deeds may limit the use of the property in a manner which may prevent the sale and disposition of the property under laws relating to the disposition of surplus property so as to prevent the recovery of a substantial portion of the Government's investment in the property. Titles are not acceptable which are subject to such covenants and conditions in the absence of clear authorizing legislation.

* * * * *

(f) A defeasible fee title to land may be acquired by purchase or donation when no permanent improvements are to be created thereon, provided that the statute authorizing the acquisition in question does not preclude acquisition of title to the interest which the agency intends to acquire, the interest intended to be acquired is sufficient to permit the use of the land contemplated, and the consideration for the land has been determined with reference to the value of the limited interest that is acquired. *In the event it is decided at some future time to erect permanent improvements on such land, the provision for defeasance must be eliminated. Exceptions to the foregoing restrictions and requirements may be made only by the Attorney General, in individual instances when warranted in the interests of the United States.*[15]

Regulations, 5(a)–(c), (f) (emphasis added).

Thus, unless the estate is "clearly authorized by the Congress," less than fee simple titles for lands on which the United States is placing permanent improvements may not be approved by the Corps of Engineers.

The Air Force argues that the estate—a right-of-way subject to a reversion interest—has been "clearly authorized" by § 701 of the Military Construction Authorization Act, *supra*. Section 701 permits the authority to place permanent improvements on land to "be exercised before title to the land is approved under [40 U.S.C. § 255], and even though the land is held temporarily."

[15] This last sentence was added in 1974

The Air Force states that it forwarded "DD Forms 1391" to its oversight committees from 1969 to 1977, and that these forms contained lines indicating that some of the land being used for air bases was under long lease. Letter from Assistant General Counsel Reynolds, Department of the Air Force, to Deputy Assistant Attorney General Liotta, Land and Natural Resources Division, March 3, 1982. The Air Force therefore concludes that, since the forms were printed in the Committee hearings, this is "powerful proof that the practice of construction on land held in other than fee under appropriate circumstances is an approved one." *Id.* at 2. *But see TVA* v. *Hill,* 437 U.S. 153, 191–93 (1978); *supra* n.11.

We disagree with the Air Force's analysis. We believe that the phrase "even though the land is held temporarily," read in context, permits the Secretary to build on land held temporarily—*e.g.*, through a lease—while the Attorney General scrutinizes the title. We have previously stated our belief that statutes granting general authority to purchase lands and interests in lands are not enough to constitute the clear authorization needed to overcome the Regulations. "[N]othing short of a direct and specific approval by Congress of a particular acquisition will suffice whenever substantial improvements are to be made and the acquisition of less than fee title is contemplated." Memorandum for General Counsel Coleman, Department of Energy, from Deputy Assistant Attorney General Hammond, Office of Legal Counsel, August 28, 1979 at 8 (Energy Memorandum) (rejecting servitude interest).[16] Section 701 was not meant to overrule the Attorney General's outstanding regulations, regulations that reflect an administrative practice dating back to the nineteenth century that insists that the government obtain a fee title when making permanent improvements. There is nothing in the legislative history of § 701 or its predecessors that indicates Congress meant to reject this rule in favor of letting valuable military establishments be placed on any kind of estate that the military happens to obtain. Rather, the emphasis is on the need for speed and efficiency in beginning work on military projects. The Air Force's interpretation would encourage the military to obtain the cheapest—and hence, often the weakest—land interests available, a goal at odds with the Attorney General's oversight role and Congress' own interest in ensuring that valuable improvements are not placed at risk.[17] If a temporary interest were sufficient for permanent improvements, there would never be a need for the Attorney General to pass on the sufficiency of the title.

The issue need not be resolved, however, because the central issue in this dispute is whether the Attorney General is willing to approve the title to this land.[18] Even if we found that § 701 "clearly" authorized acquisition of less than

[16] The statute in that case authorized purchase of any possessory right, including easements, leaseholds, and mineral rights. *Id.* at 2

[17] We would note that this policy is already reflected in 10 U.S.C. § 9773(d) which deals with Air Force acquisition of land for regular "air bases and depots." 10 U.S.C. § 9773(a) When the Secretary of the Air Force needs land, he may acquire "title, in fee simple and free of encumbrance." *Id.* § 9773(d)

[18] The Regulations mandate that the Attorney General's opinion be requested by the agency to which a delegation has been made both when an exception is sought to the fee simple requirement, *see* Regulations, 5(f), and when the land is subject to a reversionary interest *Id.* 5(g). "When it is desired to accept the title to lands, subject to any rights of reversion, *the opinion of the Attorney General must be requested* and full supporting facts containing a reference to any authorizing authority must be submitted for consideration." (Emphasis added.) *See also* Regulations, 5(h) ("Federal departments and agencies must exercise sound legal judgment in determining the validity of titles to lands and, in case of doubt of such validity, the Attorney General must be requested to render his title opinion pursuant to the above-mentioned Act prior to the payment of the purchase price.")

fee interests, which we do not, the next step would still be an examination of whether the Attorney General should approve the title. The next section sets forth various reasons why we believe the Land and Natural Resources Division, acting on behalf of the Attorney General, may wish to disapprove the title proffered for the CSOC land.

IV. The Attorney General's Broad Duty Under 40 U.S.C. § 255

"These regulations recognize that Congress may authorize the acquisition of *any* interest in real property . . . no matter how risky, but they also recognize that 'it is very seldom that a particular interest is authorized by legislation.' Regulation 4(a)." Energy Memorandum, at 4. There is nothing in the language of 40 U.S.C. § 255 which requires that the Attorney General only approve fee simple titles when permanent improvements are planned. Nevertheless, the Attorney General has chosen to narrow his own discretion by issuing the Regulations prescribing limits on the kind of title that may be approved when the government wishes to erect permanent improvements. The Regulations bind both the Land and Natural Resources Division, which is acting for the Attorney General, and the agencies to whom approval authority has been delegated.

When Congress revised 40 U.S.C. § 255 in 1970, it discussed the factors to be considered in evaluating whether a title is sufficient for the purpose for which the property is being acquired. That evaluation involves more than determining that there is no cloud on the title. As the House Report stated,

> [Agencies already make] determinations [that] relate to the propriety, timing and scope of acquisition, as well as the development, use and disposition of such properties. *Whether the interest in land,* that is the title being acquired, *is sufficient for the purpose of a program or presents unwarranted risks for the United States* involves a similar sort of determination under current practices.

H.R. Rep. No. 970, *supra*, at 5 (emphasis added). *See* Regulations, 5(a), *supra*.

In order to provide you with some observations concerning the exercise of your discretion regarding whether the proposed title is sufficient for government purposes, we have done a brief review of applicable Colorado law. While we are by no means experts on Colorado law, our review has raised issues for you to consider. We concur with your tentative view that the right-of-way offered by Colorado is not sufficient for the Air Force's purposes for a variety of reasons. There are persuasive arguments that a right-of-way subject to a reversion is not adequate to protect the interests of the federal government. Moreover, there is a risk that the Colorado State Board of Land Commissioners' transfer of the land *via* a deed to a right-of-way rather than by sale of the fee interest would be beyond the scope of its powers under the Colorado Constitution and implementing statutes.

The Board has limited authority, deriving its powers from the Colorado Constitution, Colo. Const. art. IX, §§ 9, 10,[19] and implementing statutes.

[19] "It shall be the duty of the State board of land commissioners to provide for the . . . sale or other disposition of all the lands . . . in such manner as will secure the maximum possible amount therefor" Colo. Const. art. IX, § 10.

Colorado jurisprudence has long held that, as a creature of limited authority, the Board may not act beyond its authority, and that when it does, its actions are null and void. For example, the Colorado Supreme Court, nullifying a land sale because the Board had not properly advertised the land, has said:

> Whatever power the board possesses to sell state lands *or any part thereof* is derived from the Constitution, and the manner or method to be pursued by it in selling or conveying the same is to be in accordance with some legislative act prescribing or regulating the steps to be taken. Hence, when the board attempts to dispose of the state lands under its lawful powers, *a failure on its part to substantially comply with the requirements of the legislative act concerning such disposition leaves the title unaffected,* and conveys no title in the land to the purchaser. Under such circumstances the acts of the board, in executing or delivering any deed or other muniment of title to the land, are ultra vires.

Briggs v. *People,* 121 P. 127, 128–129 (Colo. 1912) (*en banc*) (emphasis added). *See also Driscoll* v. *State Bd. of Land Comm'rs,* 23 F.2d 63, 64 (8th Cir. 1927), *cert. denied,* 277 U.S. 586 (1928); *Evans* v. *Simpson,* 547 P.2d 931, 934 (Colo. 1976) (*en banc*); *Walpole* v. *State Bd. of Land Comm'rs,* 163 P. 848, 850, 851 (Colo. 1917).

The Board's action may be open to challenge on the grounds that the transaction is a "sale," governed by Colo. Rev. Stat. § 36–1–124, rather than the grant of a right-of-way, *id.*, § 36–1–136 (1980 Cum. Supp.).[20] A right-of-way may be granted to the United States "on any tracts of state land," *id.*, while the Draft Agreement would grant it "upon, over, under and across the surface" of the land. Draft Agreement, ¶ 4.[21] The Colorado Constitution requires that the "sale or other disposition" of state lands must "secure the maximum possible amount therefor." Colo. Const. art. IX, § 10. Sales and leases are, therefore, publicly advertised and auctioned, unlike this transaction. A disappointed land seeker

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[20] "The state board of land commissioners . . may grant rights-of-way *on* any tracts of state land to any public agency or instrumentality of the United States . . for any public use or purpose." (Emphasis added)

[21] We are also concerned that the Board does not have the authority to grant a right-of-way that conveys such an extensive interest. Even the Board's more general authority is only to grant rights-of-way "across or upon" certain tracts Colo. Rev Stat. § 36–1–136 (1980 Cum. Supp) The GAO's analysis of this transaction expresses some doubts as to its legality but concludes that there is no real problem since the United States can always condemn the property

> The Air Force and State are evidently treating this transaction as a grant of right-of-way falling under the statute rather than as a sale or other disposition falling under the constitutional provision Whether this is correct is a question of State law Generally, GAO will not question a State's interpretation of its own law. The Board's counsel advised us that the Board does not believe the constitutional provision applies and therefore that the Board is not required to secure the maximum possible amount.
>
> The possibility exists that the legality of the conveyance could be challenged in a lawsuit While the possibility of litigation cannot be foreclosed, it is in our judgment not likely. Moreover, as mentioned earlier, the United States may condemn without delay whatever interest in land it needs, should any doubt later arise as to the legality of the conveyance by the State. With that option available, and given the Board's view that it has legal authority to convey the right-of-way, we find no legal reason for the Air Force not to go ahead with the acquisition as planned

GAO Op No B–205335, at 3, *reprinted as* Appendix IV to GAO Final Report on CSOC Acquisition Condemnation may provide a remedy when the title proves insufficient, but it does not answer the question of whether a title is in fact sufficient under 40 U S C § 255

might argue that, no matter how the Board denominates the transaction, it is actually a sale, which must be advertised to produce the maximum return, Colo. Rev. Stat. § 36–1–124, or a lease, *id.* § 36–1–118(1)(a), which can be for a term of no more than ten years.[22] The land is presently being leased to a private user for grazing purposes,[23] and the lessee's interests are being conveyed to the United States for $1,950.[24]

Our second concern is that a right-of-way would appear to be insufficient for the Air Force's purpose. The section authorizing the Board to grant rights-of-way "shall not be construed to grant authority to said board to convey title to any such land by a grant of right-of-way." *Id.* § 36–1–136 (1980 Cum. Supp.). Under Colorado law, therefore, there is no "title" conveyed to the United States that the Attorney General can examine for sufficiency.

Even if we assume, however, that the meaning of "title" in 40 U.S.C. § 255 is broader than the "title" under Colorado law, so that there is a "title" to the right-of-way that the Attorney General can examine, that "title" would seem to be entirely too precarious for the Air Force's purposes. First, rights-of-way and easements belonging to the United States may be condemned in state court upon the application of any corporation authorized under Colorado law to condemn public lands. Colo. Rev. Stat. § 38–3–101.[25] This would expose the United States to the constant threat of new rights-of-way circumscribing the Air Force's use of parts of the tract as corporate pipelines, telephone wires and access roads are erected, and to the need either to pay the corporations to choose some other route, engage in litigation to forestall the condemnations, or, eventually, to condemn the tract itself and pay the state for the taking.[26]

Second, all Colorado state institutions, departments, and agencies, *id.* § 24–82–201, as well as the Board, can grant easements or rights-of-way over

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[22] The Board hears claims on lands, Colo Rev Stat. § 36–1–131 (Cum. Supp. 1980), but its decisions may be challenged by any interested party. *See, e g., Wilson* v *Collins*, 165 P 2d 663 (Colo. 1946) (*en banc*) (taxpayers could maintain mandamus action to force Board to collect rents owed on State land); *People ex rel Stonebraker* v. *Wood*, 10 P 2d 331 (Colo 1932) The uncertainty inherent in state land law decisions is another reason that the Attorney General has always insisted on an irreproachable title to land

> But, if the question presented have not been so adjudged in the State, if it be a new point of construction presented by the statutes of a State,—the Attorney General would take upon himself burdens of responsibility, not justified by any emergency in the mere matter of expediency of selection between this or that site of a court house or post office, or of paying more or less money for a site, if he should presume to warrant to the Government what will be the decision of the courts of the particular State on the construction of their own statutes, especially where the United States are concerned.

8 Op. Att'y Gen. 405, 408 (1857).

[23] *See* Quitclaim Deed attached to Draft Agreement

[24] One of the potential issues for litigation is the extent of the present lessee's rights, specifically reserved to him, under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C § 4601 *et seq.* Quitclaim Deed, at 1.

[25] The list of corporations possessing the power of condemnation is fairly broad. *See* Colo Rev. Stat. §§ 38–2–101–105.

[26] In a recent decision, the Colorado Court of Appeals upheld the Board's grant of a right-of-way for a railroad over mining lands leased from the State, despite the lessee's objections. *Utah Int'l, Inc.* v *Bd of Land Comm'rs*, 579 P.2d 96 (Colo 1978). The Court held that the lessee was not adversely affected because it had no immediate plans to mine the coal under the proposed right-of-way. If the railroad, once built, did interfere with the mining, the Court indicated that the remedy was a damage action, 579 P.2d at 97, not removal of the railroad Unless the Air Force plans to build on all 640 acres immediately, private parties could similarly narrow the government's ability to use the entire tract. *See also Bd of Land Comm'rs* v. *District Court*, 551 P 2d 700 (Colo. 1976) (*en banc*)

land owned by the state. We are not aware of anything in the Draft Agreement that would preclude a state agency or the Board from granting another right-of-way over part of the CSOC tract—which would still be owned by the state.

Third, the Attorney General has traditionally not approved titles to property where there is a reversionary right.

> Acceptance of such a title could result in the loss of extensive investments made by the United States in improvements on the property. There is no assurance that the Congress will continue to appropriate funds for an intended use, thereby causing the title to the lands and the improvements to revert to the [State]. Furthermore, provisions allowing the Government to remove the improvements in the event of such reversion are usually meaningless since the cost of removing permanent expensive buildings is generally greatly in excess of any sale of the salvage from the building.

Memorandum for Director Zwick, Bureau of the Budget, from Deputy Attorney General Christopher, Sept. 10, 1968, at 1. The Draft Agreement provides for reversion whenever the land is not being used for a governmental purpose and does not even include a right to salvage the permanent improvements. Rather, the United States could either sell the improvements or abandon them—in which case they revert to the state. Draft Agreement, ¶ 13.[27]

The lack of any "title" under state law and the precarious nature of rights-of-way under Colorado law are the very kinds of flaws that an Attorney General's review are meant to detect. 8 Op. Att'y Gen. 405, 407 (1857).[28] The Attorney General's duty is to protect the federal government from the harassment and possible financial loss that could result from a less than sufficient title. The proffered "title" to the right-of-way seems to be seriously insufficient for the site of a multimillion dollar military complex. We are aware of nothing which would prevent the Air Force from buying the land,[29] and we recommend that course of action.

V. Conclusion

We believe that the Land and Natural Resources Division has correctly determined that the Attorney General must examine the title for the right-of-way

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[27] The right-of-way is also made subject to outstanding rights-of-way and easements *Id.* ¶ 6. The Board has assured the Air Force that none exists, but if any should come to light, their continued existence would raise the same problems outlined above

[28] A policy implication that may need further consideration is that the Draft Agreement reserves both mineral and water rights. *Id.* ¶¶ 5. 9 The United States cannot even explore for water without the state's permission *Id* ¶ 9 Water rights which may be sufficient now for the Air Force's purposes may well be insufficient in a decade or so when the CSOC is a center of activity with personnel and their families living on the tract Colorado is not a water-rich state, and development of the CSOC may be severely curtailed if Colorado refuses to permit exploration, while any water flowing through the tract may be appropriated by others in the interim In the same way, it would seem wiser to acquire now the title to subsurface mineral interests, such as geothermal resources and oil, rather than wait and pay an almost assuredly higher price to the state in a few years Moreover, their purchase would place control of exploration and exploitation in the federal government, which could ensure that they did not conflict with the CSOC's mission.

[29] *See* Colo Rev. Stat § 3–1–101.

and that, acting on behalf of the Attorney General, it should advise the Corps of Engineers that the interest conveyed by the Draft Agreement to a right-of-way in the tract is not sufficient for the purpose for which the property is being acquired.

ROBERT B. SHANKS
Deputy Assistant Attorney General
Office of Legal Counsel

Questions Raised by the Attorney General's Service as a Trustee of the National Trust for Historic Preservation

No conflict of interest or breach of fiduciary duty is created where the Attorney General is responsible for defending a suit brought against the Army Corps of Engineers by the National Trust for Historic Preservation, on whose Board of Trustees he serves, by statute, as an ex officio member As an ex officio trustee, the Attorney General is always presumed to be representing the interests of the United States, especially in those situations in which the interests of the Trust and those of the United States conflict, so that no question of divided loyalty arises.

While the Attorney General is authorized to participate in litigation involving the National Trust if he considers it to be in the interests of the United States, the National Trust is not a federal agency such that the Attorney General has the authority to supervise and control all litigation to which the Trust is a party.

The terms "officer, director, or trustee" in 18 U.S.C. § 208 do not include an ex officio member of an essentially private body, whose service in that body derives only from an office of public trust.

While a trustee ordinarily owes a duty of loyalty to the beneficiaries of the trust, that requirement may be altered by the terms of the trust, in this case the statute which established the Trust and which made the Attorney General an ex officio trustee

July 14, 1982

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

This responds to your request for our opinion whether a suit filed by the National Trust for Historic Preservation in the United States (National Trust or Trust) against the Army Corps of Engineers creates a conflict of interest or breach of fiduciary duty for you or the Attorney General. The question arises because the Attorney General is designated by statute as an ex officio member of the Board of Trustees of the National Trust, a responsibility he has delegated to you in your capacity as Assistant Attorney General of the Land and Natural Resources Division, while you and the Attorney General also have supervisory authority over the defense of the suit on behalf of the Corps of Engineers. For the reasons set forth below, we conclude that no conflict of interest or breach of fiduciary duty arises because of these dual responsibilities.[1]

[1] A preliminary issue we have considered is whether the Attorney General has the authority under 28 U.S.C. § 519 to control litigation filed by the Trust. Section 519 provides in relevant part that

> [e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party . . .

Although, as we have concluded on previous occasions, the Attorney General may participate on behalf of the

Continued

I. Background

A. National Trust

The National Trust was established by Congress in 1949 as a "charitable, educational, and nonprofit corporation" and given a mandate:

> to receive donations of sites, buildings, and objects significant in American history and culture, to preserve and administer them for public benefit, to accept, hold, and administer gifts of money, securities, or other property of whatsoever character for the purpose of carrying out the preservation program, . . .

16 U.S.C. § 468. Since its creation, the National Trust has focused its efforts on administering properties and funds designated for historic preservation, acquiring historic properties, and cooperating with and/or financing state, local, and private historic preservation efforts. For example, the Trust owns and manages a number of historic properties, such as the Decatur House in Washington, D.C., and the Woodlawn Plantation in Mount Vernon, Virginia.

The members of the Trust include individuals, private corporations, and organizations concerned with historic preservation, such as historic societies and museums. The enabling statute provides that the affairs of the Trust shall be under the general direction of a board of trustees. 16 U.S.C. § 468b. Three federal officials—the Attorney General, the Secretary of the Interior, and the Director of the National Gallery of Art—are designated as ex officio members of the Board of Trustees. Each may delegate his responsibilities and, under the Trust's bylaws, is entitled to vote on matters coming before the Board. The remainder of the Board is composed of not less than six general trustees[2] chosen by the members of the

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United States in litigation involving the National Trust if he considers participation to be in the interests of the United States, *see* 28 U S C § 518(b), we do not believe that the National Trust is a federal "agency" within the meaning of § 519 such that the Attorney General has the authority to supervise or control all litigation to which the Trust is a party The legislative history of the statute that created the Trust, Ch. 755, 63 Stat. 927 (1949), 16 U.S.C. § 468, makes it clear that Congress intended the Trust to be a nongovernmental, voluntary entity organized for the purpose of encouraging and facilitating private cooperation in historic preservation efforts *See* S Rep. No 1110, 81st Cong , 1st Sess. 1–2, *reprinted in* [1949] U S. Code Cong & Ad News 2285–86 The composition of the Board of Trustees (*see* text *infra* at 3) is consistent with the view that Congress did not intend the Trust to be a federal agency subject to the litigating control of the Attorney General. With the exception of the three federal trustees, who serve ex officio, the trustees are all selected by the members of the Trust, without federal involvement. Since the federal trustees do not form a majority of the Board, the Trust is simply not subject to executive control In fact, were the Trust an agency of the Executive Branch, the method of selecting trustees might raise serious constitutional questions under the Appointments Clause (Art II, § 2, cl. 2), in that the trustees, who would then presumably be "officers" of the United States, are not appointed by the President Moreover, as far as we have been able to determine, the Trust has historically engaged in litigation on its own behalf, either through staff or private counsel The Trust has occasionally requested the cooperation or assistance of the Department of Justice in particular litigation when the United States' interests have appeared to be the same as the Trust's, but neither the Trust nor the Department of Justice has ever taken the position that, absent such a request and a finding of a federal interest justifying the Department's participation, the Attorney General could or should supervise and control litigation involving the Trust. Therefore, we see no reasonable basis upon which the Attorney General could assert authority to control the present litigation.

[2] The Board of Trustees may, in its discretion, increase the number of general trustees. 16 U S.C § 468b At present, there are 30 general trustees

Trust. The Chairman of the Board of Trustees is elected by a majority vote of the members of the Board. *Id.*

B. Present Litigation

By memorandum dated June 21, 1982, Michael L. Ainslie, President of the National Trust, informed the Board of Trustees that the Trust and three private historic preservation organizations would file suit against the United States Army Corps of Engineers on June 22, 1982, in the United States District Court for the Southern District of Ohio, seeking injunctive relief and a declaratory judgment to halt an alleged violation by the Corps of § 106 of the National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 917, 16 U.S.C. § 470f.[3] The basis for the complaint is the alleged failure of the Corps to afford the Advisory Council on Historic Preservation a "reasonable opportunity to comment" prior to the Corps' issuance of a permit for construction of a coal-barge loading facility on the Ohio River in Cincinnati, Ohio. This permit will allegedly have an adverse effect on the Anderson Ferry, a property that has been determined to be eligible for inclusion on the National Register of Historic Places.

As far as you are aware, neither this suit nor the facts upon which its allegations were framed have been discussed at any meeting of the Board of Trustees of the National Trust. You and the Attorney General first became aware of the suit when your representative on the Board received Mr. Ainslie's memorandum of June 21, 1982.[4]

II. Analysis

You are concerned that the Attorney General or you, as his representative on the Trust, may face a conflict of interest because questions concerning the conduct of the litigation by the Trust against the Corps or confidential information about the basis for the litigation may be brought before the Board for its consideration. If the subject matter of the litigation were brought to the Board, either at the request of the Trust's staff or at the Board's own initiative, you or the Attorney General could be placed in the position of voting on whether or how to conduct litigation against a client agency of the Department of Justice, or could be given information that would be helpful to the defense by the Department of Justice of the Corps of Engineers in the litigation, and therefore potentially harmful to the interests of the Trust. While it could be politically awkward for you or the Attorney General to be placed in that position, and you might therefore

[3] Section 106 of the National Historic Preservation Act provides in pertinent part that the head of any federal agency or department with authority to license a federal or federally assisted undertaking shall, prior to approval or issuance of any license or expenditure of any federal funds, take into account the effect of the undertaking on districts, sites, buildings, structures, or objects eligible for inclusion in the National Register, and must afford the Advisory Council on Historic Preservation "a reasonable opportunity to comment with regard to such undertaking." 16 U S C. § 470f.

[4] Filing of the suit was apparently approved by the Trust's Executive Committee, a body authorized by the bylaws to exercise powers of the Trustees between meetings of the Board, subject to the control of the Board No federal trustee currently sits as a member of the Executive Committee

choose to refrain from participating in any discussion or consideration of the litigation by the Board, we do not believe that any actual or apparent conflict of interest is created under applicable federal statutes and regulations or the Code of Professional Responsibility.

The only provision of the conflict of interest laws that remotely could be said to bear on this question is 18 U.S.C. § 208. This provision prohibits, *inter alia,* an Executive Branch officer from personally and substantially participating, as such officer, in any particular matter as to which an organization in which he is serving as "officer, director, [or] trustee" has a "financial interest."[5] Even assuming that the National Trust has a "financial interest" in the litigation, which seems doubtful,[6] in our view the Attorney General does not serve as an "officer, director, [or] trustee" of the Trust within the meaning of § 208, because he serves as trustee only in an ex officio capacity.

Section 208 is premised on the concern that a federal officer or employee who is also an officer, director, or trustee of an organization may act in the interests of that organization, rather than in the interests of the United States, in any matter that he, acting as a federal officer or employee, can influence. An ex officio member of an organization, however, serves only by virtue of his holding a particular office. When the office from which his service derives is not an office in the organization itself, and is in fact a public office of trust, the reasonable inference to be drawn is that the ex officio member serves only in the interest of his outside office, and not in the interest of the organization, except to the extent that those interests are consistent. Therefore, it is the position of the Office of Legal Counsel that "officer, director, [or] trustee," as used in § 208, should not be read to include an ex officio member of an essentially private body, whose service in that body derives only from a public office of trust.[7]

That is, the Attorney General, as an ex officio member of the National Trust, is charged with the responsibility of representing the interests of the United States in matters that come before the Trust.[8] If the Trust's interests and those of the United States are the same with respect to a particular matter coming before the Board, the Attorney General can, in effect, further the interests of the Trust.

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[5] Section 208 is restated, with modifications not relevant here, in the Department of Justice's conflict of interest regulations. 28 C.F.R. § 45 735–5 (1981). The remaining regulations dealing with conflicts of interest for Department of Justice officers or employees are not applicable here.

[6] The National Trust apparently does not own or manage the Anderson Ferry, which is the historic property allegedly threatened by the Corps of Engineers' actions, and therefore it is difficult to see how the Trust would have any financial interest at stake in the litigation.

[7] This Office has previously taken this position in response to a possible conflict of interest raised by participation by the Attorney General and Deputy Attorney General in a decision whether to file an antitrust suit against the American Bar Association (ABA), in light of their ex officio membership in the ABA House of Delegates. *See* Memorandum to Thomas E. Kauper, Assistant Attorney General, Antitrust Division, from Mary C Lawton, Deputy Assistant Attorney General, Office of Legal Counsel (May 21, 1976).

[8] The legislative history of 16 U.S.C § 468b is silent on the reason for inclusion of the Attorney General as an ex officio trustee of the National Trust. The most reasonable inference to be drawn, particularly as Congress did not contemplate that the Trust would be subject to control by the Executive Branch (*see* note 1, *supra*), is that Congress intended the Attorney General to represent the interests of the United States—not that Congress intended the Attorney General to provide legal representation for the Trust.

However, if those interests conflict, the responsibility of the Attorney General is clear; he must represent the interests of the United States in accordance with his responsibilities as chief federal law enforcement officer. No question of divided loyalties is presented, and we believe therefore that the proscriptions of § 208 do not apply.

We have also considered those canons of the Code of Professional Responsibility that might be said to bear on your question. Three canons are possibly relevant: Canon 4, which provides that a lawyer should preserve confidential information of his client; Canon 5, which provides that a lawyer should exercise independent professional judgment on behalf of his client; and Canon 9, which provides that a lawyer should avoid "even the appearance of professional impropriety."

Each of these canons applies to professional participation by a lawyer in a matter in which he or she has or appears to have divided loyalties—for example, if he or she represents multiple clients with conflicting interests or has personal dealings or responsibilities that could influence his or her professional judgment. As we discussed with respect to applicability of the conflict of interest laws, the Attorney General has no such divided loyalties here; his only "client" is the United States, and his responsibility is to represent the interests of the United States. It is our view, therefore, that no actual or apparent conflict of interest or appearance of impropriety exists for the Attorney General, or therefore for you, with respect to the current suit.

A related question is whether the Attorney General would breach some fiduciary duty owed to the Trust, for example, by disclosing confidential information given to the trustees to Department lawyers responsible for defending the suit on behalf of the Corps of Engineers. In private trust law, a trustee generally owes a duty of loyalty to the beneficiaries of the trust and may not put himself in a position in which it would be to his benefit (here, to the benefit of the United States) to violate his fiduciary duty. *See* 2 Scott, The Law of Trusts § 170 (3d ed. 1967). For much the same reason as we discussed above with respect to any possible conflict of interest, we do not believe that, if the interests of the United States are at stake, the Attorney General owes a fiduciary duty to the Trust.[9] The Attorney General's role and responsibility vis-à-vis the Trust are only those imposed by statute. As we have discussed, his statutory responsibility under 16 U.S.C. § 468b is to represent the interests of the United States. Similarly, his statutory responsibility under 28 U.S.C. § 519 (*see* note 1, *supra*) is to exercise his best judgment to determine if and how to defend the Army Corps of Engineers against the claims filed by the National Trust. We do not see how the Attorney General could be thought to violate a fiduciary duty to the Trust by carrying out his statutory responsibilities in a manner that, in his best judgment, is necessary to serve the interests of the United States.

[9] We do not deal with the question whether the Attorney General stands in a fiduciary relationship, in his capacity as trustee, with respect to matters that do not involve the interests of the United States.

Even if the Attorney General is governed by principles applicable to private trustees, it is a well-settled principle under private trust law that, while a trustee ordinarily owes a duty of loyalty to the beneficiaries of the trust, that requirement may be altered by the terms of the trust:

> [W]here the settlor knew when he drew the trust that the trustee whom he proposed to name was then in a position which after the acceptance of the trust would expose him to a conflict between personal and representative interest, it has been held that there was an implied exemption from the duty of loyalty so far as that transaction was concerned.

G. Bogert, Trusts and Trustees § 543 at 583 (2d ed. 1960).

When Congress established the National Trust, it could have foreseen that the Attorney General might be placed in a position in which there would be a conflict between the interests of the Trust and the interests of the United States. Thus, even applying private trust law principles, there is no breach of fiduciary duty inherent in the Attorney General's participation in matters coming before the Board of Trustees while the current litigation is pending, including the subject of the litigation itself.

We conclude that you, the Attorney General, or your delegated representative may continue to participate in all activities of the Board of Trustees during the pendency of the suit against the Corps of Engineers, and that neither you nor the Attorney General need disqualify yourself from supervision of the litigation on behalf of the Corps. If you feel it advisable from a policy standpoint, you may, of course, discuss any concerns you may have with the Trust, or may choose to recuse yourself from consideration of any questions concerning the litigation that may come before the Board. We do not believe, however, that you are obligated to do so.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Committee Approval Provision in the Simpson-Mazzoli Immigration Bill

The provision in the Simpson-Mazzoli immigration bill, which gives the House and Senate Judiciary Committees power to dispense with certain otherwise applicable statutory requirements for an employment eligibility system, is unconstitutional, whether viewed as allowing a congressional committee to exercise delegated executive power, or as authorizing a legislative act without the necessary requirements of bicameralism and presentation to the President

July 15, 1982

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum addresses the question whether the committee approval provision in the Simpson-Mazzoli immigration bill comes within the class of so-called "legislative veto" provisions to which the Department of Justice objects on constitutional grounds. We believe that it does, for reasons set forth in this memorandum.

The relevant provision is § 101(c) of S. 2222, which provides in pertinent part as follows:

> (c)(1) Within three years after the date of the enactment of this section, the President shall implement such changes in or additions to the requirements of subsection (b) [which deals with eligibility for employment] as may be necessary to establish a secure system to determine employment eligibility in the United States, which system shall conform to the requirements of paragraph (2).
>
> (2) Such system shall be designed in a manner so that—
> (A) the system will reliably determine that a person with the identity claimed by an employee or prospective employee is eligible to work, and that the employee or prospective employee is not claiming the identity of another individual;
>
> (B) if the system requires an examination by an employer of any document, such document must be in a form which is resistant to counterfeiting and tampering, *unless the President and the Judiciary Committees of the Congress have determined that such form is unnecessary to the reliability of the system* . . . .

S. 2222, *reprinted in* S. Rep. No. 485, 97th Cong., 2d Sess. 32 (1982) (emphasis added). The italicized language contains the committee approval mechanism. The President is directed by subsection (c)(1) to "implement such changes in or additions to the requirements" of subsection (b) "as may be necessary to establish a secure system to determine employment eligibility in the United States . . . ." The system "shall conform to the requirements of paragraph (2)," which includes the committee approval mechanism. In particular, if the system requires an examination by an employer of any document, such document "must be in a form which is resistant to counterfeiting and tampering, *unless the President and the Judiciary Committees of the Congress have determined that such form is unnecessary to the reliability of the system* . . . ." (emphasis added). We interpret this language to mean that so long as the system requires an employer to look at any document, the document must be tamper-proof unless there is, in effect, agreement between the President and the House and Senate Judiciary Committees that such tamper-proof requirements are not needed to assure a reliable system.

When the provision is so interpreted, it purports to allow the Judiciary Committees to exercise delegated power under the statute. The Judiciary Committees would be given power to decide whether or not a tamper-proof system of documentation will or will not be required. If the President were to determine that tamper-proof requirements were unnecessary in any particular instance, he nevertheless would have to implement such requirements if the Judiciary Committees did not agree with him. The exercise by the Committees of this kind of governmental power, as an analytical matter, is necessarily either an executive or a legislative action for constitutional purposes. (We believe that it would clearly not be a judicial action, for it constitutes the exercise of delegated power to establish what the law will be, not the adjudication of a case or controversy on particular facts.) This being so, the question is whether the Judiciary Committees may be authorized by statute to play the role in the execution of this bill contemplated in subsection (c)(2)(B). The answer, in our view, is no.

Assuming that the exercise of such authority by the Judiciary Committees were sought to be justified on the ground that it constitutes an appropriate exercise of Article I legislative power, the exercise of such power must follow a constitutionally prescribed procedure. The Constitution plainly bars Congress from assigning to one or more of its committees alone the authority to exercise legislative power by adopting measures intended to have legal effect outside the Legislative Branch. Such lawmaking power may be accomplished only by the combined action of both Houses of Congress and the President, or if there is a presidential veto, by two-thirds of both Houses of Congress.

Article I, § 1 of the Constitution vests "[a]ll legislative powers herein granted" "in a Congress of the United States, which shall consist of a Senate and House of Representatives." The legislative power granted by the Constitution is "the authority to make laws," *Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976), quoting *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928). Alexander Hamilton emphasized this basic point when asking rhetorically: "What is a legislative

power but a power of making Laws? What are the *means* to execute a legislative power but laws?" *The Federalist* No. 33 (A. Hamilton), at 204–205 (J. Cooke ed. 1961) (emphasis in original).

The procedure for passing laws, whether called bills or resolutions or votes before passage, is set forth in Article I, § 7, Clauses 2 & 3. Clause 2 provides in pertinent part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes 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 . . . .

If the President disapproves the bill, "it shall become a Law" only if two-thirds of both Houses of Congress override the disapproval.

If Clause 2 appeared alone in the Constitution, it could be argued that the requirements of bicameral passage of a legislative measure and presentation to the President could be evaded by using some mechanism other than a "Bill," such as, for instance, a "resolution" or a committee "vote" or determination such as contemplated by the present bill that is not cast in terms of any formal procedure. This possibility was foreseen by the Framers. As a result, Clause 3 was added, which provides:

> 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.

The "Concurrence" of the Senate and House of Representatives is "necessary" under the Constitution whenever Congress attempts to exercise the legislative power granted by Article I. Accordingly, when the Judiciary Committees seek to determine whether a tamper-proof system of identification will or will not be required, they are exercising legislative powers. Such exercise of authority is subject to the bicameralism and presentation requirements if that exercise is to be legally binding.

We note that the Senate Judiciary Committee interpreted Article I, § 7, Clause 3 in a manner consistent with our analysis in a thorough historical study conducted in 1897. The Committee concluded at that time that the concurrence of both Houses and presentation to the President are required with respect to all resolutions that "contain matter which is properly to be regarded as legislative in its character and effect." S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897).

Furthermore, the principles we have put forward have been embraced by the United States Court of Appeals for the District of Columbia Circuit in *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, 673 F.2d

425 (D.C. Cir. 1982). In this case, the court, without dissent, ruled that a provision of the Natural Gas Policy Act of 1978 purporting to authorize one House of Congress to invalidate an incremental pricing regulation promulgated by FERC was unconstitutional. As the court noted, "[t]he primary basis of this holding is that the one-house veto violates Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress." *Id.* at 448. *See also Chadha* v. *Immigration and Naturalization Service,* 634 F.2d 408, 433 (9th Cir. 1980) ("Having vested all legislative power in the Congress, the framers deemed it necessary not only to design checks on that power by means of the other branches, but also to use the internal checks of bicameralism.").[1]

We understood that a question about the foregoing analysis has been raised on the ground that the committee approval mechanism in the Simpson-Mazzoli bill would purport to empower the Judiciary Committees to eliminate the tamper-proof requirement, rather than to impose a new requirement. The suggestion appears to be that whenever Congress seeks to authorize its committees to excuse the Executive Branch from an otherwise-applicable legal requirement, rather than to impose a new legal constraint, Congress may do so as a constitutional matter without complying with Article I, § 7, Clauses 2 & 3.

We believe that this suggestion finds no support whatsoever in the Constitution's text, history or purposes. It makes no difference whether the committee action would seek to add new requirements, or to repeal, withdraw or waive old restrictions. So long as the committee action constitutes an exercise of legislative power, it is invalid unless it conforms to the constitutionally prescribed procedures in Article I, § 7, Clauses 2 & 3. Congress surely may block the execution of any law by the President if it chooses to do so. However, it is our view that in order to do so, Congress must pass plenary legislation subject to the President's veto.

The underlying legal deficiency of the foregoing suggestion is illustrated by extending the argument to its rational conclusion. Under the suggested logic, it would be acceptable, for instance, for a statute to require the Executive Branch to halt all programs and activities presently authorized, unless the Judiciary Committees approve (along with the Executive Branch) of the continuation of a given program or activity. This kind of realignment of power in the national government, albeit extreme, is different only in degree from the rearrangement contemplated by the committee approval provision in the Simpson-Mazzoli bill. Such a statutory arrangement would purport to give to the Judiciary Committees the power to decide whether legal requirements will or will not be imposed on (and rights conferred on) the Executive Branch or, indeed, private persons. The exercise of such power is consummately a legislative decision. As we have discussed, under our Constitution such a decision may be made only after compliance with the plenary legislative process mandated by Article I, § 7, Clauses 2 & 3.

[1] In *Chadha,* the court of appeals held unconstitutional a provision of the Immigration and Nationality Act that purports to allow one House of Congress to overturn the decision of the Attorney General suspending the deportation of an alien. The case is presently pending before the Supreme Court, having been recently set down for reargument during the coming term of the Court

In addition, the attempt to confer on committees of Congress power to determine whether or not tamper-proof documentation will be necessary "to the reliability of the system" also may be seen as an attempt to confer on congressional committees executive power. Executive power is the power to execute the laws. As Chief Justice Marshall observed, "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law." *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). *See also Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976), quoting *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928). Under the principle of the separation of powers—which is one of the basic principles underlying the Constitution—it is unconstitutional as a substantive matter to confer on a Legislative Branch entity, such as a committee of Congress, power to execute the laws. As the Supreme Court wrote in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 121–122, quoting *Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928), "'it is a breach of the National fundamental law if Congress . . . by law attempts to invest itself or its members with either executive power or judicial power.'"

The substantive unconstitutionality of attempting to vest in the Judiciary Committees power to determine whether or not tamper-proof documentation will be required follows directly, in our view, from the Supreme Court's decision in *Buckley, supra*. In that case, the Court held unconstitutional a statutory provision authorizing the President *pro tempore* of the Senate and the Speaker of the House of Representatives to appoint members of the Federal Election Commission. *See* 424 U.S. at 109–41. In discussing this matter, the Court extensively reviewed the doctrine of separation of powers and, in particular, its expression in the Appointments Clause, Article II, § 2, Clause 2. The Court concluded that any "significant governmental duty . . . pursuant to a public law" (*id.* at 141)—which includes promulgating regulations, issuing advisory opinions, determining eligibility for benefits and otherwise executing the law—must be exercised by "Officers of the United States" appointed by the President or otherwise in conformity with the Appointments Clause. Such duties, the Court held, cannot be exercised by officials appointed by Congress. *Id.* at 138–141; *see also id.* at 125–126.

Under the Simpson-Mazzoli bill, Congress would purport to authorize the Judiciary Committees to make the determination that a tamper-proof documentation system is or is not necessary for the reliability of the Nation's employment eligibility system. Such exercise of authority plainly constitutes the exercise of significant governmental duties that involve the discharge of executive power. That kind of action, as *Buckley* held, can be exercised only by officers of the Executive Branch, not by members of the Judiciary Committees.

The underlying substantive defect of the attempt to confer on the Judiciary Committees power to determine whether or not a tamper-proof identification system will be required is essentially similar to the defect found to exist by the Court of Appeals for the Ninth Circuit in *Chadha* v. *Immigration and Naturalization Service*, *supra*, in a provision allowing one House of Congress to overturn a decision to suspend an alien's deportation. In both cases, the separation of powers principle is violated by attempts to vest executive decisionmaking authority in a

Legislative Branch entity. The effect of such a scheme is to render the efforts of the Executive Branch faithfully to execute the laws entirely tentative and conditional on action—whether by means of disapproval or approval—by legislative authorities. The *Chadha* court summarized as follows its rejection of such legislative provisions on the basis of the separation of powers principle:

> We cannot accept that definite, uniform, and sensible criteria governing the conferral of government burdens and benefits on individuals should be replaced by a species of non-legislation, wherein the Executive branch becomes a sort of referee in making an initial determination which has no independent force or validity, even after review and approval by the Judiciary, save and except for the exercise of final control by the unfettered discretion of Congress as to each case. . . . In such a world, the Executive's duty of faithful execution of the laws becomes meaningless, as the law to be executed in a given case remains tentative until after action by the Executive has ceased.

634 F.2d at 435–36. In response to the argument that the Necessary and Proper Clause of Article I, § 8, should permit Congress to reserve to itself power to determine whether a requirement will or will not be imposed on the Executive Branch, *Chadha* noted that this Clause "authorizes Congress to 'make all laws,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power." *Id.* at 433.

In sum, if the committee approval mechanism in the Simpson-Mazzoli bill is sought to be justified as an exercise of Congress' Article I power, it is invalid because it does not contemplate the exercise of legislative authority by means of the procedures set forth in Article I, § 7, Clauses 2 & 3. In addition, to the extent that the committee approval mechanism would authorize the Judiciary Committees to determine when a tamper-proof system is necessary and when it is not, the provision would seek to authorize the Committees to act as if they were Executive Branch officials, which they are not. Thus, the provision also violates the separation of powers principle.

We note in closing that the procedural and substantive limitations discussed in this memorandum are not mere formalities or empty legalisms that are being employed to seek a result desired on other grounds. To the contrary, these principles lie at the core of our nation's constitutional scheme. They could not be more fundamental. As a result, since they apply directly to the committee approval provision in the Simpson-Mazzoli bill, we are constrained to object strongly to that provision.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Importation of Morphine Sulfate for Placement in the National Defense Stockpile

The Attorney General may authorize the General Services Administration to import morphine sulfate from Turkey for placement in the National Defense Stockpile under an exception in 21 U.S.C. § 952(a)(2)(A), if he determines that acquisition by import is necessary due to an emergency in which domestic supplies are inadequate to meet a legitimate need of the United States.

A reasonable argument can be made that the prohibition in 21 U.S.C. § 952(a) does not apply to the importation of drugs by the United States, notwithstanding long-standing and consistent administrative practice and interpretation to the contrary.

July 19, 1982

MEMORANDUM OPINION FOR THE ACTING ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION

You asked whether the Attorney General[1] may, in light of 21 U.S.C. § 952(a), permit the General Services Administration (GSA) to import, for placement in the National Defense Stockpile, morphine sulfate manufactured in Turkey. Assuming that § 952(a) applies to the importation of drugs by the United States, although a reasonable legal argument can be made that it does not, we conclude that the Attorney General may nevertheless be in a position to sanction the import if the facts indicate that it would fall within an exception to the § 952(a) prohibition.[2]

Section 952(a) provides:

> It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of

[1] Your question is phrased in terms of the authority of the Attorney General. We note, however, that the Attorney General's authority under 21 U.S C. § 952(a) has been delegated to the Administrator of the Drug Enforcement Administration, 28 C.F.R. § 0 100, and has, in the past, been exercised by him. *E.g.*, 39 Fed Reg 44033 (1974). For the purposes of consistency, both with the language of your request and with that of the statute, we will refer throughout our opinion to the authority of the Attorney General under § 952(a). It should be understood, however, that the Administrator of the Drug Enforcement Administration is the official who actually exercises that authority

[2] You asked also that we consider, if we conclude that § 952(a) prohibits the import, whether other, superior legal authority is available to authorize it We have researched this point and have found no statute which by its terms or by fair implication would authorize the President, the Attorney General, or any other Executive Branch official to permit an import otherwise prohibited by § 952(a) Nor do we know of a constitutional power of the Executive, applicable in present circumstances, to override a valid law enacted by Congress and made applicable to the United States.

subchapter I of this chapter or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Morphine sulfate is a schedule II controlled substance within the meaning of § 952(a). 21 C.F.R. § 1308.12 (1981). It is not crude opium. Under the plain language of § 952(a) its importation into the United States is, therefore, unlawful unless one of the exceptions of subsection (2) applies. You have informed us that, in your view, competition among domestic manufacturers of morphine sulfate is adequate and that the exception contained in § 952(a)(2)(B) is, for this reason, unavailable on the facts. We accept this assessment and our opinion does not treat that exception. You observe also that "today, no shortage of morphine sulfate is known to exist." This observation calls into question the applicability of the exception provided for in § 952(a)(2)(A). We are reluctant, however, to conclude, on the basis of your observation—notwithstanding the recognized expertise of the Drug Enforcement Administration (DEA) concerning the normal needs of the country for morphine sulfate and the adequacy of domestic supplies to meet those needs—that the availability of a § 952(a)(2)(A) exception is necessarily foreclosed under the facts in the case at hand. Our reluctance stems from our belief that agency expertise in addition to that of DEA should appropriately be consulted to permit full factual development and to assist in making or rejecting the finding required by § 952(a)(2)(A).

As stated above, GSA wishes to import morphine sulfate from Turkey for placement in the National Defense Stockpile. Under the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. §§ 98–98h–4 (Supp. III 1979), the President is charged with responsibility to "determine from time to time (1) which materials are strategic and critical materials for the purposes of [the

Act], and (2) the quality and quantity of each such material to be acquired for the purposes of [the Act] and the form in which each such material shall be acquired and stored." 50 U.S.C. § 98b(a). He is directed to acquire and store materials determined to be strategic and critical, 50 U.S.C. § 98e(a)(1) and (2), in the "interest of national defense," and in quantities "sufficient to sustain the United States for a period of not less than three years in the event of a national emergency." 50 U.S.C. § 98b(b)(1) and (2). The basic purpose which Congress intended the Act, and thus the authority of the President, to serve is "to decrease and to preclude, when possible, a dangerous and costly dependence by the United States upon foreign sources for supplies of [strategic and critical materials] in times of national emergency." 50 U.S.C. § 98a(b). It is clear that the acquisition and maintenance of adequate supplies of strategic and critical materials in the National Defense Stockpile is, under the Act, a high national priority and an important responsibility of the President.

The President has delegated to various officials his functions and authority, although not his ultimate responsibility, *see* 3 U.S.C. § 301, under the Strategic and Critical Materials Stock Piling Act. Executive Order No. 12155 of Sept. 10, 1979, 44 Fed. Reg. 53071, *reprinted in* 50 U.S.C. § 98 note (Supp. III 1979). Relevant here, he has authorized the Director of the Federal Emergency Management Agency (FEMA) to determine on his behalf which materials are to be designated strategic and critical and in what quantity, quality and form they are to be acquired for storage in the National Defense Stockpile. Executive Order No. 12155, § 1–101. In addition, he has delegated to the Administrator of General Services authority to acquire the designated materials. Executive Order No. 12155, § 1–102.

Pursuant to this delegation, the Director of FEMA has, we are informed, designated opium salts in the form of morphine sulfate as a strategic and critical material and has made it one of the highest priority items for acquisition for the National Defense Stockpile. At present, in spite of this high priority, the supply of opium salts, together with an equivalency in raw opium from which the salts may be processed, is 58,697 AMA (anhydrous morphine alkaloid) lbs., or approximately 45 percent, below the goal of 130,000 AMA lbs. which the Director of FEMA has set. The Administrator of General Services is attempting "to correct this critical shortage" and plans to acquire approximately 44,000 AMA lbs. of opium salts within one year. The Administration has determined that 20,000 AMA kilograms (approximately 44,000 AMA lbs.) of morphine sulfate, the form of opium salts which FEMA has specified as its first preference for storage in the National Defense Stockpile, can be acquired from the Turkish Soil Products Office within the established one-year time period.

We doubt that it can be disputed that the acquisition of morphine sulfate for the National Defense Stockpile is, within the terms of § 952(a), in furtherance of a legitimate need of the United States. The factual question remains, however, whether such acquisition by import from Turkey (as opposed to by purchase from U.S. manufacturers) is necessary due to an emergency in which domestic supplies of morphine sulfate are inadequate to meet this legitimate need. This is

the finding required by § 952(a)(2)(A). To answer this question, we believe it is essential first to identify precisely what that need is, second to determine whether failure to fulfill that need creates an emergency situation, and finally to examine whether domestic supplies are adequate to meet the need as identified, within the time period set by FEMA and GSA.

Since FEMA is the government agency with both the authority and primary responsibility under Executive Order No. 12155 to determine what the need is, and with the expertise to know whether failure to meet that need creates an emergency with respect to the defense preparedness of the United States, its views on these issues should be solicited and will be entitled to considerable weight. It is also apparent that GSA, which is charged with fulfilling the need, is in a position to have or to develop the facts concerning the adequacy and availability of domestic supplies to satisfy the need according to the terms set by the two agencies.

We cannot, of course, predict whether, after FEMA and GSA have been consulted and additional information made available to DEA from other sources has been considered, the facts will establish the availability of a § 952(a)(2)(A) exception for the importation from Turkey of morphine sulfate for the National Defense Stockpile. We cannot rule out the possibility, however, that an inquiry properly focused on the relevant facts would establish that § 952(a)(2)(A) is applicable to the proposed import. Such an inquiry should give due consideration to the requirements and views of FEMA and GSA, as well as to the facts presented by them and by other interested parties,[3] including: the need for the specific substance morphine sulfate in the National Defense Stockpile; the quantity and quality of morphine sulfate needed; the period of time within which that need must be met; the consequences to national defense preparedness if that need is not fulfilled within that time period; whether those consequences would constitute an emergency; and whether domestic supplies of morphine sulfate are, or will be, adequate during the relevant time period to meet that need, both as to quantity and quality, given that the medical, scientific, and other legitimate needs of the United States, including the maintenance by private industry of sufficient reserve supplies, for opium-based drugs must be met simultaneously.

As we noted earlier, a legal argument can be made that § 952(a) is inapplicable in the case of an import by the United States, through one of its agencies, of a controlled substance otherwise within the scope of this statute. This argument is based on a line of Supreme Court cases best typified by *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), which hold that, as a matter of statutory construction, unless extraneous and affirmative reasons (such as the legislative history or the context within which a statutory scheme operates) indicate otherwise, "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." *Id.* at 272. *See also Hancock* v. *Train*, 426 U.S. 167 (1976); *United States* v. *Wittek*, 337 U.S. 346 (1949); *United States* v. *Herron*, 87 U.S. (20 Wall.) 251 (1874); *United*

[3] A formal hearing on the availability of a § 952(a)(2)(A) exception is not required. 21 U.S.C. § 958(h).

States v. *Knight*, 39 U.S. (14 Pet.) 301 (1840); and 26 Op. Att'y Gen. 415 (1907) (Statute prohibiting, on penalty of forfeiture, transportation of merchandise from one United States port to another in foreign-owned vessels inapplicable to the shipment of property owned by the United States).

Without going into detail, we observe that nothing specific in the language of § 952(a) or of its predecessor statute, the Narcotic Drugs Import and Export Act of 1922, Pub. L. No. 227, § 2(b), 67th Cong., 2d Sess., 42 Stat. 596, 21 U.S.C. § 173 (1964) and little in their combined legislative histories indicates clearly that they were intended to restrict the actions of the United States. Thus application to § 952(a) of the rule of construction that general statutes do not divest the sovereign of pre-existing rights is not clearly precluded. The argument that § 952(a) should not be construed to prohibit importation by the United States is strengthened when one considers the statutory mechanisms chosen by Congress to enforce it: criminal prosecution, 21 U.S.C. § 960, and forfeiture to the United States, 21 U.S.C. §§ 965, 880. Both penalties are inappropriate for application to the United States.

Other arguments, however, support the conclusion that the prohibition of § 952(a) should be applied to the United States. Primary among these is that DEA and its predecessor agencies responsible for enforcing § 952(a) and its progenitor have long interpreted the provisions as applicable to the United States, *e.g.*, 21 C.F.R. §§ 1311.24–25 (Exempting military personnel and certain federal law enforcement personnel from import and export registration requirements). The United States, as an administrative practice, has never imported narcotics in violation of these provisions. This interpretation by the agency responsible for administering the statute, and the long and consistent administrative practice, would, we believe, carry great weight with the courts. *E.g.*, *United States* v. *Rutherford*, 442 U.S. 544, 553–54 (1979). Moreover, although direct evidence is scanty, there is some indication in the legislative history that § 952(a) is intended, at least in part, to foster a United States industry to produce opium-based drugs and to protect that industry from foreign competition. *See generally Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings Before the House Committee on Ways and Means*, 91st Cong., 2d Sess., 458–62 (1970) (Statement of Stephen Ailes). *See also* 21 U.S.C. § 958(h) (Giving U.S. manufacturers certain hearing rights before imports may be authorized). Failure to apply the law to the United States, a substantial consumer of such drugs, arguably would be inconsistent with such an intent. Further, § 952(a), like its predecessor, places an absolute ban on the importation of opium for manufacturing heroin or smoking opium. Since this prohibition was derived from § 952(a)'s predecessor and since that statute was enacted in large part in reaction to adverse congressional and public opinion concerning the increase in drug use in the United States for non-medical purposes—particularly opium smoking—it seems doubtful that Congress meant to exempt the United States

from this particular prohibition. Finally, § 952(a) must be read in *pari materia* with 21 U.S.C. § 953(a)[4], dealing with the export of controlled substances. We note that the prohibitions of that section almost certainly are applicable to exports by the United States since they are intended to implement the treaties and international conventions cited in that section and those treaties and conventions apply, by their terms, to actions of the United States government.

In conclusion, an argument can be made, as outlined briefly above, that § 952(a) does not bind the United States. Nevertheless, a contrary legal argument can be made, based on administrative practice and interpretation, that it does. In these circumstances, we conclude that it would be imprudent to rely solely on this argument to attempt to justify the proposed import by GSA of morphine sulfate from Turkey without first carefully examining the relevant facts available to FEMA and GSA to determine whether the § 952(a)(2)(A) exception is available. Should you determine that the facts do not support an exception under that section, we would be pleased to explore more fully the legal question of the applicability of § 952(a) to imports of controlled substances by the United States.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[4] Both are sections of the Controlled Substances Import and Export Act, which was enacted as Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub L No 91-513, Title III, 91st Cong , 2d Sess., 84 Stat. 1285.

Department of Justice Representation of Federal Employees in Fair Employment Suits

Government attorneys are not prohibited by 18 U.S.C. § 205 from representing federal employees in judicial personnel administration proceedings, as long as the representation is uncompensated and is not inconsistent with the attorney's performance of his or her official duties. However, Department of Justice regulations prohibit departmental attorneys from representing federal employees in fair employment suits in federal court, explicitly limiting such representation to administrative complaint procedures.

July 23, 1982

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

This responds to your request for the views of this Office regarding the representation by Department of Justice attorneys of federal employees with Equal Employment Opportunity (EEO) complaints. Specifically, you asked whether a Department of Justice attorney could represent a federal employee in a fair employment suit against a federal agency, and if so, whether such representation depended upon the division or section in which the attorney works, or whether the employee's claim was against the Department of Justice.

The statute which addresses the "conflict of interest" issues raised by your request is 18 U.S.C. § 205.[1] This section prohibits "officer[s] or employee[s] of the United States" from "act[ing] as agent or attorney for prosecuting any claim

[1] 18 U.S.C. § 205 provides in pertinent part:

> Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties—
>
> (1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or
>
> (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both
>
> * * * * *
>
> Nothing herein prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

against the United States, or receiv[ing] any gratuity, [therefor]" or from "act[ing] as agent or attorney for anyone before any department, agency, [or] court . . . in connection with any proceeding, . . . in which the United States is a party or has a direct and substantial interest." Excepted from the prohibitions contained in this section are "officer[s] or employee[s] [who,] if not inconsistent with the faithful performance of [their] duties, . . . act [ ] without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings."

With respect to Department of Justice employees, the Department has promulgated regulations with similar language in 28 C.F.R. § 45.735–9(c)(1),[2] and § 45.735–6(c) (1981).[3] In addition, in 1973 the Department issued DOJ Order 1713.5 establishing its policy regarding volunteer representation of employees of the Department who are involved in EEO complaint procedures.[4] This order, which is embraced by regulations most recently revised by the Department in 1980, prohibits the representation of EEO complainants in federal court by Department attorneys, explicitly limiting such representation to administrative complaint procedures.

As you noted in your opinion request, Attorney General Edward H. Levi issued two memoranda on November 20, 1975, encouraging representation by all government attorneys of federal employees with EEO complaints "during all phases of the proceedings," so long as the representation would not be inconsistent with the employee's faithful performance of his or her duties and the employee is not compensated for such work. Levi, Memorandum to All Employees re: Representing Equal Employment Opportunity Complainants at 1 (November 20, 1975); Levi, Memorandum to Heads of Departments and Agencies re: Representation by Federal Employees of EEO Complainants (November 20, 1975). The memorandum directed to the heads of agencies stated that, while the Department of Justice found no distinction under § 205 between administrative and judicial proceedings, the determination whether policy considerations warranted a distinction between administrative and judicial proceedings was the responsibility of each agency.

The memorandum directed to Department of Justice employees did not explicitly prohibit representation by federal employees of EEO complainants in judicial proceedings; however, the memorandum does appear to have con-

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[2] Section 45.735–9(c)(1) provides in pertinent part:

> Representation of Federal Employees in Equal Employment Opportunity (EEO) complaint procedures may be provided in accordance with § 45.735–6(c) of this title and the Department's established EEO policy (see DOJ Order 1713.5) rather than this subsection.

[3] Section 45 735–6(c) provides:

> (c) Nothing in this part shall be deemed to prohibit an employee, if it is not otherwise inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person in a disciplinary, loyalty, or other Federal personnel administration proceeding involving such person

[4] *See* Department of Justice Order No. 1713 5, Volunteer Representatives for Employees Involved in EEO Complaint Procedures (Oct. 30, 1973)

templated such a limitation,[5] particularly when considered in the context of the 1973 DOJ Order 1713.5, which established the "EEO Volunteer Representatives Program" for the Department, and current Department regulations citing that order.[6]

Thus, in answer to your specific question, Department of Justice attorneys are presently prohibited from representing federal EEO complainants in federal courts—without regard to the division in which the attorney is employed, or whether the complaint has been filed against the Department of Justice. We would add that this prohibition is based on DOJ Order 1713.5 and current Department regulations, not on our interpretation of the conflict of interest provisions contained in § 205. Both prior to and since Attorney General Levi's November 20, 1975, memorandum to agency heads, this Office has taken the position that § 205 excepts from its general conflicts provision the representation of federal employees in personnel administration proceedings in court as well as before agencies, so long as the representation does not, in the judgment of an appropriate official, conflict with the attorney's official duties.[7]

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[5] In discussing the relevant conflict of interest provision, the memorandum states that a federal employee "representing a person *before a government agency* in a personnel proceeding, such as the EEO complaint process," is generally exempt from the conflict of interest laws, so long as the representation is uncompensated and is not inconsistent with the attorney's faithful performance of his or her duties Levi, Memorandum to All Employees, *supra* at 2 (emphasis added)

[6] *But cf* Rex E. Lee, Assistant Attorney General, Civil Division, Memorandum to All Section and Unit Chiefs re Representation by Federal Employees of EEO Complainants (Mar 26, 1976) (concluding that the Levi memorandum to Department employees *does* authorize representation in federal courts by Department of Justice attorneys, but advising Civil Division attorneys that they are not authorized to participate in such representation because of the conflicts that might arise, "since the representation of the government in these cases is a traditional function of the Civil Division once the case proceeds to litigation." *Id.* at 1).

[7] *See* Roger X Cramton, Assistant Attorney General, Memorandum for the Deputy Attorney General re Representation by Department of Justice Attorneys of Federal Workers Claiming Discrimination in Employment (Oct. 31, 1972); Leon Ulman, Acting Assistant Attorney General Memorandum for the Assistant Attorney General, Criminal Division re. *Charles E. Langyher, III, et. al.* v *United States*—Applicability of 18 U S.C. § 205 to Participation of Counsel (May 10, 1972); Frank Wozencraft, Assistant Attorney General, Letter to the General Counsel, United States Civil Service Commission (May 8, 1967); Norbert X Schlei, Assistant Attorney General, Letter to the General Counsel, Post Office Department (Feb 26, 1965)

Reimbursement for Defense Department Assistance to Civilian Law Enforcement Officials

The Department of Defense Authorization Act of 1982 authorizes the Secretary of Defense to seek reimbursement from civilian law enforcement agencies to whom the Department provides various forms of assistance, and the Secretary of Defense may condition his Department's provision of assistance on such reimbursement. However, the Act also gives the Secretary discretion to waive a requirement of reimbursement for assistance provided under its authority.

The Economy Act, 31 U.S.C. § 686 (1976), provides general authority for one agency to request assistance from another agency for an activity or operation that the requesting agency has authority to perform, and a performing agency should seek reimbursement for the actual cost of services provided under that Act. However, where there is specific authority for one agency to assist another, the provisions of the Economy Act do not apply.

July 24, 1982

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for an opinion regarding reimbursement for assistance provided by the Department of Defense to civilian law enforcement officials under the Department of Defense Authorization Act, 1982.[1] This Act provided the Defense Department with express authorization to provide certain assistance to civilian law enforcement officials. With such express authorization, the provision of such assistance cannot be said to violate the Posse Comitatus Act, a Reconstruction-era law generally limiting the role of the Nation's military forces in executing the law.[2] The narrow issue upon which you have requested our opinion is whether the Defense Department is required to seek reimbursement from civilian law enforcement agencies for authorized assistance it provides pursuant to this Act, or whether, under this Act, that Department is authorized to condition assistance on reimbursement although it need not do so.

It is our opinion, after reviewing the Act and its legislative history as well as a number of memoranda prepared by the Defense Department,[3] that the Act

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[1] The Department of Defense Authorization Act, 1982, is Pub L No 97-86, 95 Stat. 1099 (1981).

[2] The Posse Comitatus Act is codified at 18 U.S.C § 1385. That Act's general restriction on the Defense Department's authority to execute the laws is made inapplicable under § 1385 itself if use of the Armed Forces is "expressly authorized by . Act of Congress. . . ."

[3] We have received five main documents from the Defense Department stating its view. (1) a Memorandum for the Deputy Secretary of Defense from the General Counsel, Defense Department, dated March 11, 1982, to which is attached a background discussion of the Act's legislative history; (2) a Memorandum for the Deputy Secretary of Defense from the General Counsel, Defense Department, dated March 18, 1982; (3) Enclosure 5 of Defense Department Directive No 5525.5, dated March 22, 1982, entitled "DoD Cooperation with Civilian Law Enforce-

Continued

authorizes but does not require that Department to seek reimbursement from civilian law enforcement agencies. Our reasons for reaching this conclusion are set forth in section II below. The Defense Department's position on the matter at issue is summarized in section I.

I. The Defense Department's Interpretation

To understand the matter at hand, it is first necessary to set forth the major provisions of the Department of Defense Authorization Act, 1982. They are the following new §§ 371 through 377 of Title 10, United States Code (Supp. V), contained in § 905, Title IX, of the Act:

> § 371. *Use of information collected during military operations*
>
> *The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military operations* that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.
>
> § 372. *Use of military equipment and facilities*
>
> *The Secretary of Defense may, in accordance with other applicable law, make available any equipment, base facility, or research facility* of the Army, Navy, Air Force, or Marine Corps *to any* Federal, State, or local *civilian law enforcement official* for law enforcement purposes.
>
> § 373. *Training and advising civilian law enforcement officials*
>
> *The Secretary of Defense may assign members of the Army, Navy, Air Force, and Marine Corps to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment made available under section 372* of this title and to provide expert advice relevant to the purposes of this chapter.
>
> § 374. *Assistance by Department of Defense personnel*
>
> (a) . . . *the Secretary of Defense*, upon request from the head of an agency with jurisdiction to enforce—
>
> (1) the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

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ment Officials", (4) a letter from the Deputy Secretary of Defense to the Attorney General, dated March 26, 1982; and (5) a letter from the General Counsel, Defense Department, to Theodore B Olson, Assistant Attorney General, Office of Legal Counsel, dated June 11, 1982.

In addition, we have received a copy of testimony by the Defense Department's General Counsel before the Subcommittee on Crime of the House Committee on the Judiciary, dated June 3, 1981, which relates generally to the issue before us Further, we have received a copy of a memorandum prepared by this Department's Office of Legal Policy on the issue at hand, dated April 30, 1982.

(2) any of sections 274 through 278 of the Immigration and Nationality Act (8 U.S.C. 1324–1328); or

(3) a law relating to the arrival or departure of merchandise (as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401)) into or out of the customs territory of the United States (as defined in general headnote 2 of the Tariff Schedules of the United States (19 U.S.C. 1202)) or any other territory or possession of the United States, *may assign personnel of the Department of Defense to operate and maintain or assist in operating and maintaining equipment made available under section 372* of this title with respect to any criminal violation of any such provision of law.

§ 375. *Restriction on direct participation by military personnel.*

The Secretary of Defense shall issue such regulations as may be necessary to *insure that the provision of any assistance* (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official *under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps* in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity *unless participation in such activity by such member is otherwise authorized by law.*

§ 376. *Assistance not to affect adversely military preparedness*

Assistance (including the provision of any equipment or facility or the assignment of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such assistance will adversely affect the military preparedness of the United States. . . .

§ 377. *Reimbursement*

The Secretary of Defense shall issue regulations providing that reimbursement may be a condition of assistance to a civilian law enforcement official under this chapter.

(Emphasis added.)

The foregoing provisions authorize the Defense Department to provide various forms of assistance to civilian law enforcement officials, although certain general limitations must be observed. First, Congress took care to prevent "direct" involvement of military forces in civilian law enforcement activities, *see* § 375. Second, Congress sought to assure that assistance under the Act would not adversely affect the Nation's military preparedness, *see* § 376. In § 377, Congress specifically provided that the Secretary of Defense shall issue regulations

"providing that reimbursement *may* be a condition of assistance to a civilian law enforcement official under this chapter." (Emphasis added.)

The Defense Department's interpretation of its authority to waive reimbursement may be summarized in terms of two major propositions. First, the Department contends that when its authority for assisting civilian law enforcement officials was based on the Economy Act, 31 U.S.C. § 686 (1976), as it was prior to the passage of the Department of Defense Authorization Act, 1982, the Secretary of Defense was legally required to request reimbursement in most situations. This contention rests on an analysis of the Economy Act and decisional law, particularly that of the Comptroller General, under it. Second, the Department argues that nothing in the Department of Defense Authorization Act, 1982, changed that result. In short, the Defense Department urges that the principles of the Economy Act as applied prior to the recent Act's passage still apply.

The Defense Department's position is expressed in the letter of the Deputy Secretary of Defense to you dated March 27, 1982, where it is stated that "[t]he authority of the Secretary of Defense to make reimbursement a condition of assistance under 10 U.S.C. § 377 permits waiver of reimbursement only to the extent that reimbursement is not required by other applicable laws, such as the Economy Act." The letter proceeds to urge that Congress' intent in enacting the recent Act was "to leave in place existing laws governing the provision of assistance to other agencies," and "did not intend . . . to provide a new basis for DoD funding of civilian law enforcement activities." (Page 1.)

As a result of the Defense Department's analysis of the reimbursement issue, it concludes that the recent Act does not accord the Department any new discretion or any general authority to waive reimbursement for assistance provided to civilian law enforcement officials.

II. Analysis of the Defense Department's Interpretation

In responding in this section to the major points underlying the Defense Department's interpretation, we will set forth our own analysis of the reimbursement issue.

(1) First, we find no reason to agree or disagree with the Defense Department's argument about the requirement, prior to the passage of the recent Act, to seek reimbursement from civilian law enforcement agencies for assistance provided to them. It is correct that the Economy Act, 31 U.S.C. § 686, is a source of authority for one agency to request assistance from another agency for an activity or operation that the requesting agency has authority to perform.[4] It also is

[4] As the Comptroller General has stated, the purpose of 31 U.S.C. § 686, which is § 601 of the Economy Act of 1932, as amended, is to authorize inter-agency procurement of work, materials, or equipment 57 Comp. Gen. 674, 676–77 (1978). Congress intended that economies could be achieved by providing such authority to "enable all bureaus and activities of the Government to be utilized to their fullest" *Id.* at 680, quoting H.R. Rep No 2201, 71st Cong., 2d Sess 2–3 (1931) (a report on a predecessor bill) The Economy Act, 31 U.S C. § 686, does not give the performing agency any new authority to perform any function; it only gives the requesting agency authority to request the performing agency to assist the requesting agency if the requesting agency otherwise has authority to perform the function.

generally correct that, under the Comptroller General's opinions interpreting the Economy Act, a performing agency should seek reimbursement for the actual cost of services provided to a requesting agency under the Economy Act.[5] However, in our view, these propositions and the argument employing them as advanced by the Defense Department are essentially beside the point in the present context.

The Economy Act, 31 U.S.C. § 686, is needed only when there is no specific authority for one agency to assist another agency, or no authority for the performing agency to take the action in the course of fulfilling its own statutory duties. In such circumstances, under the terms of the Economy Act, an agency may "place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render. . . ." However, where there is specific authority for one agency to assist another, there is simply no need to rely on the Economy Act in the first place.

This point is clear not only from the Economy Act's language, but also from its legislative history, which makes plain that the chief purpose of enacting the provision was to establish general authority for one agency to assist another agency when specific authority did not satisfy the requesting agency's needs for assistance. *See, e.g.*, 57 Comp. Gen. 675, 678–80 (1978) (reviewing the legislative history of the Economy Act, and noting that prior to its passage, some agencies had specific authority to perform certain classes of work for other agencies, but there was no general authority under which agencies could assist other agencies); H.R. Rep. No. 1126, 72d Cong., 1st Sess. 15–16 (1932).

Accordingly, we cannot accept the suggestions that the Economy Act applies in the present context and that it requires reimbursement for assistance provided by the Defense Department. Our chief difficulty with these suggestions is, in short, that the Economy Act no longer applies since there is no longer any need to use its general authority as the basis on which the Defense Department provides assistance to civilian law enforcement officials. In its plain terms, the Department of Defense Authorization Act, 1982, authorizes the Defense Department to provide certain forms of assistance to civilian law enforcement officials. In such a situation, the law concerning reimbursement under the Economy Act is inapplicable.[6]

(2) Second, the Defense Department's suggestion that nothing in the recent Act countermands its conclusion that reimbursement is required under the Economy Act cannot be reconciled with the plain language of § 377, the reimbursement provision. This provision states specifically that the Secretary of Defense "shall issue regulations providing that reimbursement *may* be a con-

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[5] *See, e.g.*, 57 Comp Gen. 674 (1978), 56 Comp. Gen. 275 (1977); 46 Comp Gen. 73, 76 (1966); 18 Comp. Gen. 262, 266 (1938).

[6] We would emphasize that this conclusion follows directly from the existence in the Department of Defense Authorization Act, 1982, of specific authority for the Defense Department to assist civilian law enforcement agencies. The existence of this specific authority makes it unnecessary to rely on the Economy Act, 31 U.S.C § 686, as the authority for such assistance. Accordingly, even if § 377 of the recent Act had not been enacted, the Economy Act would be inapplicable in the present context.

dition of assistance to a civilian law enforcement official under this chapter." (Emphasis added.) It is difficult to imagine how Congress could have indicated more clearly that the Secretary may—but need not—condition assistance on reimbursement.[7]

This conclusion is supported by the ordinary meaning of "may," which normally indicates that one has permission or liberty to do something, not that one is required or compelled to do something. *See Webster's Third New International Dictionary* 1396 (1976). A statute's terms are ordinarily to be interpreted in light of the usual or customary meaning of the words themselves. *See, e.g., Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). Moreover, it is significant that in § 377, Congress spoke of reimbursement in terms of what the Secretary "may" do, whereas it spoke of the issuance of regulations dealing with reimbursement in terms of what the Secretary "shall" do. This contrast in the use of terms suggests strongly that when Congress wanted to impose a mandatory requirement in this statute—indeed, this very provision—it knew how to do so.

If the plain language of § 377 were an insufficient basis on which to rest the conclusion that the Secretary has discretion to decide whether to condition assistance under the Act on reimbursement, then we believe that consideration of the provision's legislative history confirms the foregoing reading of its plain meaning.

The predecessor provision in the bill introduced in the Senate, S. 815, 97th Cong., 1st Sess. (1981), also was permissive on its face with respect to the issue of reimbursement. It provided:

> The Secretary of Defense shall . . . issue such regulations as may be necessary to insure that reimbursement for the provision of assistance, including the provision of any equipment or facility, under this chapter to any Federal, State, or local civilian law enforcement official may be obtained *whenever the Secretary of Defense determines such reimbursement to be appropriate.*

(Emphasis added.)[8] The report of the Senate Committee on Armed Services stressed that the bill's language was intended to authorize the Secretary to provide certain indirect assistance to civilian law enforcement officials without requiring the Defense Department to provide such assistance. The report also noted that the decision whether to request reimbursement for such assistance was within the Secretary's discretion to so act as "appropriate." As the report stated:

> The Secretary of Defense would be authorized, not required, to provide this aid. And *the Department of Defense could obtain*

[7] We note that because § 377 on its face deals only with "assistance" provided by Defense "under this chapter [§§ 371–77]," any assistance provided by the Department of Defense pursuant to any other existing authority that predated, and is not overlapped by, this Act is not covered by § 377. In other words, if assistance is not authorized by the recent Act, then its provision continues to be governed by the Economy Act

[8] The reimbursement provision in the Senate bill would have been a new § 374(b) of Title 10, United States Code; it appears at pages 64 to 65 of the printed Senate bill

reimbursement for any assistance provided when the Secretary determined such reimbursement was appropriate.

S. Rep. No. 58, 97th Cong., 1st Sess. 149 (1981) (emphasis added).

The House bill, H.R. 3519, 97th Cong., 1st Sess. (1981), contained the same reimbursement provision as the Senate bill.[9] The report of the House Committee on Armed Services noted specifically that the provision was intended to authorize the Secretary to issue regulations "to ensure reimbursement for provisions of assistance, equipment and facilities *whenever he determines reimbursement is appropriate*. . . ." (Emphasis added.) H.R. Rep. No. 71, 97th Cong., 1st Sess. (pt. 1) 164 (1981).

The report of the House Committee on the Judiciary, to which the bill was sequentially referred, elaborated upon the permissive nature of the reimbursement authorization:

> The final subsection of proposed section 374 authorizes the Secretary of Defense to issue *regulations which may condition the rendering of any assistance under this Chapter upon a reimbursement to the military.* According to information received from the Coast Guard, United States Customs Service, and the Department of Justice (the Federal agencies most likely to request assistance), this reimbursement provision is acceptable and should not require any immediate increase in the budgets of those agencies. *The availability of this reimbursement option is not meant to serve as an excuse for the Secretary of Defense to decline to cooperate in the provision of assistance*. Rather, the reimbursement option should serve instead as an informal check of the magnitude and frequency of the requests made by civilian law enforcement officials. *The availability of military assistance is not intended by the Committee to be an indirect method of increasing the budget authority of the civilian law enforcement agency.*

H.R. Rep. No. 71, 97th Cong., 1st Sess. (pt. 2) 11 (1981) (emphasis added).

In the foregoing discussion, the House Judiciary Committee clearly sought to tread a careful line between seeming to impose an undue burden on federal civilian law enforcement agencies, on the one hand, and to impose an excessive burden on the Department of Defense by indirectly "increasing the budget authority of the civilian law enforcement agency" involved, on the other hand. At the same time, the foregoing passage, by referring specifically to "the reimbursement *option*" created by the bill (emphasis added), makes plain that reimbursement under the House bill would not be required by the bill itself, but rather was to be an option available to the Defense Department. The Committee acknowledged that the need to pay for assistance authorized by the bill was likely to operate as an informal check on the number and size of requests for such

[9] The reimbursement provision appears at page 44 of the printed House bill.

assistance. As the Committee put it, "the reimbursement option should serve . . . as an informal check on the magnitude and frequency of the requests made by civilian law enforcement officials." Nevertheless, such a "check" was evidently intended to operate as the result of a *discretionary* decision by the Secretary of Defense to request reimbursement in a particular case, not as the result of any requirement of reimbursement under the bill itself.

The discussion of the reimbursement provision contained in the House bill by the third House Committee to which the bill was referred, the Committee on Government Operations, confirms that reimbursement was to be an option, not a requirement:

> Section 908 of H.R. 3519 as reported by the committee of original jurisdiction contains the following language:
>
> The Secretary of Defense may assign members of the armed forces to train Federal, State, and local law enforcement officials in the operation of military equipment . . . and to provide expert advice relevant to the purposes of this chapter, if the provision of such training or advice will not adversely affect the military preparedness of the United States.
>
> *An additional provision of the section specifies that the Secretary of Defense shall issue such regulations as may be necessary to insure that reimbursement for the provision of such assistance is obtained when the Secretary deems such reimbursement to be appropriate.*

H.R. Rep. No. 71, 97th Cong., 1st Sess. (pt. 3) 37 (1981) (emphasis added).[10]

During floor debate on the House bill, it was acknowledged once again that reimbursement for assistance provided to civilian law enforcement officials by the Defense Department would be an option of the Secretary of Defense. Congressman Bennett, for instance, stated that:

> *Section 374 requires the Secretary of Defense to issue regulations:* First, to insure that the provision of assistance, equipment, or facilities does not impair military training or operations necessary to the military preparedness of the United States; and second, *to insure reimbursement for the provision of assistance obtained from the Department of Defense when the Secretary determines it is appropriate.* The regulations provided by this section will insure that the cooperation with the civilian law enforcement officials does not interfere with carrying out the primary mission of our Armed Forces, that is, military preparedness. *The regulation will also insure that the law enforcement cooperation is not done at the expense of defense activities.*

[10] In another passage of the report of the House Committee on Government Operations, it is reaffirmed that the House bill would extend authority to the Secretary of Defense to provide training services and advice "without reimbursement, if he determined that to be appropriate." H R Rep. No 71, 97th Cong., 1st Sess. (pt. 3) 37 (1981).

> The results of the Armed Forces work should not be used at the cost of defense budgets to support the activities of other agencies of Government regardless of how laudable those activities might be. *I understand the Department of Defense has always required reimbursement in the past, and it will continue to do so under these provisions.*

127 Cong. Rec. H 4056–57 (daily ed. July 8, 1981) (emphasis added). These remarks reflect sensitivity to the potential problems that could arise if the Defense Department were not allowed to seek reimbursement for the assistance it provides to civilian law enforcement agencies. The reimbursement option evidently was designed to "insure that the law enforcement cooperation [as authorized by the bill] is not done at the expense of defense activities." In this context, Congressman Bennett noted that "in the past" the Defense Department had required reimbursement, and that it intended to do so in the future. At the same time, these remarks do not purport to, and they do not, state any legal requirement that reimbursement be sought under the bill. To the contrary, the remarks are directly tailored to protect the Defense Department's authority to obtain reimbursement when the Secretary deems it "appropriate."

Another pertinent discussion of reimbursement during the House debate is the following by Congressman Hughes:

> Mr. Chairman, . . . under the provisions of the bill any loaning of equipment or any loaning of personnel is reimbursable. *It does not come out of the Department of Defense budget. We are not asking the Defense Department to use their amounts set aside for the military mission for law enforcement purposes.*
>
> All we are doing is, we are trying, first of all, to codify the existing practices relative to the sharing of intelligence, the sharing of base facilities, the sharing of research, and we have taken it one step further; they need equipment from time to time, but it is an empty gesture when you offer equipment and do not offer the manpower to operate the very sophisticated equipment. . . .

Id. at H 4066–67 (emphasis added). Although the foregoing remarks indicate concern about using Defense Department funds appropriated for military missions to provide assistance to civilian law enforcement agencies, the comments are limited in their reference: "*We are not asking* the Defense Department to use their amounts set aside for the military mission for law enforcement purposes." (Emphasis added.) We believe that this statement means only that *Congress* did not intend to require the Defense Department to pay for the assistance it provides as authorized by the bill. Indeed, the bill specifically empowers the Defense Department to seek reimbursement. Congressman Hughes' comments, like those discussed above, do not purport to establish any legal requirement that reimbursement must be sought by the Defense Department, even though they indicate an expectation that reimbursement might frequently be sought. This

crucial point is further confirmed by the statement of Congressman Sawyer that "*the law enforcement agency* requesting the military equipment *is chargeable* for the use of that equipment." *Id.* at 4067 (emphasis added). To say that a civilian law enforcement agency is "chargeable" under the bill is not to say that such an agency *must* be charged for assistance authorized by the bill.

If there were any substantial doubt remaining after a survey of the foregoing comments in the legislative record about the conclusion that the Defense Department has discretion to decide whether to condition assistance on reimbursement, such doubt is dispelled by the report of the conference committee, which stated the following about the reimbursement provision:

> *This section authorizes the Secretary of Defense to issue regulations providing that reimbursement may be a condition of the assistance to civilian law enforcement officials under this chapter.* This provision was contained, in slightly different form, in both bills. *The regulation should reflect sufficient flexibility to take into consideration the budgetary resources available to civilian law enforcement agencies.*

H.R. Rep. No. 311, 97th Cong., 1st Sess. 122 (1981) (emphasis added). If the conference committee had sought to require the Secretary of Defense to condition assistance on reimbursement, it would hardly have been consistent for the committee to have noted that the reimbursement provision provides "sufficient flexibility to take into consideration the budgetary resources available to civilian law enforcement agencies." Such "flexibility" in fact is reflected in the language ultimately enacted, which provides that the Secretary of Defense "may" condition assistance under the Act on reimbursement.

In view of the plain language of § 377 and the fact that the relevant committee reports and floor debates confirm that Congress sought to provide flexibility to the Secretary to determine whether to require reimbursement, we conclude that the Secretary of Defense has discretion under the Act to decide whether to request reimbursement for assistance rendered pursuant to the Act. Since the Act's fundamental purpose was to provide the express authorization for the Defense Department to assist civilian law enforcement officials notwithstanding the general restriction under the Posse Comitatus Act, *see* note 2, *supra*, there is no longer any need for the Defense Department to rely on the Economy Act in providing the assistance authorized by the Act. In short, since the reimbursement provision of the Department of Defense Authorization Act, 1982, governs, and since that provision is permissive, we conclude that the Secretary of Defense is authorized but not required to seek reimbursement for assistance rendered under the Act.

(3) In opposition to the foregoing analysis of § 377 and its legislative history, the Defense Department maintains that Congress intended to retain under this Act the strictures of the Economy Act, 31 U.S.C. § 686. This position rests on three main arguments.

First, the Defense Department contends that the language of § 372, which limits the provision of assistance under that section "in accordance with other applicable law," effectively incorporates, albeit indirectly, the Economy Act into this Act. Second, the Defense Department seeks support in a variety of passages in the legislative history indicating that Congress expected that the Defense Department would not have to pay for all of the assistance rendered under the Act. Third, the Defense Department notes that it is charged with implementing the Act by means of regulations. For this reason, the Department suggests, even if implicitly, that its interpretation should be given particular weight. We will discuss each argument in turn.

A. The Language of § 372

The Defense Department's primary textual argument is that the phrase, "in accordance with other applicable law," in § 372 incorporates in this Act the law relating to reimbursement under the Economy Act, 31 U.S.C. § 686. Section 372 states:

> The Secretary of Defense may, *in accordance with other applicable law,* make available any equipment, base facility, or research facility of the Army, Navy, Air Force, or Marine Corps to any Federal, State, or local civilian law enforcement official for law enforcement purposes.

(Emphasis added.)

The central support for this reading of the phrase, "in accordance with other applicable law," is the following passage from the report of the House Committee of the Judiciary, H.R. Rep. No. 71, 97th Cong., 1st Sess. (pt. 2) 9 (1981):

> *The Committee on Government Operations expressed some concern that the proposed section,* as reported by the Armed Services Committee, *could cause potential conflicts with the application of other property disposition statutes. Thus,* at the recommendation of the Committee on Government Operations and with the support of the Department of Defense, *the* [Judiciary] *Committee added the phrase 'in accordance with other applicable law' to clarify the continued application of the disposition procedures of the Economy Act, 31 U.S.C. 638a, and other similar provisions. See, e.g., 10 U.S.C. 2576 and 2667* (governing the disposition of certain real and personal military property).

(Emphasis added.) The foregoing reference to the "disposition procedures of the Economy Act, 31 U.S.C. 638a," is said by the Defense Department to demonstrate that Congress intended to retain the reimbursement requirements that would apply if the provision of assistance to civilian law enforcement agencies under the Act were to proceed entirely under the Economy Act, 31 U.S.C. § 686.

We have a number of difficulties with this contention. First, the statute cited as the Economy Act in the foregoing passage from the Committee report, 31 U.S.C. § *638a*, is not the same as the statute upon which the Defense Department seeks to rely, namely, 31 U.S.C. § *686*. The statute actually cited by the Committee—31 U.S.C. § 638a—deals specifically with the purchase, operation, use, and maintenance of passenger motor vehicles and aircraft by the federal government.[11] Although it might be suggested that the Committee report made a mistake in citation, the statute actually cited does appear directly relevant to the point the Committee report was making, namely, that "disposition procedures" specifically relating to federal property should continue to apply.

Moreover, it bears noting that such "disposition procedures" are not in any obvious or necessary sense "similar" to principles of reimbursement under 31 U.S.C. § 686.[12] The two statutes cited by the Committee in addition to 31 U.S.C. § 638a deal respectively with the sale to law enforcement and firefighting agencies of surplus military equipment, 10 U.S.C. § 2576, and leases by military departments of "non-excess" property, 10 U.S.C. § 2667. These statutes, combined with 31 U.S.C. § 638a, place specific limits on the disposition of federal property. The particular requirements in these three statutes are simply not the same as the general principles concerning reimbursement on which the Defense Department seeks to rely.

The evidently limited reference of the "other applicable law" language in § 372 is confirmed by a passage in the report of the House Committee on Government Operations. It should be recalled that the House Judiciary Committee, in adding the "other applicable law" language, stated that it was doing so in response to the concern of the Government Operations Committee that the lack of such language "could cause potential conflicts with the application of other property disposition statutes." Accordingly, the explanation of the Government Operations Committee of the meaning of the phrase "other applicable law" should be given particular weight. That Committee explained the language as follows:

> Under an amendment adopted by the Judiciary Committee on June 9, 1981, the provision of military equipment and facilities to law enforcement officials would be made 'in accordance with applicable law.' *It is the Committee's understanding that this language would bring [the section] under the terms of the property management and disposal provisions of the Federal Property and Administrative Services Act of 1949.*[13]

[11] Under 31 U S.C § 638a, a number of limitations are placed on the purchase or hire of passenger motor vehicles and aircraft by the federal government.

[12] The need to be clear about exactly which statutes were intended to remain applicable under § 372 is obvious in light of such additional statements in the legislative history as the following: "The sale, donation or other outright transfer of such equipment to civilian law enforcement agencies shall be *in accordance with existing statutes* covering such transfers." S. Rep. No. 58, 97th Cong., 1st Sess. 149 (1981) (emphasis added). This statement suggests, but by itself does not make fully clear, that the relevant statutes are those dealing specifically with property or equipment transfers, which constitute a distinct subject from that of reimbursement for any of a variety of types of assistance provided by one agency to another under 31 U S C § 686.

[13] *See also* H.R. Rep. No 311, 97th Cong., 1st Sess 119 (1981) ("This provision [speaking of "other applicable law"] assures the continued application of existing law, such as the Federal Property and Administrative Services Act of 1949")

H.R. Rep. No. 71, 97th Cong., 1st Sess. (pt. 3) 37 (1981). This reference to the Federal Property and Administrative Services Act underscores that the Government Operations Committee's intention was to guarantee that that statute's provisions—not general reimbursement principles under 31 U.S.C. § 686—would continue to operate under this Act.

In short, we are unconvinced that the inclusion in § 372 of the "other applicable law" language was intended to have the far-reaching effects attributed to the language by the Defense Department. We believe that the phrase "other applicable law" in § 372 refers to the specific statutes cited in the legislative history, which do not include 31 U.S.C. § 686. This conclusion is buttressed by the canon of statutory construction that each provision of a statute should be read to have independent meaning.[14] If § 372 had been intended to have the meaning attributed to it by the Defense Department, it would constitute in effect a nullification of the plain language of § 377, a result finding no support in the language, history, or purposes of the Act.[15]

B. The Act's Legislative History

The Defense Department also argues that the legislative history supports its view that the Secretary of Defense has no general authority to waive reimburse-

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[14] Courts have noted that, in the normal case, every word Congress uses in a statute should be given effect *See, e g , Reiter* v. *Sonotone Corp.*, 442 U S 330, 339 (1979). This approach is reflected in the notion that the "meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view," *Panama Refining Co.* v *Ryan*, 293 U S 388, 439 (1935) (Cardozo, J , dissenting), and that "a section of a statute should not be read in isolation from the context of the whole Act. . ." *Richards* v. *United States*, 369 U S. 1, 11 (1962). Moreover, a court interpreting a statute is not "at liberty to imply a condition which is opposed to the explicit terms of the statute . . To [so] hold is not to construe the Act but to amend it " *Detroit Trust Co.* v *The Barlum*, 293 U S. 21, 38 (1934), quoted in *Fedorenko* v *United States*, 449 U S. 490, 513 (1981)

[15] We also note that § 371 specifies that action pursuant to it shall be "in accordance with other applicable law." This provision authorizes the sharing of information obtained by the Defense Department "during the normal course of military operations." To what does the "in accordance with other applicable law" language in § 371 refer? To be consistent with its argument about § 372, the Defense Department apparently would have to argue that it refers to the Economy Act, 31 U.S.C. § 686

However, we are aware of no legislative history to that effect Indeed, the House Judiciary Committee specifically stated that the "other applicable law" language in § 371 refers to the Privacy Act (without mentioning 31 U S.C. § 686). "The phrase 'in accordance with other applicable law' as used in section 371 is meant to continue the application of the Privacy Act to this type of intelligence sharing. *See* 5 U.S.C. 552a." H.R. Rep. No 71, 97th Cong., 1st Sess. (pt 2) 8 (1981) *See also* H.R. Rep. No 311, 97th Cong , 1st Sess. 119 (1981). This explanation of § 371 seems to confirm a pattern by which Congress, in referring to "other applicable law" in certain provisions granting the Defense Department authority to provide assistance, was intending to refer to statutes directly bearing on the specific subject matter of the authorizing provision in question Such a pattern is not consistent with the Defense Department's suggestion that "other applicable law" refers to a broad set of principles relating to reimbursement under the Economy Act in general

Furthermore, even if the phrase referring to "other applicable law" in §§ 372 and 371 were to be construed—contrary to what we consider the reasonable construction—as effectively nullifying the reimbursement provision, it is difficult to understand how such a construction would lead to the result sought by the Defense Department with respect to assistance provided under §§ 373 and 374 The latter two provisions do not contain "other applicable law" language. Although they do refer to equipment provided under § 372, their subjects are distinct from that of § 372: § 373 deals with the use of Defense personnel in training and advisory capacities, and § 374 deals with the use of Defense personnel in operating and maintaining equipment provided under § 372 In order for the Defense Department to establish its position with respect to §§ 373 and 374, it would be necessary to conclude that the fact that those sections involve the use of personnel in connection with equipment provided under § 372 is sufficient to limit the assistance of such personnel in the same manner that the use of equipment is said to be limited under § 372 "in accordance with other applicable law" We believe that this argument is excessively attenuated. Not only does it depend on an interpretation of "other applicable law" that is not borne out by the legislative history, but it also depends on reading into §§ 373 and 374 language that is not contained in those provisions

ment for assistance provided under the Act. The initial difficulty with this argument is that legislative history cannot serve to supersede the plain language of a statutory provision such as § 377. It is an established canon of statutory construction that "legislative intention, without more, is not legislation." *Train* v. *City of New York*, 420 U.S. 35, 45 (1975).

In any event, we do not read the passages in the legislative history on which the Defense Department seeks to rely as supporting the view advanced by that Department. The problems with relying on the passages may be shown with reference to each one.

One of the central passages relied upon in the March 26, 1982, letter from the Deputy Secretary of Defense to the Attorney General is the following drawn from remarks by Congressman Hughes during floor debate on the House bill:

> [U]nder the provisions of the bill any loaning of equipment or any loaning of personnel is reimbursable. It does not come out of the Department of Defense budget. *We are not asking the Defense Department to use their amounts set aside for the military mission for law enforcement purposes.*

127 Cong. Rec. H 4066 (daily ed. July 8, 1981). These remarks are quoted in their fuller context above.

The main observation to make about the foregoing remarks is that they merely state that the Defense Department is not required under the Act to use money appropriated specifically for military purposes to pay for assistance provided under the bill. As Congressman Hughes noted, Congress is "not asking the Defense Department to use their amounts set aside for the military mission for law enforcement purposes." That, however, is not the question before us. Our question is whether the Defense Department has discretion under the Act to determine whether it will condition authorized assistance on reimbursement. It is, in brief, a *non sequitur* to argue that because Congressman Hughes indicated that Congress was not requiring the Defense Department to use military funds to pay for assistance provided under the bill, therefore the Defense Department is required by the Act to demand reimbursement when it does provide assistance. The latter proposition, in our view, is not established by the quoted comments.

Another passage relied upon by the Defense Department is taken from testimony by the Department's General Counsel on June 3, 1981, as follows:

> Section 374 [of the House bill] contains two provisions of considerable importance to the Department of Defense. . . . Subsection (b) requires the Secretary to issue regulations governing reimbursement to the Department of Defense, an essential element of the legislation. The funding of nonmilitary law enforcement activities is the responsibility of those agencies given the authority to investigate and prosecute crimes against the United States. *The Department of Defense is pleased to provide assistance, consistent with the limitations set forth in this legislation*

> *and other laws, but we cannot use defense resources to fund the activities of other agencies of the federal government. We have required reimbursement in the past when costs have been incurred in the provision of such assistance, and we shall continue to do so under the provision of this legislation if enacted.*

Posse Comitatus Act: Hearings on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 15–16 (1981) (emphasis added). In the Defense Department's view, this statement confirms that it always has intended to approach the issue of reimbursement under the Act in the same manner in which it approached reimbursement prior to the Act's passage.

Our difficulty with relying on this testimony in the present context is that it merely reflects the Defense Department's intention at the time of testimony with respect to implementing any powers it would have under the bill, if enacted, and it discusses the Department's past practices regarding reimbursement. However, these are not the issues with which we are primarily concerned. Our question is whether the Act *requires* the Defense Department to implement its stated desire of seeking reimbursement in certain circumstances.[16] The testimony of the General Counsel establishes only that the Defense Department informed Congress that it would generally seek reimbursement, but this does not clarify the fundamental issue whether that Department is legally compelled to do so.

An additional passage in the legislative history relied upon by the Defense Department is the following from the report of the House Judiciary Committee:

> The final subsection of proposed section 374 authorizes the Secretary of Defense to issue regulations which may condition the rendering of any assistance under this Chapter upon a reimbursement to the military. According to information received from the Coast Guard, United States Customs Service, and the Department of Justice (the Federal agencies most likely to request assistance), this reimbursement provision is acceptable and should not require any immediate increase in the budgets of those agencies. *The availability of this reimbursement option is not meant to serve as an excuse for the Secretary of Defense to decline to cooperate in the provision of assistance. Rather, the reimbursement option should serve instead as an informal check of* (sic) *the magnitude and frequency of the requests made by civilian law enforcement officials. The availability of military assistance is not intended by the Committee to be an indirect method of increasing the budget authority of the civilian law enforcement agency.*

H.R. Rep. No. 71, 97th Cong., 1st Sess. (pt. 2) 11 (1981) (emphasis added).

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[16] One must bear in mind the fundamental distinction between a requirement to do X and the authority to do X. In this context, the Defense Department has the authority to implement its stated intention of seeking reimbursement under the Act's reimbursement provision This does not mean, however, that the Department is necessarily required to seek reimbursement. The two matters are and must be kept analytically distinct.

Our inability to derive from the foregoing passage the conclusion preferred by the Defense Department rests primarily on the fact that the passage speaks of reimbursement in terms of an "option" available to the Defense Department, not in terms of a legal requirement. As we noted earlier, it is clear that the Committee was sensitive to the need to balance the interests of the Defense Department in not having to pay for all of the assistance it provides to civilian law enforcement officials against the legislative desire to authorize such assistance. But it simply does not follow from this that the Defense Department is legally *required* under the Act to seek reimbursement. If it were, the Department would not have the "option" evidently contemplated by the Committee.[17]

To summarize, the Defense Department's argument based on legislative history founders, first, on the canon of construction that legislative history cannot overcome the plain language of a statutory provision and, second, on the fact that the passages cited do not appear directly to support the notion that the Department is required by the Act to seek reimbursement for assistance authorized by the Act.

C. The Defense Department's Construction of the Act

Implicit in the Defense Department's position is the further argument that its interpretation of Congress' intention should be controlling since it is the agency charged with implementing the statute by regulation. Also, it actively participated in the legislation's drafting, and thus may be presumed to have intimate knowledge of the congressional design. We acknowledge that these facts distinguished the present case from one in which an agency charged with implementing a statute has not been similarly involved with the statute in question. Surely a court reviewing the legal issue presented to us would accord a responsible agency's view a certain respect in light of the normal understanding that such an agency is in a position to grasp the legislature's intent.[18]

However, there are two difficulties with relying on any presumption that the Defense Department's views should be accorded special weight in this case. First, the Defense Department is not the only agency in the Executive Branch affected by the authority conferred by the Act, nor is it the only agency that was involved in deliberations prior to the Act's passage. This Department, as the major civilian law enforcement agency, is intimately affected by the Act and played a role in deliberations leading to its enactment. Accordingly, any argument by the Defense Department that its views should be accorded special consideration must be balanced against the fact that it is not the only department whose views are entitled to consideration.

More importantly, a court will not blindly give weight to a particular agency's views of a statute affecting the agency. To the contrary, courts have made clear

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[17] For further discussion of this passage from the House Judiciary Committee report, *see supra*.

[18] *See generally Red Lion Broadcasting Co.* v. *FCC*, 395 U S. 367, 381 (1969); *Zemel* v. *Rusk*, 381 U.S 1, 11–12 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). *See also SEC* v *Sloan*, 436 U.S 103 (1978); *General Electric Co.* v *Gilbert*, 429 U.S. 125, 141 (1976).

that their primary responsibility of deciding issues of law arising in cases involving challenges to an agency's action requires them to reach an independent judgment in light of statutory language and legislative history. Courts in general will not defer to an administrative interpretation when it is not consistent with a statute's language and history.[19]

In this case, there is no doubt that the Secretary of Defense, subject to the supervisory power of the President, has the authority and responsibility to issue regulations dealing with the issue of reimbursement. However, the Secretary may not read into the statute a legal requirement that is not contained therein. In our view, for the reasons stated earlier, we do not believe that the Secretary is required by the Act to seek reimbursement.

III. Conclusion

In conclusion, we believe that the Act's reimbursement provision means what it says: the Secretary of Defense "shall issue regulations providing that reimbursement may be a condition of assistance" under the Act. We cannot find in this provision, its legislative history, other provisions of the statute, or the Act's legislative history in general any legal *requirement* that reimbursement be sought under the Act. Also, since this Act provides authority for the Defense Department to assist civilian law enforcement officials in certain circumstances, there is no occasion to rely on the Economy Act, 31 U.S.C. § 686, as the authority under which the Defense Department will provide such assistance. Therefore, this is not a situation in which reimbursement is governed by the law that would have applied under the Economy Act itself.

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[19] A court's deference to an agency's construction is constrained by the statute's language, history and purposes. *See Teamsters* v. *Daniel*, 439 U.S 551, 566 n 20 (1979), *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Billings* v. *Truesdell*, 321 U S. 542, 552–53 (1944); *Great Northern Ry Co.* v. *United States*, 315 U.S 262, 275–76 (1942); *United States* v. *Jackson*, 280 U.S 183, 193 (1930). Courts are the final authorities on issues of statutory interpretation and "are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute" *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968).

Confidentiality of the Attorney General's Communications in Counseling the President

[The following memorandum examines the scope of confidentiality accorded the Attorney General's communications with the President, and the extent to which those communications may be shielded from compulsory disclosure to Members of Congress, the courts, and members of the public. It considers the dual nature of the Attorney General's role as Cabinet member and as principal legal adviser to the President, and extends to the broader question of the confidentiality of the deliberative materials generated by the Attorney General and those who assist him. The memorandum discusses the applicability of the doctrine of executive privilege, and the appropriate circumstances for its invocation. It also analyzes the scope of the deliberative process and attorney-client privileges under the Freedom of Information Act, and of the traditional governmental evidentiary privileges and their statutory counterparts.]

August 2, 1982

MEMORANDUM FOR THE ATTORNEY GENERAL

You have asked this Office to advise you regarding the scope of confidentiality accorded your communications with the President in your role as Attorney General. Your inquiry focused particularly on the extent to which legal advice rendered by you to the President may be shielded from compulsory disclosure to Members of Congress, the courts, and members of the public. Our analysis of these issues includes the broader subject of the confidentiality of the deliberative materials generated by you, and those who assist you, in the performance of your responsibilities as adviser to the President. We also discuss briefly certain privileges which protect other communications generated by the Department of Justice in the course of performing its duties.

Any discussion of the confidential nature of the Attorney General's communications with the President must begin with a recognition of the dual counseling functions performed by the Attorney General. The Attorney General serves as both a Cabinet adviser and the principal legal adviser to the President.[1] As a member of the President's Cabinet, the Attorney General maintains a close and confidential advisory relationship with the President over a broad range of policy issues, including the highest and most delicate affairs of state. *See, e.g.*, Rankin,

[1] In 1828 Attorney General Wirt described the Attorney General as "confidential law adviser to the Executive branch of the government." *See* H. Cummings and C. McFarland, Federal Justice 91 (1937). In two lengthy essays analyzing the executive departments and the Attorney General in particular, former Attorney General Cushing described the department heads as the President's "constitutional counsellors," his "political or confidential ministers," and his "constitutional advisers." 7 Op. Att'y Gen. 453 (1855), 6 Op. Att'y Gen. 326 (1854).

Assistant Attorney General, Office of Legal Counsel, "Memorandum for the Attorney General re: Secrecy of Cabinet Proceedings and Papers" (Oct. 15, 1954). This advisory relationship to the President, a relationship shared by all members of the President's Cabinet, is constitutionally based. Article II, § 2, of the Constitution provides that the President

> may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . .

With respect to the Attorney General, this constitutional duty was carried over into statute by § 35 of the Judiciary Act of 1789, 1 Stat. 93, which required the Attorney General "to give his advice and opinions upon questions of law when required by the President of the United States." This provision is now codified in 28 U.S.C. § 511.[2]

We note, as a preliminary matter, that the confidentiality of the communications discussed herein cannot be analyzed without consideration of the contents of the communications, including the identities of the persons generating the communications and the persons to whom they are addressed, as well as the identities of the persons seeking disclosure. Generally speaking, however, the conclusions reached in this memorandum, and discussed in detail below, are as follows:

1. The President may assert an arguably absolute executive privilege against the Legislative Branch and in the courts to protect from disclosure communications involving military, diplomatic, or national security secrets;[3] a qualified

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[2] The original language of § 35 of the 1789 Judiciary Act has remained virtually intact through subsequent codifications of the provision. *See* 28 U.S C. § 511 (1976), which provides:

> The Attorney General shall give his advice and opinion on questions of law when required by the President.

[3] *See Halkin* v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978), holding that "[t]he state secrets privilege is absolute[,]" *id.* at 7, but permitting the district court to examine a classified affidavit *in camera*, in order to satisfy itself of the validity of the claim of privilege with respect to the underlying classified information

Although the Supreme Court has not stated expressly that the privilege for military, diplomatic, and national security secrets is absolute, it has used very strong language to this effect. *See, e.g.*, the Court's suggestion in *United States* v. *Nixon*, 418 U.S. 683, 711 (1974), that even *in camera* examination of documents may be inappropriate when a court is satisfied, "from all the circumstances of the case," that there exists a reasonable danger of disclosure of military, diplomatic, or national security secrets·

> As to the areas of Art. II duties [involving military or diplomatic secrets,] the courts have traditionally shown the utmost deference to Presidential responsibilities In *C. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S 103, 111 (1948) [(emphasis added)], dealing with Presidential authority involving foreign policy considerations, the Court said:
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> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. *It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.*"
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> In *United States* v. *Reynolds*, 345 U.S. 1 [,10] (1953), . . . the Court said:
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> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and *the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.*"

418 U.S. at 710–11 (emphasis added). *See also United States* v. *Reynolds*, 345 U.S. 1 (1953):

> In each case, the showing of necessity [for access to the documents] which is made will determine

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executive privilege may be claimed to protect law enforcement investigatory files and sensitive deliberative communications between the Office of the President and the Attorney General's Office, as well as staff communications within the two offices which are reflective of the deliberative process. The President customarily reserves exclusively to himself the power to assert the claim of executive privilege against Congress.[4] However, the Attorney General, as "head of [an executive] department which has control over the matter," may, after personal consideration of the matter, invoke the privilege against others in court. *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953).[5]

2. The Attorney General may assert a "deliberative process" privilege pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), to withhold from the public nonfactual deliberative communications; absent a breach of the confidentiality of the privileged communication, the President, or the Attorney General on his behalf, may assert the attorney-client privilege pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). Similarly, absent a waiver of the privilege, the Attorney General may assert the common-law privilege for attorney-client communications, which has been codified in Rule 501 of the Federal Rules of Evidence, and Rule 26 of the Federal Rules of Civil Procedure, to protect from disclosure in litigation certain confidential communications of a legal advisory nature which were prepared for the Office of the President.

3. Finally, this memorandum addresses the traditional "governmental" evidentiary privileges which, although available to the Attorney General, only

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how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, *but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.*

345 U.S. at 11 (footnote omitted) (emphasis added). *See generally* Daniel, Assistant Attorney General, Civil Division, "Memorandum to All Civil Division Attorneys re· Asserting Claims of Official Governmental Privilege in Litigation" (Nov. 1980); Rehnquist, Assistant Attorney General, Office of Legal Counsel, "Testimony on Executive Privilege before the Senate Judiciary Subcommittee on Separation of Powers" (Aug 4, 1971). *Cf American Civil Liberties Union* v. *Brown*, 619 F.2d 1170 (7th Cir. 1980) *(en banc)*, and *Halkin* v. *Helms*, *supra*, both construing *Reynolds*, *supra*, and *Nixon*, *supra*, to permit *in camera* examinations of documents for which the state secrets privilege was claimed in certain exceptional circumstances. *American Civil Liberties Union*, *supra*, held that a litigant's strong showing of need, *e.g.*, that withheld documents were critical to substantiate a claim of constitutional violation, may compel the district court to conduct *in camera* review of documents allegedly covered by state secrets privilege in order to determine whether they are properly classified

[4] This limitation on the exercise of the privilege against Congress stems from a practice instituted by Presidents Kennedy and Johnson, that "Executive privilege can be invoked only by the President and will not be used without specific Presidential approval," letter from President Kennedy to Congressman Moss (Mar 7, 1962), and formalized in President Nixon's "Memorandum for the Heads of Executive Departments and Agencies" (Mar. 24, 1969) To date, subsequent administrations have followed this practice. *See* Olson, Assistant Attorney General, Office of Legal Counsel, "Memorandum to the Attorney General re: Executive Privilege" (Oct 9, 1981); Harmon, Assistant Attorney General, Office of Legal Counsel, "Memorandum to All Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice" (May 23, 1977). *See generally Common Cause* v. *NRC*, 674 F.2d 921, 935 (D.C. Cir 1982) (dictum to the effect that only the President may assert executive privilege).

[5] Although assertion of the state secrets privilege clearly requires that the claim be made by the head of an agency, the case law governing other claims of executive privilege in litigation is not settled with respect to who must assert the privilege. *Compare Union Oil* v *Morton*, 56 F.R.D 643 (C.D. Cal 1972); *FTC* v. *Bramman*, 54 F.R.D. 364 (W.D. Mo 1972); (recognizing claims made by persons other than agency heads), *with Anchem Products* v. *GAF Corp*, 64 F.R.D. 550 (N.D. Ga 1974); *Carter* v *Carlson*, 56 F.R D. 9 (D.D.C. 1972) *See also* Daniel, "Asserting Claims of Official Governmental Privilege in Litigation," *supra* note 3 (recommending that *all* claims of governmental privilege in litigation, other than those relating to the informant's privilege, be formally asserted by the heads of agencies).

rarely would be applicable to his communications with the President. These privileges, which have analogues in the Freedom of Information Act, protect (a) confidential information which certain employees or members of the public are required to report on government records, (b) the identity of government informants, and (c) certain law enforcement investigatory files.[6]

I. Executive Privilege

The doctrine of executive privilege defines the constitutional authority of the Executive Branch to protect documents or information in its possession from public disclosure and from the compulsory process of the Legislative and Judicial Branches. *See* Rehnquist, Assistant Attorney General, Office of Legal Counsel, Testimony on Executive Privilege Before Senate Judiciary Subcommittee on Separation of Powers (Aug. 4, 1971). Executive privilege protects material the disclosure of which would significantly impair the conduct of foreign relations, the national security, or the performance of the Executive's lawful duties.[7] It also shields confidential deliberative communications which have been generated within the Executive Branch from compulsory disclosure, in the absence of a strong showing of need by the branch seeking disclosure that access to the privileged communications is critical to the responsible fulfillment of its constitutional functions. *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 441–55 (1977); *United States* v. *Nixon,* 418 U.S. 683, 711–12 (1974); *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* 498 F.2d 725, 730–31 (D.C. Cir. 1974) *(en banc).* This privilege is based on the need for confidentiality of communications among high-level government officials, as well as the constitutional doctrine of separation of powers, which provides that each branch of government is "suprem[e] . . . within its own assigned area of constitutional duties." *United States* v. *Nixon, supra* at 705.

A. Constitutional and Practical Bases of the Privilege

The necessity for confidentiality in the advisory relationships between Cabinet advisers and the President, and their respective aides, is of both constitutional and practical significance. *See United States* v. *Nixon, supra; Senate Select Committee on Presidential Campaign Activities* v. *Nixon, supra. See also* Opinion of the Attorney General for the President, "Assertion of Executive Privilege in Response to a Congressional Subpoena," 43 Op. Att'y Gen. ____, 5 Op. O.L.C. 27 (Oct. 13, 1981) (hereafter 1981 Attorney General Opinion); Harmon, Assistant Attorney General, Office of Legal Counsel, "Memorandum for the

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[6] *See* Daniel, "Asserting Claims of Official Governmental Privilege in Litigation," *supra* note 3. *See also FOIA* exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," § 552(b)(6); and exemption 7, which shields certain law enforcement investigatory records, § 552(b)(7).

[7] Because the types of communications discussed in this memorandum are less likely to implicate military, diplomatic, or national security interests, the qualified privilege for law enforcement files, *see* n 33 *infra,* and for sensitive advisory or deliberative communications, provides a more appropriate focus for our analysis.

Attorney General re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning Gasoline Conservation Fee" (Jan. 18, 1981) (hereafter Harmon Memorandum); Rehnquist Testimony, *supra*.[8] It is premised on the need to discuss confidential matters which arise within the Executive Branch and to assist the President in the discharge of his constitutional powers and duties, by ensuring discussion that is free-flowing and frank, unencumbered by fear of disclosure or intrusion by the public or the other branches of government. The President and those who assist him require candid advice on the wide range of issues which confront the Executive, and such candid advice may not be forthcoming if Cabinet advisers or their aides must anticipate disclosure of the advice rendered by them and the potential public or legislative criticism which might result therefrom.

A unanimous[9] Supreme Court in *United States* v. *Nixon*, *supra*, affirmed the constitutional underpinnings of the privilege, recognizing the "protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" as supported by the doctrine of separation of powers, and by historic practice.[10] The Court described this constitutional and historic basis as "too plain to require further discussion." *Id.* at 705. *See also Senate Select Committee*, *supra*. The Court went on to state that "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." *United States* v. *Nixon*, *supra* at 705. Such "temper[ed] candor" in presidential advisers' deliberations clearly would impede the President's performance of his constitutional duty to exercise the executive powers described in Art. II, § 3 of the Constitution. *See Nixon* v. *Administrator of General Services*, *supra; United States* v. *Nixon*, *supra*.

The Supreme Court and lower federal courts have made clear that the presumption of confidentiality accorded presidential communications is intended to protect not only the substance of sensitive communications between the President

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[8] *See generally* Rankin, Assistant Attorney General, Office of Legal Counsel, "Memorandum for the Attorney General re. Secrecy of Cabinet Proceedings and Papers" at 3 (Oct 15, 1954):

> [T]he special and perhaps most significant aspect of [Cabinet members'] office is that of trusted adviser to the Chief Executive in the affairs of the Nation, a relationship which cannot long be maintained with respect to those feeling themselves at liberty to make unauthorized disclosures of information imparted to them at Cabinet meetings in strict confidence, and accordingly . . . each member, to retain the confidence of the President, must constantly bear in mind the overriding need for scrupulous observance of the secrecy of Cabinet proceedings and papers

[9] Justice Rehnquist did not participate in this decision 418 U.S. at 685

[10] The Court noted that the 1787 Constitutional Convention had been conducted by the Framers in complete privacy, and that the records of the Convention were sealed for more than 30 years thereafter. 418 U S at 705, n 15 *See* 1 M Farrand, The Records Of The Federal Convention of 1787, pp. xi–xxv (1911), 3 Stat. 475, 15th Cong , 1st Sess , Res. 8 (1818). *See also* C Warren, The Making Of The Constitution 134–39 (1937)

The need for confidential deliberations is not unique to the Executive Branch The Framers recognized that some congressional deliberations would of necessity be privileged from publication, Art. I, § 5, cl 3, or from questioning beyond the House or Senate floor, Art. I, § 6, cl 1. Similarly, judicial deliberations, as well as discussions between judges and their law clerks, are undoubtedly privileged, although neither the Executive nor the Legislative Branches has ever attempted to challenge the right of courts to withhold such information. *See generally Nixon* v. *Sirica*, 487 F.2d 700, 717 (D C Cir. 1973) *(en banc); Soucie* v. *David*, 448 F 2d 1067, 1080–81 (D C Cir 1971) (Wilkey, J., concurring), Henkin, "The Right to Know and the Duty to Withhold. The Case of the Pentagon Papers," 120 U. Pa L. Rev 271, 274 (1971)

and his advisers but the integrity of the decisionmaking process within the Executive Branch as well.[11] *See Nixon* v. *Administrator of General Services, supra; Senate Select Committee, supra; Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (*en banc*). *See also* 1981 Attorney General Opinion *supra;* Harmon Memorandum, *supra*. It is these concerns which justify the invocation of executive privilege by the President, or, where appropriate, the heads of executive departments, as well as the "deliberative process" privilege, which may be claimed by any federal agency pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), to withhold documents requested by members of the public.[12]

B. Limitations on the Scope of the Privilege

Notwithstanding the necessity for confidentiality in executive deliberations, the privilege against their disclosure to Congress and the courts is qualified, in both scope and application. First, the executive privilege for intragovernmental deliberations does not protect materials the disclosure of which would not implicate or hinder the Executive Branch's decisionmaking processes. *United States* v. *Nixon, supra*. Thus, factual, nonsensitive materials—communications from the Attorney General which do not contain advice, recommendations, tentative legal judgments, drafts of documents, or other material reflecting deliberative or policymaking processes—do not fall within the scope of materials for which executive privilege may be claimed as a basis of nondisclosure. *Cf., e.g., NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Taxation With Representation* v. *IRS*, 646 F.2d 666 (D.C. Cir. 1981); *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 866–69 (D.C. Cir. 1980).[13]

Second, even in cases involving sensitive deliberative materials for which a claim of privilege may be appropriate, the executive interest in nondisclosure must be balanced against the needs of the requesting branch before the validity of the claim of privilege can be determined. It is in these cases of potential conflict and competing claims of legitimate need by each branch that the separation of

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[11] In its analysis of executive privilege in *United States* v. *Nixon, supra*, the Supreme Court discussed the role of confidentiality among presidential advisers and concluded:

> The expectation of a President to the confidentiality of his conversations and correspondence . . is [grounded on] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. 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. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

418 U.S. at 708 (footnote omitted).

[12] The deliberative process privilege will be discussed *infra* in part II A.

[13] The standard for nondisclosure under a claim of executive privilege is analogous to the "deliberative process" privilege codified in the Freedom of Information Act, 5 U.S.C. § 552(b)(5), which exempts predecisional and deliberative documents from the general disclosure mandate of the Act. *See generally McClelland* v *Andrus*, 606 F.2d 1278, 1287 n.54 (D.C. Cir. 1979) However, Congress may not expand the public's statutory right to disclosure under FOIA beyond those limits set, in any given case, by the constitutional doctrine of executive privilege, *Soucie* v. *David*, 448 F.2d 1067, 1071–72, n 9, 1081–83 (D.C Cir. 1971); conversely, because of its constitutional basis independent of FOIA, Congress may not limit the scope of executive privilege by altering the standards for disclosure under FOIA. *Id.*

powers principle on occasion must yield to the principles of "a workable government"—"separateness but interdependence, autonomy but reciprocity." *United States* v. *Nixon, supra* at 707 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). These principles recognize a "spirit of dynamic compromise" among the coordinate branches when a conflict in authority arises—a spirit which requires each branch to "take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in a particular fact situation." *United States* v. *AT&T,* 567 F.2d 121, 127 (D.C. Cir. 1977). This duty to recognize and accommodate the legitimate needs of the other branches was examined in its constitutional context by the D.C. Circuit in *United States* v. *AT&T, id.* at 130 (footnote omitted):

> [I]t was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations . . . [Thus,] the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi,* which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

See also 1981 Attorney General Opinion, *supra,* 5 Op. O.L.C. at 30 ("The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.").

The more generalized the executive interest in withholding the disputed information, the more likely it is that the claim of privilege will yield to a specific, articulated need related to the effective performance by the coordinate branches of their constitutionally assigned functions. Conversely, the more specific the need for confidentiality, and the less specific the articulated need of the requesting branch for the information, the more likely it is that the Executive's need for confidentiality will prevail. *Nixon* v. *Administrator of General Services, supra; United States* v. *Nixon, supra. See generally* 1981 Attorney General Opinion, *supra;* Harmon Memorandum, *supra.* Thus, in determining whether to assert the privilege, the Executive, in the first instance, must balance the "public" interest[14] inherent in the "general privilege of confidentiality of Presidential communications in performance of the President's responsibilities" against the national or public interest in disclosure, as determined by the ability

[14] The "public" interest in nondisclosure derives from the recognized value which accrues to the public from an effective executive decisionmaking process, supported by the exchange of "candid, objective, and even blunt or harsh opinions," *United States* v. *Nixon, supra* at 708, and fostered by ensuring the confidentiality of such opinions. *Nixon* v. *Sirica, supra* at 717 *See also McClelland* v. *Andrus,* 606 F.2d 1278, 1287 n.55 (D.C Cir 1979) (citations omitted) (recognizing the "compelling public [interest in] confidentiality" which is "[n]owhere . more vitally involved than in the fidelity of the sovereign's decision and policymaking resources ") *See generally* Rehnquist Testimony, *supra*

of the requesting branch responsibly to fulfill its constitutional duties without the assistance provided by the requested documents. *United States* v. *Nixon*, *supra*, 418 U.S. at 706, 711–712. *See Nixon* v. *Sirica*, *supra*, 487 F.2d at 716–17. In making such a determination, each document—and the role that it plays in the decisionmaking process—must be examined individually. *Playboy Enterprises* v. *Department of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982); *Coastal States*, *supra*, 617 F.2d at 867.

In the case of Congress, the grant of legislative power in Article I of the Constitution implies a requirement that Congress have access to pertinent information, as well as the authority to summon witnesses and to compel the production of needed evidence, as a prerequisite to the proper performance of its legislative function. *Jurney* v. *MacCracken*, 294 U.S. 125 (1935); *McGrain* v. *Daugherty*, 273 U.S. 135 (1927). *See generally* Rehnquist Testimony, *supra*. Congress' duty to investigate and inform itself of matters which may involve the Executive is very broad, extending "over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate." *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1959). *See also Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504–07 (1975); *Watkins* v. *United States*, 354 U.S. 178, 187 (1957). *See generally* Cox, "Executive Privilege," 122 U. Pa. L. Rev. 1383, 1426 (1974). This broad-based power of inquiry includes matters requiring new or remedial legislation, appropriations of funds, congressional probes into various governmental departments to expose corruption, inefficiency, or waste, as well as the administration of existing laws or proposed statutes. Yet, these very sources of Congress' power to obtain information also outline the limits of that power: Congress may only inquire into those matters on which it may potentially legislate or appropriate—it may not inquire into those matters "which are within the exclusive province" of the Executive or the Judiciary. *Barenblatt*, *supra* at 112. *See Watkins*, *supra*. Nevertheless, the validity of a claim of privilege for documents demanded by Congress in the performance of its legitimate legislating functions, including the "oversight" function, can only be determined by balancing the particular interests of the Legislative and Executive Branches against each other in each case, in light of the possibility of accommodation. *Senate Select Committee*, *supra*.[15]

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[15] *See, e g.*, 1981 Attorney General Opinion, *supra*, discussing the relatively weak congressional interest in obtaining predecisional, deliberative Executive Branch documents in the context of Congress' performance of its general "oversight" function, as compared to its consideration of specific legislative proposals

> At the stage of oversight, the congressional interest is a generalized one of ensuring that the laws are well and faithfully executed and of proposing remedial legislation if they are not. The information requested is usually broad in scope and the reasons for the request correspondingly general and vague. In contrast, when Congress is examining specific proposals for legislation, the information which Congress needs to enable it to legislate effectively is usually quite narrow in scope and the reasons for obtaining that information correspondingly specific. A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information
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> [Moreover,] the congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking

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Similarly, with respect to judicial functions, an evaluation must be made of the impact of a successful claim of executive privilege on the ability of the Judiciary to perform effectively its duties of fair adjudication of controversies and supervision of grand jury investigations. *See United States* v. *Nixon, supra; Nixon* v. *Sirica, supra*. As is the case when the privilege is asserted against the Legislative Branch, if the information withheld by the Executive is "demonstrably critical to the responsible fulfillment" of the Judiciary's functions, a generalized claim of privilege must fail. *Nixon* v. *Sirica*, 487 F.2d at 717 ("the general confidentiality privilege must recede before the grand jury's showing . . . that the subpoenaed [information] contain[s] evidence peculiarly necessary to the carrying out of [its] vital function."). *Cf. Senate Select Committee*, 498 F.2d at 731.

Notwithstanding these limitations on the scope of the privilege for Executive Branch communications, it is not essential that the communications for which the privilege is claimed have been directed to or emanated from the President himself. *See* Nixon, "Memorandum for the Heads of Executive Departments and Agencies" (March 24, 1969). *See also United States* v. *AT&T, supra;* Harmon Memorandum, *supra*. The underlying rationale of the privilege to foster robust and honest debate in the presidential decisionmaking process is as applicable to Executive Branch advisers both within and outside the immediate Office of the President as it is to the President himself. The Supreme Court, in *United States* v. *Nixon, supra,* recognized the need for the President *"and those who assist him* [to] 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." 418 U.S. 708 (emphasis supplied). In addition, this office has recently expressed the view that because of the importance of the executive department heads and their advisers to the President and his closest advisers in presidential decisionmaking, it would be "artificial" to draw a rigid and inflexible line between the executive departments and the President's Office, limiting the reach of the constitutional privilege only to the latter. Harmon Memorandum, *supra* at 13–14.[16] Thus, memoranda prepared by the Attorney General or his assistants containing legal or policy advice on issues under consideration by the President and his advisers may be properly encompassed by a claim of executive privilege. This category of documents would include, for example, staff level advice to Assistant Attorneys General concerning matters on which the President has

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> within the Executive Branch, it oversteps the bounds of the proper legislative function Restricted to its proper sphere, the congressional oversight function can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances.

5 Op O L.C at 29 (citations omitted)

[16] Nevertheless, former Assistant Attorney General Harmon's January 18, 1981, memorandum recognized that there exist "differences of degree" of sensitivity inherent in the broad category of executive deliberations. The memorandum pointed out that in deciding whether to claim the privilege, it is especially important to protect the integrity of deliberations involving the President himself and his closest advisers.

> In accommodating Congress's legitimate need for certain information, the executive branch should be least willing to reveal deliberations directly involving the President and his closest advisers, and more willing to disclose material from within the executive departments.

Harmon Memorandum, *supra*, at 13

sought advice, staff level advice to officials in the Office of the President, notes of middle level staff meetings concerning issues before the President or members of his staff, and tentative legal judgments or draft policy statements prepared for the President or his staff.

For purposes of invoking executive privilege, communications from the Attorney General, *qua* the President's chief legal adviser, should be analyzed in the same fashion as communications from other Cabinet advisers and trusted high-level officials. Unlike the attorney-client privilege, which focuses exclusively on communications of a *legal* advisory nature, executive privilege may be claimed for any nonfactual, sensitive deliberative communication for which there exists a sufficiently strong public interest in nondisclosure. While it is unlikely that very many of the Attorney General's communications will be in the category of communications with regard to which claims of privilege are entitled to the strictest deference, *e.g.*, military, diplomatic, or sensitive national security matters, his communications to the President may nevertheless demand greater confidentiality than those of some other Cabinet advisers, because of the nature of the Attorney General's responsibilities to the Executive and his special areas of expertise, *e.g.*, legal advice and law enforcement. *See* Harmon Memorandum, *supra*, at 26.[17]

II. The Freedom of Information Act—Exemption 5: The Deliberative Process Privilege and the Attorney-Client Privilege

Exemption 5 of the Freedom of Information Act (FOIA)[18] protects from compulsory disclosure to the public, government materials which are "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." 5 U.S.C. § 552(b)(5). This exemption thus codifies the traditional common law privileges afforded certain documents in the context of civil litigation and discovery, *see* Fed. R. Civ. P. 26; Fed. R. Evid. 501, including the executive "deliberative

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[17] In his memorandum to the Attorney General regarding a congressional subcommittee's demand for certain documents from the Department of Energy, Assistant Attorney General Harmon advised:

> [T]o whatever extent the customary attorney-client privilege applies to government attorneys, we believe that the reasons for the constitutional privilege against the compelled disclosure of executive branch deliberations have special force when legal advice is involved None of the President's obligations is more solemn than his duty to obey the law. The Constitution itself places this responsibility on him, in his oath of office and in the requirement of article II, section 3 that "he shall take care that the laws be faithfully executed " Because this obligation is imposed by the Constitution itself, Congress cannot lawfully undermine the President's ability to carry it out. Moreover, legal matters are likely to be among those on which high government officials most need, and should be encouraged to seek, objective, expert advice. As crucial as frank debate on policy matters is, it is even more important that legal advice be "candid, objective, and even blunt or harsh," *see United States* v. *Nixon*, 418 U.S. 683, 708 (1974), where necessary. Any other approach would jeopardize not just particular policies and programs but the principle that the government must obey the law. For these reasons, it is critical that the President and his advisers be able to seek, and give, candid legal advice and opinions free of the fear of compelled disclosure

Harmon Memorandum, *supra*, at 26

[18] While other exemptions to the FOIA occasionally may be applicable to the types of communications discussed in this memorandum, *e g.*, the exemption 7 privilege for law enforcement investigatory records, *see* 5 U.S.C. § 552(b)(7) discussed in part III C., *infra*, because of the Attorney General's advisory relationship to the President, most such communications will come within the privileges embraced by exemption 5.

process" privilege, *NLRB* v. *Sears, supra; EPA* v. *Mink*, 410 U.S. 73 (1973); *Taxation With Representation* v. *IRS*, 646 F.2d 666 (D.C. Cir. 1981); the attorney-client privilege, *Brinton* v. *Department of State*, 636 F.2d 600, 603–04 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Mead Data Central* v. *United States Department of Air Force*, 566 F.2d 242, 252–55 (D.C. Cir. 1977); and the attorney work-product privilege, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *Bristol-Myers Co.* v. *FTC*, 598 F.2d 18 (D.C. Cir. 1978), as applied to document requests of government agencies from members of the public. *See also Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980). All of these privileges encompassed by exemption 5 may be claimed, in appropriate circumstances, to protect communications between the Attorney General's Office and the Office of the President from compulsory disclosure to members of the press and the general public.[19] Nevertheless, even though the FOIA exemptions noted above are analogous to the common law evidentiary privileges which have been incorporated by implication into the Act, the standards for asserting the evidentiary privileges can serve only as a "rough guide" to the courts in determining the validity of FOIA exemption claims. This is so because

> decisions as to discovery are usually based on a balancing of the relative need of the parties, and standards vary according to the kind of litigation involved. Furthermore, the most fundamental discovery and evidentiary principle, relevance to the issues being litigated, plays no part in FOIA cases.

Coastal States, supra, at 862, citing *EPA* v. *Mink*, 410 U.S. 73, 86 (1973). *See also Playboy Enterprises* v. *Department of Justice*, 677 F.2d 931, 936 (D.C. Cir. 1982); *McClelland* v. *Andrus*, 606 F.2d 1278, 1287 nn. 54, 55 (D.C. Cir. 1979).[20]

A. "Deliberative Process" Privilege

The "deliberative process" privilege under FOIA is substantially similar in scope and purpose to the deliberative process aspect of executive privilege,

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[19] The exemptions contained in the Freedom of Information Act do "not [provide] authority to withhold information from Congress." 5 U.S.C. § 552(c)

[20] In explaining the relationship between the privileges under FOIA and the evidentiary privileges in litigation, the D C. Circuit stated:

> [T]he analysis contained in Exemption 5 cases is applicable [to common law discovery cases] because Exemption 5 exempts only those documents normally privileged in the civil discovery context *NLRB* v *Sears, Roebuck & Co* , 421 U.S. 132, 148–49 . . (1975); *EPA* v *Mink*, . . . 410 U S. at 85–86 . . (1973); *Vaughn* v *Rosen*, 523 F.2d at 1143 (1975). Thus in effect Exemption 5 is co-extensive with the common law discovery privileges: Exemption 5 shields from a member of the public seeking a document under FOIA that which would be shielded from a litigant seeking discovery from an agency. There is, however, an additional factor to be considered in the discovery context that is not considered in the FOIA context . When a party seeks discovery against the Government and the Government interposes a claim of privilege, it is appropriate for the court to consider the litigant's need for the material. But when a member of the public seeks access to material under FOIA and the Government claims that the material comes within the purview of Exemption 5, disclosure is permitted of that which would "routinely be disclosed" in private litigation. H.R Rep. No 1497, 89th Cong , 2d Sess. 10 (1966). *Stated differently, the extent of the requester's need is not considered in the FOIA context*

McClelland v. *Andrus*, *supra*, at 1287, n.54 (emphasis supplied).

discussed above. Although both privileges apply generally to the same types of documents, the primary differences between the two privileges lie in their respective applications. First, executive privilege traditionally has been invoked only by the President to shield documents from disclosure to Congress, and by the President or the head of any executive department or agency in judicial proceedings.[21] FOIA exemptions, in contrast, may be claimed by the head, or other designated official, of any government agency in possession of documents for which a request has been made by a member of the public. Second, as noted above, claims of executive privilege for deliberative documents must be balanced against the public interest in disclosure, which is frequently analyzed in terms of the requesting government institution's ability to perform its functions responsibly—whether legislative investigations or judicial resolution of disputes—without gaining access to the disputed materials. In considering the claims of exemptions under FOIA, however, the requestor's interest in or need for the documents is irrelevant. *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *McClelland* v. *Andrus*, *supra*. Notwithstanding these differences, the analyses involved in the applications of the two privileges are very similar.

As in the case of executive privilege, the "deliberative process" privilege embraced by exemption 5 was intended to protect the integrity of the decision-making process and to promote full and frank deliberations during that process. However, consistent with the strong disclosure policy of FOIA, the privilege is to be considered " 'as narrowly as [is] consistent with efficient Government operation.' " *Coastal States*, *supra*, 617 F.2d at 868, quoting from S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). *See also FBI* v. *Abramson*, 456 U.S. 615, 629–32 (1982); *Department of Air Force* v. *Rose*, 425 U.S. 352, 360–62 (1976). The privilege exempts documents which are advisory or recommendatory in nature, reflecting "the give-and-take of the consultative process . . ., weighing the pros and cons of agency adoption of one viewpoint or another," *Coastal States*, *supra*, 617 F.2d at 866, and "other subjective documents that reflect the personal opinions of the writer prior to the agency's adoption of a policy." *Taxation With Representation*, *supra*, 646 F.2d at 677. *See also NLRB* v. *Sears*, *supra*, 421 U.S. at 150; *Brinton* v. *Department of State*, *supra*, 636 F.2d at 604–06. In the words of the D.C. Circuit, which has developed a considerable body of law construing the deliberative process privilege:

> [The privilege] was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity. . . . Such consultations are an integral part of [an agency's] deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.

[21] *See* nn. 4, 5, *supra*.

Ryan v. *Department of Justice*, 617 F.2d 781, 789–90 (D.C. Cir. 1980) (footnote omitted). In addition, the privilege was designed to

> protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States, *supra*, 617 F.2d at 866.

Applying this standard to the materials discussed in this memorandum, documents reflecting the internal details involved in the preparation of formal Attorney General opinions or Office of Legal Counsel opinions, as well as the more informal predecisional working papers which pass between and within the Attorney General's Office and the Office of the President, would be included in this category of deliberative documents protected by exemption 5. *See, e.g.*, *Brinton* v. *Department of State*, *supra* (holding that opinions prepared by the Office of the Legal Adviser for the Secretary of State fell within the deliberative process privilege of exemption 5).

The courts have held, however, that "deliberative process" privilege does *not* protect documents which reflect final opinions, statements of reasons supplying the bases for decisions, or policies actually adopted, or documents that otherwise constitute the "working law" of an agency. *See NLRB* v. *Sears*, *supra*, 421 U.S. at 152–53; *Taxation With Representation*, *supra*, 646 F.2d at 678; *Coastal States*, *supra*, 617 F.2d at 866–68. The rationale underlying the "final opinion" exception to the deliberative process privilege is to prevent agencies from developing a body of "secret law" veiled by the exemption 5 privilege—the maintenance of which "would weigh heavily against the public interest." *Sterling Drug, Inc.* v. *FTC*, 450 F.2d 698, 715 (D.C. Cir. 1971). *See Brinton* v. *Department of State*, *supra*, 636 F.2d at 605. Thus, decision documents of the Office of the President, deliberative materials "incorporated" into those documents, and opinions of the Attorney General which have been "incorporated" into the President's final document, would be subject to disclosure under FOIA. *See EPA* v. *Mink*, 410 U.S. 73 (1973).[22]

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[22] "Final opinions" of the Office of Legal Counsel or the Attorney General, which were written for the President and form part of the basis of the President's final action, but which have not been "incorporated" into the President's final decision document, would be protected from disclosure under exemption 5's privilege for attorney-client communications, as well as the deliberative process privileges. *See Brinton* v *Dep't of State*, *supra*, *Mead Data Central*, *supra*

If the "final opinions" from the Attorney General's Office are *not* of a legal advisory nature—or are otherwise ineligible for a claim of attorney-client privilege—an analysis must be made regarding the purpose of the opinion documents in issue If the opinion is a predecisional document—*i.e.*, the document presents the Attorney General's views on a particular matter which will be considered by the President in taking final executive action, or in the case where final executive action has already been taken but the Attorney General submits a document which "provide[s] guides for decisions of similar or analogous cases arising in the future"—the Supreme Court has stated that the document is exempted from FOIA's disclosure mandate as a deliberative document *NLRB* v *Sears*, *supra*, 421 U.S. at 152, n.19. If the Attorney General's "final opinion" is postdecisional, as are most final opinions—*i e.*,

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Nor does the privilege extend to documents of a purely factual nature. In the case of documents of a mixed factual/deliberative nature, factual materials which can reasonably be severed from the deliberative or advisory segments of the document without compromising the confidential remainder of the document must be disclosed. *EPA* v. *Mink, supra,* 410 U.S. at 91. However, "factual segments [of advisory documents] are protected from disclosure as not being purely factual if the manner of selecting or presenting those facts would reveal the deliberate process, or if the facts are 'inextricably intertwined' with the policy-making process." *Ryan* v. *Department of Justice, supra,* 617 F.2d at 790 (footnotes omitted). *See Playboy Enterprises* v. *Department of Justice, supra.*[23]

B. Attorney-Client Privilege

Exemption 5 of FOIA also embraces the common law evidentiary privilege for attorney-client communications. 5 U.S.C. § 552(b)(5); Fed. R. Civ. P. 26; Fed. R. Evid. 501.[24] *See NLRB* v. *Sears, supra,* 421 U.S. at 154; *Mead Data Central, supra.* The attorney-client privilege protects confidential disclosures of a client to his or her attorney, which were made in order to obtain legal assistance and not for the purpose of committing a crime or tort. 8 Wigmore, Evidence § 2290–2329

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communications which "look[] back on and explain[] a decision already reached or a policy already adopted"—the opinion would *not* be exempt from FOIA's disclosure mandate, since disclosure would pose "a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions." *Id.*

In its companion case to *NLRB* v *Sears, supra, Renegotiation Bd.* v *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184–85 (1975), the Court set forth the additional consideration of whether the author of the "final opinion" possesses decisional authority with reference to matters addressed in the opinion. Thus, if the subject of the Attorney General's opinion, or other Department of Justice communication, involves a matter over which the Office of the President has final decisional authority, the opinion necessarily is predecisional, and therefore exempt from disclosure, even if the opinion represents the "final" view or disposition of the Department of Justice on the matter. Of course, the final action taken by the Office of the President may incorporate the Attorney General's advisory opinion—in which case, it would lose its predecisional character and become subject to disclosure *See also Brinton* v. *Dep't of State, supra,* 636 F.2d at 605 (holding that legal opinions prepared by the Office of the Legal Adviser for the Secretary of State were properly withheld on the ground that the Legal Adviser's opinions were not "final opinions" as contemplated by the FOIA, inasmuch as the Legal Adviser "has no authority to make final decisions concerning United States policy . . [,] [i]nstead, his role is to give advice to those in the State Department who do make the policy decisions.").

[23] The D.C. Circuit recently rejected the Department's claim of privilege for a 302-page document prepared by a task force of the Office of Professional Responsibility of the Department of Justice for the Attorney General. The document reported the results of an eight-month investigation into the circumstances surrounding the infiltration of an FBI informant into the Ku Klux Klan *Playboy Enterprises* v. *Dep't of Justice, supra,* 677 F.2d 931. Against the Department's claim that the entire report "reflect[ed] the 'choice, weighing and analysis of facts' by the task force and [was] therefore protected as a part of the deliberative process," 677 F.2d at 935, the court of appeals held that the report was, for the most part, not exempt from disclosure, and remanded to the district court for a determination of those limited portions of the report which were properly exempt, as containing conclusions, recommendations, or opinions and were severable from the factual portions of the document. The court stated:

> We are not persuaded by the Department's argument. Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as part of the deliberative process.

Id.

[24] The attorney-client privilege is a common law evidentiary privilege which has been codified in Rule 501 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure for use in civil litigation and discovery. While the Rules are not applicable to congressional subpoenas, the interests implicated by the attorney-client privilege generally are subsumed under a claim of executive privilege when a dispute arises over documents between the Executive and Legislative Branches, and the considerations of separation of powers and effective performance of constitutional duties determine the validity of the claim of privilege.

(McNaughton rev. 1961). *See Upjohn* v. *United States*, 449 U.S. 383 (1981); *Fisher* v. *United States*, 425 U.S. 391 (1976). Notwithstanding its overall purpose to protect the *client's* factual disclosures, the privilege has been extended by federal courts to include an attorney's communications to his or her client in order to prevent inadvertent disclosure, either directly or by implication, of information which the client had previously confided to the attorney, as well as to foster the attorney's ability to give sound and informed professional advice. *Coastal States*, *supra*, 617 F.2d at 862; *Mead Data Central*, *supra*, 566 F.2d at 254 n.25.

Like the executive and deliberative process privileges, the attorney-client privilege is designed to encourage full and frank discussions among the persons whose communications are protected and thereby to "promote [the] broader public interests in the observance of law and administration of justice." *Upjohn*, *supra*, 449 U.S. at 389. To this end, "[t]he privilege recognizes that sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client." *Id. See also Mead Data Central*, *supra*, 566 F. 2d at 252 ("The opinion of even the finest attorney . . . is no better than the information which his client provides. In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent."). *See generally* 2 J. Weinstein and M. Berger, Weinstein's Evidence ¶ 503 (1982).

Although the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector. *See Brinton* v. *Department of State*, *supra*, 636 F.2d at 603–04; *Mead Data Central*, *supra*, 566 F.2d at 252–55; *Jupiter Painting Contracting Co.* v. *United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980); *Falcone* v. *Internal Revenue Service*, 479 F. Supp. 985, 989–90 (E.D. Mich. 1979). *See also* Office of Legal Counsel, "Memorandum for Helen S. Lessin, Director, Federal Legal Council, re: OLC Policies Regarding Issuance and Release of Opinions" (Sept. 10, 1980).[25]

The Supreme Court's recent opinion in *Upjohn*, *supra*, analyzing the scope of the corporate "client" for purposes of the attorney-client privilege, is helpful to our consideration of the privilege in the context of the Attorney General and the Office of the President. In *Upjohn*, *supra*, the Court discarded the restrictive "control group" test[26] for determining which communications are within the scope of the privilege in a corporate setting, in favor of a broader scope of "client," more suited to the purposes of the privilege. The Court noted that the

[25] In addition, Government attorneys, no less than private attorneys, are bound by the ABA Code of Professional Responsibility's disciplinary rule DR 4–101(B), which provides that a lawyer shall not knowingly reveal a confidence or secret of his client unless the client consents to such disclosure.

[26] The control group test restricts the definition of "client" for purposes of the privilege to "upper-echelon management" officials "responsible for directing [the client corporation's] actions in response to legal advice." 449 U.S. at 388, 391.

privilege was designed to protect both the giving of professional advice to those who are charged with the actual implementation of the client corporation's policies, as well as the communication of information to the attorney sufficiently specific to enable him or her to provide sound, practical, and informed legal advice. *Id.* at 390. These purposes were frustrated by the narrow scope of privileged communications recognized by the "control group" test.

While the *Upjohn* decision studiously avoided setting forth a precise formulation of the scope of the attorney-client privilege in the corporate or governmental setting, the Court was nonetheless insistent in its view that application of the privilege had to be determined in each case to serve the purposes of the privilege. In view of the criticism expressed in the *Upjohn* decision of the control group test, it is likely that, in most instances, the "client" in the context of communications between the President and the Attorney General, and their respective aides, would include a broad scope of White House advisers in the Office of the President. The "functional" analysis suggested by *Upjohn* focuses on whether the privilege would encourage the communication of relevant and helpful information from advisers most familiar with the matters on which legal assistance is sought, as well as whether the privilege is necessary to protect and encourage the communication of frank and candid advice to those responsible for executing the recommended courses of action. A corollary to this expanded concept of the "client," which reflects the realities of the governmental setting, is that the "attorney" whose communications are subject to the attorney-client privilege may, in fact, be *several* attorneys responsible for advising the "client" agency or division regarding the prudence and propriety of proposed courses of conduct. Thus, advice given by the various Assistant Attorneys General and their staffs may be subject to the privilege. *See, e.g., Brinton* v. *Department of State, supra.*[27]

Notwithstanding these notions of "attorney" and "client" which the Court has expanded to implement fully the purposes of the privilege, the actual operation of the privilege continues to be governed by the traditional guidelines and procedures.[28] As in the traditional attorney-client context, once the privilege has attached, only the client, in this case the President or some other high level official in the Office of the President who is responsible for receiving and acting on the legal advice, may waive it. Thus, for example, a FOIA request lodged with the Department of Justice for information communicated to the Office of the President by the Attorney General which is protected by the attorney-client privilege should not be honored unless the Office of the President consents to release of the information. *See* Office of Legal Counsel, "Memorandum for Helen S. Lessin," *supra. See generally* Harmon, Memorandum for Patricia M.

[27] Although the *Brinton* decision was ultimately decided on deliberative process grounds, the attorney-client privilege aspect of exemption 5 was discussed at length by the court.

[28] *See United States* v. *Anderson*, 34 F.R D. 518, 523 (D Colo. 1963), for application of the traditional attorney-client privilege formulation in the governmental context:

> [T]he documents are privileged insofar as they do not comment or report on information coming from persons outside the government or from public documents, or are summaries of conferences held with or in the presence of outsiders, and were produced with the idea of obtaining or receiving legal advice.

Wald, Assistant Attorney General, Office of Legislative Affairs, "Formulation of Policy on Disclosure of Information to Congress" at 8, 10 (July 19, 1977).

In addition, the person seeking to assert the privilege—either the client or the attorney on the client's behalf—must be able to demonstrate that the confidential disclosures "might not have been made absent the privilege," *Fisher* v. *United States, supra,* at 403, and that the underlying facts for which the privilege is claimed have *remained* confidential. *Mead Data Central, supra,* at 253. *See also Permian Corp.* v. *United States,* 665 F.2d 1214 (D.C. Cir. 1981); *Brinton* v. *Department of State, supra.*[29] Applying this rule to President-Attorney General communications, the circulation of advisory documents outside the operative circle of officials responsible for giving or receiving advice in the Office of the President or the Department of Justice, or, the reporting of factual information acquired from persons or sources outside the privileged relationship, would constitute a waiver, whether express or implied, of the privilege with respect to those documents and would subject them to disclosure, unless exempt from the Freedom of Information Act pursuant to some other exemption. *See Permian Corp.* v. *United States, supra;*[30] *Brinton* v. *Department of State, supra.* Advisory documents from the Attorney General which have been turned over to congressional committees are presumed to be no longer confidential and may not be the basis of a claim of attorney-client privilege. *See generally* Harmon, "Formulation of Policy on Disclosure of Information to Congress," *supra.*[31] *See also Permian Corp.* v. *United States, supra,* at 1220–22. However, these same documents may be subject to the deliberative process privilege under exemption 5.[32]

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[29] The requirement that the confidential disclosures for which the privilege is sought have remained confidential does not preclude the privilege's proper attachment to communications which have been circulated in a limited fashion beyond the attorney and the person within the group requesting legal advice. *See Upjohn* v *United States, supra,* at 395; *Coastal States, supra,* at 863; *Mead Data Central, supra,* at 253 n.24. This broader scope of the confidentiality requirement is particularly appropriate in the corporate and governmental contexts. *See discussion, infra*

[30] In *Permian Corp., supra,* the D.C. Circuit held that the voluntary disclosure of confidential materials to a third party outside the privileged relationship, in this case, the SEC, constituted a waiver of the privilege with respect to those documents, notwithstanding the SEC's agreement to protect the documents from further disclosure. Thus, the court rejected the rule of "limited waiver," followed by the Eighth Circuit in *Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (1977) *(en banc),* and concluded that the privilege could no longer be invoked to protect the documents from being disclosed by the SEC to another government agency:

> The Eighth Circuit's "limited waiver" rule has little to do with [the] confidential link between the client and his legal advisor. Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a "friendly" agency.
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> [T]he attorney-client privilege should be available only at the traditional price. a litigant who wishes to assert confidentiality must maintain genuine confidentiality

665 F.2d at 1220–21, 1222 (footnote omitted).

[31] Former Assistant Attorney General Harmon suggested that even the "limited disclosure" involved in disclosing privileged materials to an executive session of Congress, or in a nonpublic administrative hearing, "would appear to undermine the theoretical predicate of the privilege," as applied in the civil discovery context. "The purpose of a privilege is to protect confidential communications necessary to promote certain relationships, once this confidentiality is breached, the rationale for granting the privilege no longer applies." "Formulation of Policy on Disclosure of Information to Congress," *supra,* at 5 (citations omitted)

[32] There is an additional privilege available under exemption 5 which may be invoked, when appropriate, to

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III. The "Governmental" Evidentiary Privileges—and Their Freedom of Information Act Counterparts

The so-called "governmental" evidentiary privileges are common law privileges, now incorporated into the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which have traditionally been available exclusively to the government as a litigant. Daniel, Assistant Attorney General, Civil Division, "Memorandum to All Civil Division Attorneys re: Asserting Claims of Official Government Privilege in Litigation" (Nov. 1980). *See generally McClelland* v. *Andrus, supra,* at 1286, n.53, quoting *Association for Women in Science* v. *Califano,* 566 F.2d 339 (D.C. Cir. 1977). These privileges—the informant's privilege, the law enforcement investigatory files privilege,[33] and the privilege for confidential information on required reports[34]—supplement the deliberative process, attorney-client and work-product privileges discussed above which are available to governmental as well as private parties in the civil litigation and discovery contexts. *See* Fed. R. Civ. P. 26; Fed. R. Evid. 501. These "governmental" privileges are necessary to protect the ability of the Executive Branch to discharge its duties under the Constitution and the laws of the United States, but because their assertion in litigation does not raise the problems of a constitutional conflict with a coequal branch, these privileges may be invoked by the head of the executive department in possession or control of the requested documents, or his or her delegate.[35] *See Association for Women in Science* v. *Califano, supra. See also McClelland* v. *Andrus, supra;* Daniel, "Asserting Claims of Official Governmental Privilege in Litigation" (Nov. 1980). These privileges also have

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protect communications from the Office of the Attorney General to the Office of the President—the work-product privilege. The work-product privilege under exemption 5 of the FOIA protects documents prepared in contemplation of litigation which reflect the "mental processes" of attorneys. The work-product privilege is distinct from the attorney-client privilege in that "it provides a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." *Coastal States, supra,* at 864. While the attorney-client privilege is designed to protect the client's interest in confidentiality, the purpose of the work-product privilege is to protect "the adversary trial process itself." *Id.*

Because it is limited to documents prepared in contemplation of litigation, the work-product privilege is the least invoked of the exemption 5 privileges in the context of President-Attorney General communications. The broad advisory role that the Attorney General plays vis-à-vis the President, together with the President's general lack of involvement in litigation strategies, makes their communications far more suited to the deliberative process and attorney-client privileges as a basis for nondisclosure in litigation or under FOIA.

[33] The investigatory files privilege—which frequently encompasses information which might reveal the identity or statements of informants—protects interests which may be asserted under a claim of executive privilege also, if the interests are sufficiently strong in a particular case to implicate constitutional concerns. *See* 40 Op. Att'y Gen. 45. *See also* Office of Legal Counsel, "Executive Privilege in Litigation for Investigative Files" (September 18, 1981); Harmon, "Memorandum to All Heads of Offices, Divisions, Bureaus, and Boards of the Department of Justice," (May 23, 1977), Rehnquist Testimony, *supra.* However, because these interests rarely impinge on the performance of constitutional functions of the Executive Branch to the same degree as the "state secrets" or deliberative process components of the privilege, the privilege is generally asserted simply as an evidentiary privilege in litigation.

[34] The privilege for confidential information on required government reports is similar to the informant's privilege, *see* discussion at 31, *infra,* in that it protects information solicited by the government for its purposes on a promise of confidentiality. This privilege, like its FOIA-exemption 6 counterpart, protects accident reports, employment history reports, financial disclosures, conflict-of-interest reports, and other information, the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *See Dep't of State* v. *Washington Post Co.,* 456 U.S. 595 (1982). *Dep't of the Air Force* v. *Rose,* 425 U.S. 352 (1976); *Ass'n for Women in Science, supra.* Of the privileges discussed in this memorandum, this is the least likely privilege to be invoked in the context of President-Attorney General communications.

[35] *See generally* n.5, *supra.*

analogues in the Freedom of Information Act under exemptions 6 and 7, 5 U.S.C. §§ 552(b)(6),(7), to shield documents of the same general type from disclosure to members of the public. As noted in the foregoing discussion of the evidentiary privileges incorporated into exemption 5 of the FOIA, the court must strike a balance between "the public concern in revelations facilitating the just resolution of legal disputes [on the one hand,] and, on the other, occasional but compelling needs for confidentiality," *McClelland* v. *Andrus, supra* at 1287, n.55, in deciding claims of privilege in the litigation context.

A. Informant's Privilege

The informant's privilege permits the government to withhold the identity of persons who furnish information concerning violations of the law, or otherwise render assistance, to officers charged with law enforcement responsibilities. *See* 8 C. Wright & A. Miller, Federal Practice & Procedure, § 2019 at 155 (1970); *Roviaro* v. *United States*, 353 U.S. 53 (1957); *Black* v. *Sheraton Corp. of America*, 47 F.R.D. 263 (D.D.C. 1969), *aff'd* 564 F.2d 550 (D.C. Cir. 1977). The informant's privilege recognizes that prospective informants usually condition their cooperation with law enforcement officers on an assurance of anonymity in order to protect against physical harm or other undesirable consequences to themselves and their families which would very likely result as a consequence of disclosure. *United States* v. *Tucker*, 380 F.2d 206, 213 (2d Cir. 1967). Although this privilege protects only the identity of the informant, information provided by the informant may also be shielded under this privilege if its disclosure would reveal the informer's identity. *Rovario* v. *United States*, *supra*, at 60. The informant's privilege, like the other privileges discussed above, is qualified; therefore, the government must show that its interest in effective law enforcement outweighs the litigant's need for the information. *See Rovario* v. *United States, supra; In re Attorney General of United States*, 596 F.2d 58 (2d Cir. 1979); 2 J. Weinstein and M. Berger, Weinstein's Evidence ¶ 510[02] at 510–18 (1982).

B. Law Enforcement Investigatory Files Privilege

Like the informant's privilege, the privilege for law enforcement investigatory files is necessary to protect against the harm that would flow from public disclosure of information contained in the files and to facilitate the government's law enforcement process. *See Black* v. *United States*, 564 F.2d 531 (D.C. Cir. 1977); *Brown* v. *Thompson*, 430 F.2d 1214 (5th Cir. 1970). Disclosure of open investigatory files[36] would undercut the government's efforts to prosecute criminals by disclosing investigative techniques, forewarning suspects under inves-

[36] As is apparent from the reasons underlying the privilege, the law enforcement investigatory files privilege does not apply to files pertaining to investigations which have been closed, although information protected by another privilege, *e.g.*, the informant's privilege, would continue to be shielded. *See* 2 Weinstein's Evidence ¶ 509(07) at 509–52–58 (1982). *Cf.* Supreme Court's recent discussion of FOIA exemption 7 in *FBI* v. *Abramson*, 456 U.S. 615 (1982)

tigation, deterring witnesses from coming forward, and prematurely revealing facts supporting the government's case.[37] The privilege for law enforcement investigatory files is a qualified privilege, and may be overcome by a strong showing of need or interest in disclosure of the information. *See Black* v. *United States, supra.*

C. FOIA Exemption 7

Exemption 7 of the Freedom of Information Act incorporates these privileges for law enforcement records to protect the information contained therein from compulsory disclosure to members of the public. Exemption 7 exempts from the general disclosure mandate of the FOIA those matters which are

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel[.]

5 U.S.C. § 552(b)(7). The subparts of § 552(b)(7) make clear that the interests protected therein are roughly analogous to those protected by the "governmental" privileges in litigation for informant's identity and law enforcement investigatory files. *See generally FBI* v. *Abramson, supra; NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *Lesar* v. *Department of Justice*, 636 F.2d 472 (D.C. Cir. 1980), *Church of Scientology of Calif.* v. *Department of Justice*, 612 F.2d 417 (9th Cir. 1979).

IV. Conclusion

The privileges available to protect the confidentiality of the Attorney General's communications with the Office of the President can be roughly categorized into three classes, depending upon the nature of the communications for which the privilege is asserted, the interests which are sought to be protected by the claim of privilege, and the persons against whom the claim is made. This memorandum represents an effort by this Office to provide the Attorney General with a general outline of the privileges available to him to protect his confidential communica-

[37] *See also* former Attorney General Jackson's opinion at 40 Op. Att'y Gen 45 (1941), concluding that premature disclosure of law enforcement investigative reports to Congress or the public could prejudice the rights of prospective defendants whose investigations are the subject of the reports.

tions and working papers from compulsory disclosure when he believes that disclosure would be against the interests of the Department, the President, or the broader "public," and to provide guidelines for the assertion of those privileges. While the foregoing discussion should prove helpful in providing a framework for analysis of potential claims of privilege, we would caution that the applicability of any privilege to a given set of circumstances will almost always involve a judgment of competing values. While the Attorney General or the client must decide initially whether to assert the privilege, the task of resolving conflicts arising out of such competing values, in the final analysis, is one that is reserved to the courts.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Swearing in of a United States Attorney

A United States Senator is not authorized by federal law to administer the oath of office to a United States Attorney, though he may administer a ceremonial oath.

August 3, 1982

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This responds to your inquiry as to whether a United States Senator (in this instance, a Senator from Georgia) can administer the oath of office to a United States Attorney.

According to 5 U.S.C. § 2903(a) (1976) the oath of office required by Article VI, clause 3 of the Constitution and 5 U.S.C. § 3301 "may be administered by an individual authorized by the laws of the United States or by local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered." In addition, a department head may, pursuant to 5 U.S.C. § 2903(b)(1), authorize in writing any employee in his department to administer the oath of office to an employee of his department.

The laws of the United States do not generally authorize Senators to administer oaths.[1] Hence, unless a Senator is authorized by state law[2] to administer oaths he could not validly swear in a United States Attorney. This, however, does not mean that the Senator may not administer a ceremonial oath of office to the United States Attorney, provided that the latter actually takes the oath before a person authorized to administer it, such as a notary or a person in the United States Attorney's office authorized in writing by the Attorney General, pursuant to 5 U.S.C. § 2903(b)(1), to administer the oath. This procedure (a ceremonial oath with a separate, private formal oath) is apparently quite common and is a practice which has been followed for many years.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[1] Senators may administer oaths with respect to matters within the jurisdiction of the Senate, in particular to witnesses before their committees. 2 U S C §§ 23, 191.

[2] A necessarily limited perusal of the Georgia Code did not disclose any power of a Senator to administer oaths

Authority of Senate Committee Staff to Depose Executive Branch Officers

There is no authority in the rules of the Senate, or in relevant statutes, for the Senate Committee on Labor and Human Resources to direct its staff to depose certain Executive Branch officials. Recent practice establishes that such depositions may be taken by Senate committee staff only when specifically authorized by a resolution of the full Senate in connection with a particular investigation.

August 4, 1982

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This responds to your request for our opinion whether the Senate Committee on Labor and Human Resources may, without specific authority conferred by a resolution adopted by the Senate, authorize its staff to take depositions of Executive Branch officials in the course of that Committee's inquiry into the confirmation of Secretary [of Labor Raymond J.] Donovan.

On July 22, 1982, the Senate Committee on Labor and Human Resources adopted a resolution authorizing an investigation into whether "the Committee received full, complete and timely disclosure of all information in the [Donovan] confirmation [proceedings]." On the afternoon of July 29, 1982, Messrs. Francis M. Mullen, formerly Executive Assistant Director of the FBI, FBI Special Agent Anthony Adamski, Jr., and Fred F. Fielding, Counsel to the President, received Notices of Deposition purporting to require them to appear for depositions at 7:30 a.m. on August 3, 6, and 9, 1982, respectively. Each Notice of Deposition states that it is authorized "pursuant to Committee resolution and the Committee rules. . . ." We have examined the Committee resolution and rules, and, in addition, the Standing Rules of the Senate, the Standing Orders and Resolutions Affecting the Business of the Senate, and relevant statutes and have found no authority, express or implied, for the depositions which are demanded of Messrs. Mullen, Adamski, and Fielding.

I. The Committee's Rules of Procedure

The Rules of Procedure of the Committee, which are attached to each of the Notices of Deposition, do not authorize the taking of depositions. In fact, the word "deposition" nowhere appears in the rules of the Committee, and no

language appears in the rules from which power in the staff to take depositions could reasonably be inferred.[1]

II. The Committee's Resolution

The Committee's resolution of July 22, 1982, purports to authorize sworn depositions "anywhere in the continental United States" to be taken by Committee staff members, provided only that a Senator be present when the deposition commences. The resolution states that "under Senate rule XXVI and section 1364(a) of title 28, United States Code, a committee may authorize the issuance of subpoenas and the taking of depositions. . . ." No other authority for taking depositions is cited in the resolution.

Rule XXVI governs Senate committee and subcommittee procedure. It provides broad authority to conduct hearings, to take testimony, to require "by subpena or otherwise" the attendance of witnesses, and to conduct investigations. Yet nowhere in the rule is there language expressly or implicitly authorizing the taking of depositions by committee staff. As with the rules of the Committee itself, the word "deposition" nowhere appears in Senate Rule XXVI. Indeed, none of the Standing Rules of the Senate contain so much as a single reference to depositions.

The statutory provision cited by the resolution, 28 U.S.C. § 1364(a) (Supp. V 1981) added by Pub. L. No. 95–521, 92 Stat. 1879, establishes jurisdiction in the United States District Court for the District of Columbia to hear certain civil actions brought by the Senate Legal Counsel, including actions to require compliance with an order of a committee seeking answers to "any deposition or interrogatory." This provision, however, is by its express language inapplicable to the taking of depositions of Executive Branch officials:

> This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpena or order issued to an officer or employee of the Federal Government acting within his official capacity.

28 U.S.C. § 1364(a); *see* S. Rep. No. 170, 95th Cong., 2d Sess. 89 (1977) (this section does not apply to Executive Branch officers). We are unaware of any other statutory provision authorizing the taking of depositions by Senate committee staff.

We have examined the Standing Orders and Resolutions of the Senate set out in the Senate Manual, S. Doc. No. 1, 96th Cong., 1st Sess., and have discovered no general standing authority for the taking of depositions by the staff of a Senate committee. It thus appears that the Committee's resolution purporting to authorize the taking of depositions by its staff was entirely without legal basis in statute or Senate rule.

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[1] We note that if the Committee's rules provided for the taking of depositions of Executive Branch officials by Committee staff, such a provision might well establish customary practice of the Committee, it would not, however, establish a source of power for the adoption of the provision itself.

III. The Flannery Memorandum

On July 12, 1982, John P. Flannery II, Special Counsel to the Labor Committee, and George Pritts, the Committee's Chief Counsel, addressed to the members of the Committee a memorandum concerning the resolution which was eventually adopted on July 22. The bulk of that memorandum discusses the nature and advantages of deposing witnesses prior to holding any public hearings. The memorandum informed the members as follows regarding the authority for the staff's taking depositions:

> As you may not be familiar with Senate staff depositions, a few explanatory remarks about their history and use follow. Senate staff depositions, first authorized in 1928,* and expressly provided for by statute,** have been used in recent Congressional investigations.*** They are similar to the depositions of a non-party witness in a civil case.****

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* S. Res. 118, 70th Congress, 1st Session.

** Title 28, United States Code, Section 1364(a).

*** *See* H. Res. 803, 93rd Congress (House Judiciary Committee, during impeachment investigation for Richard Nixon); H. Res. 222, 95th Congress (House Select Committee on Assassinations); S. Res. 495, 96th Congress, 2nd Session (Senate Billy Carter inquiry); S. Res. 4, 95th Congress, 1st Session §§ 104(c)(1)(G) (Aging Committee), 105(c)(1)(G) (Indian Affairs), 106(b)(7) (Nutrition); S. Res. 400, 94th Congress, 2nd Session, § 5(a)(7) (Intelligence).

**** *See* Rule 30 of the Federal Rules of Civil Procedure.

This statement of authority is without any foundation in the law for the following reasons:

(*A*) S. Res. 118 was passed in 1928 and provides:

> Resolved, That the President of the Senate be, and he hereby is, authorized, on the request of the chairman of any of the committees of the Senate, to issue commissions to take testimony within the United States or elsewhere.

69 Cong. Rec. 1926 (1928). This resolution provides authorization only for the President of the Senate (*i.e.*, the Vice President of the United States) to commission the taking of testimony; it provides no authority for the staff of committees to take testimony simply on the strength of a committee resolution. Further, it provides no basis for committee staff to take depositions of Executive Branch officials.[2]

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[2] We note that S Res 118 may not represent a current source of authority for committees of the Senate to take "testimony" outside Washington The Resolution does not appear in the Senate Manual, and there is nothing in the Flannery memorandum suggesting that that Resolution is not in a state of desuetude. In addition, assuming *arguendo* that the Resolution could be read to authorize the taking of testimony from Executive Branch officials, it implicitly recognizes the sensitivity of Senate committee requests for testimony of Executive Branch officials by providing that the Vice President, a member of the Executive Branch, must authorize all such requests

(*B*) Section 1364(a) of Title 28, U.S. Code, simply does not stand from the proposition cited. As stated above, § 1364 on its face does not apply to committee subpoenas or orders directed to Executive Branch officers.

(*C*) The five prior House and Senate resolutions authorizing the taking of depositions by the staff of various committees in no way provides authority for the taking of depositions by the staff of the Senate Committee on Labor and Human Resources because—among other reasons—none of the cited resolutions authorized action by this Committee or its staff, nor are they phrased in language that is even arguably applicable to Senate committees generally. On the contrary, the recent historical practice established by these five resolutions is that depositions may be taken by the staff of Senate committees only when expressly authorized by a resolution of the full Senate in connection with a particular investigation, not by a simple resolution adopted by a Senate committee *sua sponte*.

(*D*) Finally, Rule 30 of the Federal Rules of Civil Procedure lends no support to the committee resolution at issue here, since that rule applies only "after commencement of [a civil] action" in the courts of the United States. Needless to say, it provides no authority, express or implied, for depositions to be taken by Senate committee staff.

IV. Conclusion

On the basis of the references relied upon in the Committee material available to us, we find no authority for the compelled deposition of Messrs. Mullen, Adamski, and Fielding. In addition, our research into the Standing Rules of the Senate has uncovered no authority that would support the deposition power asserted in the Committee Resolution. Finally, the more recent precedents relied upon in the Committee material suggest quite strongly that older precedents which may be supportive of such standing committee power, even if they exist, have been abandoned in favor of passage of Senate resolutions authorizing the taking of depositions by committee staff in specific circumstances. At least until some more persuasive precedents are proffered, however, we are firmly convinced that there is no support in law or Senate rules for the staff of the Senate Committee on Labor and Human Resources to take the depositions of Executive Branch officials.[3]

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[3] Although this opinion is confined to the facts presented, we would emphasize that we have found no plenary authority for the taking of depositions of even private persons by the staff of Senate committees absent a specific resolution passed by the Senate authorizing such action. Whether an established practice as regards deposing of private persons would, without more, legitimate the deposing of Executive Branch officials is doubtful, given the co-equal status of the Legislative and Executive Branches under our Constitution.

Discrimination Among Classes of Legal Aliens in the Provision of Welfare Benefits

Proposed legislation authorizing the states to discriminate among classes of legal aliens in the provision of welfare benefits is within Congress' power, and state statutes passed pursuant to it would likely be held constitutional.

As a general matter, Congress could legislate to prevent states from providing welfare benefits to certain classes of aliens in order to effectuate a national policy on immigration. While there appears to be no basis for Congress' preempting provisions in state constitutions which mandated the payment of welfare to all aliens, regardless of their legal status, neither does any state constitution appear to contain such a mandatory provision.

August 10, 1982

MEMORANDUM OPINION FOR THE
ASSOCIATE DEPUTY ATTORNEY GENERAL

This responds to your request for advice whether certain language proposed for inclusion in S. 2222, 97th Cong., 2d Sess. (1982), a bill to amend the immigration laws, would be both constitutional and sufficient to overcome provisions in the constitutions of five states—California, Florida, Illinois, New York, and Texas—requiring that welfare benefits be given to citizens and legal aliens alike. The proposed language would authorize states to deny federal benefits to aliens legalized under the amnesty provisions of the bill. For reasons stated hereafter, we believe that Congress may, by statute, authorize the states to decide that they will not provide defined types of welfare benefits to designated classes of aliens legally in this country. We have, however, been unable to discover any state constitutional provisions that would affirmatively prevent state legislatures from making a decision to withdraw welfare benefits from that same class of aliens. The language will permit the states to discriminate in their statutes against this particular class of aliens.

Two states—California and New York—have statutes that explicitly provide that assistance is available to any "resident" who is either a citizen or an alien who has not been determined to be an illegal alien. Cal. Welfare and Institutions Code § 11104 (West 1980); N.Y. Social Services Law § 209(1)(a)(iv) (McKinney 1976). Illinois makes aid available to any "resident," 23 Ill. Ann. Stat. § 6–1.1 (Smith-Hurd Supp. 1982), while Florida provides assistance to those who are "needy" and are residing in Florida with an intention to remain, Fla. Stat. § 409.185(1)(c). Given the Supreme Court's ruling in *Graham* v. *Richardson*,

403 U.S. 365 (1971), it would not be surprising if most states, not just these five, provided welfare benefits to all residents, whether they were citizens or lawful aliens.

We believe that proposed § 301(a)(2)(D), which would authorize states to deny benefits to the newly created class of aliens, is permissible. Although *Graham, supra,* struck down state statutes that discriminated against aliens in the distribution of welfare benefits, that ruling was based on the statutes' encroachment on an area of federal power—*i.e.*, control of immigration—in a manner that was "inconsistent with federal policy." 403 U.S. at 380. The Supreme Court has stated, however, that if a state law regulating aliens is consistent with federal policy, or was clearly intended to be allowed by federal policy, it will not generally be struck down as violative of the federal Constitution. *See De Canas* v. *Bica,* 424 U.S. 351 (1976) (California statute forbidding employment of illegal aliens). *Cf. Toll* v. *Moreno,* 458 U.S. 1 (1982) (Congress intended certain aliens to have affirmative benefits that state policy undercut); *Plyler* v. *Doe,* 457 U.S. 202 (1982) (state could not act where there was no congressional intent to deprive children of illegal aliens of a public school education). Proposed § 301(a)(2)(D) makes explicit a national policy to deprive this new class of certain benefits and authorizes the states, if they wish, to follow suit with regard to similar benefits. We believe that the Supreme Court would uphold a state statute, passed after enactment of § 301(a)(2)(D), that deprived this particular class of aliens of benefits under the programs identified pursuant to § 301(a)(2)(C).

We have not found any provision explicitly mandating payment of general assistance to persons, regardless of their legal status, in the constitutions of the states mentioned above. New York's constitution does state that "The aid, care and support of the needy are public concerns," but it leaves to the state legislature the definition of needy and the method of meeting this affirmative duty. N.Y. Const. art. 17, § 1. The only other reference to the issue in the constitutions noted above is in the Texas constitution which authorizes, but does not require, the state legislature to provide for "needy" aged, disabled, or blind persons or dependent children. Tex. Const. art. 3, § 51–a. Thus, the assumption upon which part of your inquiry is based appears to be in error.

We are not aware of the basis upon which Congress might premise federal legislation designed to preempt contrary state constitutions and permit state legislatures to discriminate against aliens. The fact that Congress could constitutionally legislate directly to prevent all states from providing such benefits does not establish, in our view, that Congress could override state constitutional provisions that limit the power of state legislatures to make such a decision themselves. In the absence of an understanding of the particular basis upon which Congress would enact such a law, we cannot opine upon the constitutionality of any such provision.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Federal Reserve Board Policy on Bank Examiner Borrowing

The Federal Reserve Board may change its administrative policy relating to borrowing by bank examiners, to allow bank examiners to borrow or hold credit cards from lending institutions affiliated with banks or bank holding companies which they are authorized to examine. The change proposed would not result in a violation of 18 U.S.C. §§ 212 and 213.

August 25, 1982

MEMORANDUM OPINION FOR THE SECRETARY OF THE BOARD, FEDERAL RESERVE BOARD

This responds to your request for our views on a proposed change in Federal Reserve Board policy pertaining to bank examiner borrowing. The proposed change would permit bank examiners employed by the Board to borrow or hold credit cards from lending institutions affiliated with banks or bank holding companies which they are authorized to examine. Your question is whether such a policy change can be accomplished consistent with the conflict of interest laws relating to bank examiner borrowing. We conclude that it can.

At issue is the scope of the prohibition 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 Federal Deposit Insurance Corporation (FDIC) from making a loan to an examiner who "examines or has authority to examine" the bank. Section 213 complements § 212 by prohibiting a bank examiner from accepting a loan from "any bank, corporation, association or organization examined by him or from any person connected herewith . . . ."[1]

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

§ 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 National Agricultural Credit 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 . .

§ 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 . . .

The rule against examiner borrowing contained in §§ 212 and 213 was first promulgated as § 22 of the Federal Reserve Act of 1913, 38 Stat. 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). As a conflict of interest rule, it has been interpreted by the major federal agencies responsible for bank examination to prohibit *all* credit transactions between banks and the federal officials who have authority to examine their affairs, whether or not they are corrupt.[2] There is no provision in the statute or its legislative history which evinces an intent to exempt any particular kind of credit relationship, and the rule against examiner borrowing in §§ 212 and 213 has been applied to prohibit credit effected through credit cards, as well as direct loans.

Prior to 1979, bank examiners employed by the Federal Reserve Board were forbidden by Board policy to borrow or obtain credit from any bank which the Board was authorized by law to examine, including all member banks and their affiliates. *See* 12 U.S.C. §§ 248(a), 325, 338, and 483. In that year, however, recognizing the severe restrictions this policy placed on its examiners' ability to obtain ordinary credit, the Board limited the authority of its examination personnel to state member banks, bank holding companies, and their non-bank affiliates. Primary federal authority for examining national banks and state nonmember banks affiliated with member banks was ceded to the Comptroller of the Currency and the FDIC, respectively, and Federal Reserve examiners were left with no authority to audit such banks until and unless it was specifically granted on an *ad hoc* basis by the Board. As a result, since 1979 Federal Reserve examiners have been permitted to borrow and hold credit cards from national and state nonmember banks.[3]

Under the Federal Reserve Board's 1979 policy on borrowing, bank examiners employed by the Board could obtain credit from national banks and state nonmember banks even if those banks were "affiliated" with state member banks and holding companies which Federal Reserve examiners were authorized to audit.[4] However, in this event, the examiner was not permitted to participate in the

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[2] *See, e.g.*, 12 C.F.R. § 336.735–11(b)(5)(i) (1981) (FDIC examiners may not accept any extension of credit from insured banks they examine); Administrative Circular 53 (Revised) supplementing 31 C.F.R. § 0 735 (Comptroller of the Currency examiners may not accept loan or extension of credit of any kind from national banks); Federal Reserve Board Ethics Manual, Part D (examiners of Federal Reserve Board may not borrow from or hold credit cards issued by banks they are authorized to examine)

[3] This change in Federal Reserve Board policy was approved as an interpretation of 18 U.S.C. §§ 212 and 213 by the Criminal Division of this Department *See* letter of Feb. 7, 1979 to Mr. J. Charles Partee, Member of the Board of Governors of the Federal Reserve. Several years earlier, the FDIC had taken similar steps to limit the authority of its examination personnel to enable them to borrow from national banks and state member banks, also with the Criminal Division's approval. *See* letter of June 27, 1973 to Mr. Frank Wille, Chairman, FDIC. Because bank examiners employed by the Comptroller of the Currency have statutory authority to examine only national banks and their affiliates, *see* 12 U.S.C. § 481, they have never been subject to the same constraints on their ability to obtain credit as have the examiners of the Federal Reserve and FDIC

[4] As defined in applicable statutory provisions, a bank "affiliate" includes any corporation, business trust, or association (1) of which a bank owns or controls a majority of the voting shares; (2) of which control is held, directly or indirectly, by the shareholders of the bank; (3) a majority of whose directors are also directors of the bank; or (4) which owns or controls, directly or indirectly, a majority of the shares of capital stock of the bank. *See* 12 U.S.C. § 221a(b). *See also* 12 U.S.C. §§ 371c and 1828(j) An "affiliate" of a bank thus includes the holding company of which the bank is a subsidiary, and any other subsidiary of that holding company

examination of the affiliated bank or holding company. With this restriction, the Board sought to ensure that none of its examiners would be involved in a credit relationship with an affiliate of an institution he was actually responsible for examining.[5] The change which the Board now proposes to make in its policy would remove this restriction to permit one of its examiners to audit a state member bank or holding company notwithstanding any current credit relationship he may have with an affiliate of that bank or holding company.

In 1980, advising with respect to a substantially similar change proposed by the FDIC, this Office took the position that § 213 does not prevent a bank examiner from accepting a loan from an institution affiliated with a bank which he examines, so long as the loan is not approved by a "person connected with" the latter institution.[6] Our review of the legislative history of § 213 indicated that Congress intended to do no more than bar a bank examiner from accepting a loan from a bank, or an *individual* connected with a bank he was responsible for examining; its prohibition was not intended to extend to loans from affiliated institutions however tenuous their relationship with the bank subject to examination. We have reexamined that position, and we believe it to be the correct interpretation of § 213. Accordingly, we do not believe that § 213 poses an obstacle to the policy change now proposed by the Federal Reserve, which would bring its policy on examiner borrowing into line with that of the FDIC.[7] And, while our earlier opinion focused on § 213, we reach the same conclusion with respect to the complementary provisions of § 212. Section 212 prohibits loans by "an officer, director or employee of a bank" to an examiner who "has authority to examine such bank." The gravamen of the offense covered by § 212, like that covered by § 213, is the approval of credit for a bank examiner by a person connected with the same bank which the examiner has authority to audit. If bank officials of the lending institution are not also "officers, directors, or employees" of the bank or holding company subject to the examiner's audit authority, there is no opportunity for the conflict of interest sought to be avoided by §§ 212 and 213 to arise.[8]

ROBERT B. SHANKS
Deputy Assistant Attorney General
Office of Legal Counsel

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[5] Attempting to achieve the same end by a different route, the analogous FDIC policy approved by the Criminal Division in 1973 provided that FDIC examiners could not borrow from an affiliate of a bank within the ambit of their examination authority

[6] *See* July 10, 1980, Memorandum for the Executive Secretary, FDIC, "Proposed Amendments to Regulations of Federal Deposit Insurance Corporation (FDIC) Relating to Bank Loans to Examiners."

[7] *See also* Administrative Circular 53 (Revised), supplementing 31 C.F.R. § 0.735, which articulates a substantially similar credit policy for examiners employed by the Comptroller of the Currency

[8] We do not suggest that §§ 212 and 213 would permit an examiner to borrow or accept credit from an affiliate in a case where the relationship between the institution being examined and the affiliated lending institution is such as to suggest common control, or where the two entities have a common majority of officers or directors. In such a case, a loan from an affiliate might be tantamount to a loan from the bank being examined, thus giving rise to the very conflict of interest which §§ 212 and 213 were intended to prevent. We understand from discussions with members of your staff that the structure of the banking industry is such as to make this eventuality highly unlikely *Cf. United States* v. *Bristol*, *supra*, in which the court held that a bank officer's loan to an examiner violated §§ 212 and 213 even though it was funneled through an entity which the examiner had no authority to examine.

Presidential Appointment of the Board of Directors of Radio Free Europe/Radio Liberty, Inc.

Statute conditioning further funding of Radio Free Europe/Radio Liberty, Inc. on the President's selection of its Board of Directors would not undermine the public purposes of this nonprofit corporation, and it is therefore unlikely that the Delaware courts would strike it down under that state's laws.

August 31, 1982

MEMORANDUM OPINION FOR THE CHAIRPERSON, BOARD FOR INTERNATIONAL BROADCASTING

This responds to your request of July 12, 1982, for our opinion whether Delaware law would prohibit a proposed amendment to the certificate of incorporation of Radio Free Europe/Radio Liberty, Inc. (RFE/RL) and confirms the oral advice I gave you on this subject in July. RFE/RL is a nonprofit company incorporated under Delaware law with a private Board of Directors. The Board for International Broadcasting Authorization Act for Fiscal Years 1982 and 1983, Pub. L. No. 97–241, 96 Stat. 273, 295 (1982), which was signed last week by the President, requires RFE/RL, if it is to receive any future federal funding, to amend its certificate of incorporation so that its Board of Directors would be selected by the President of the United States, with the advice and consent of the Senate. For the reasons set forth in detail below, we believe that it is unlikely that the Delaware courts would strike down such an amendment to RFE/RL's certificate of incorporation.

I. Background

Although RFE/RL is a private corporation, it currently receives over 99 percent of its operating funds from congressional appropriations[1] and is subject to numerous federal restrictions on its operations as a condition for this funding. This unusual hybrid of private and public control is largely an historical artifact. Over 30 years ago the Office of Policy Coordination, and later the Central Intelligence Agency (CIA), established and secretly funded two separate, nonprofit corporations, Radio Free Europe and Radio Liberty, which were the

[1] According to your letter, its current budget request is for more than $95 million, although private contributions have never exceeded $200,000 per annum since 1975.

historical antecedents of RFE/RL.[2] In 1973, after Congress had by legislation directed that all connections between the CIA and the two corporations terminate, Congress created the Board for International Broadcasting (BIB) to oversee the funding and operation of these two radio stations. *See* Pub. L. No. 93–129, 87 Stat. 456 (1973), 22 U.S.C. §§ 2871–2879. Subsequently, Radio Free Europe and Radio Liberty merged to become RFE/RL, over which the BIB retained funding and oversight authority.

As provided in the 1973 Act, *as amended*, the BIB is composed of five members appointed by the President with the advice and consent of the Senate. The BIB has general authority to assure that RFE/RL is operated efficiently and consistently with the broad foreign policy objectives of the government. *See* 22 U.S.C. § 2873 (1981). Pursuant to this authority, the BIB has promulgated regulations which make RFE/RL "responsible for assuring compliance of its operations with the policy guidelines" established by the BIB and which provide for any remedial action the BIB determines is necessary because of violations of these guidelines. 22 C.F.R. § 1300.6(c)–(f). The Chairperson of the BIB may also veto any nomination made by the RFE/RL nominating committee for a position as an officer of RFE/RL, and, under the by-laws of RFE/RL, as a new director.[3] Finally, the regulations require that RFE/RL obtain the approval of the BIB before it amends its certificate of incorporation. *See* 22 C.F.R. § 1300.13(c).

These overlapping lines of authority have resulted in continuing disagreements between the BIB and the Board of Directors of RFE/RL over the goals and operation of RFE/RL. The Board of International Broadcasting Authorization Act for Fiscal Years 1982 and 1983 would resolve these conflicts by granting the BIB absolute authority over RFE/RL. Under § 403(a) of the Act, RFE/RL is required, as a condition for future funding from the BIB, to amend its certificate of incorporation so that the members of the BIB serve as RFE/RL's Board of Directors.[4] Since the Board of Directors of RFE/RL are also the members of RFE/RL, *see* RFE/RL, Inc., By-laws, § 2.1, this would give the BIB complete control of the corporation. Moreover, the Board of Directors of RFE/RL would be appointed by the President of the United States and would be removable by the President at his pleasure.

In response to this legislation, RFE/RL solicited an opinion from its Delaware counsel whether Delaware law would permit the continued incorporation of RFE/RL were this amendment to RFE/RL's certificate of incorporation to be adopted. You have provided us with a copy of that opinion. *See* Opinion of Potter,

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[2] Radio Free Europe, Inc. was incorporated under New York law, while Radio Liberty Committee, Inc. was incorporated under Delaware law

[3] The regulations provide that the Chairperson shall serve as an ex officio member of the Board of Directors and as a voting member of the nominating committee for the nomination of officers. *See* 22 C.F.R. § 1300.9(b). Because all nominations must receive the unanimous consent of the members of the nominating committee before they may be presented to the Board of Directors, the Chairperson can veto any nomination for an officer's position in the corporation. The by-laws of RFE/RL also provide that the Chairperson of the BIB shall serve as a voting member of the nominating committee for all purposes, thereby permitting him to veto any nomination for director as well. *See* RFE/RL, Inc., By-laws, § 3.13.1(b)(i)

[4] The Act would also increase the number of BIB members to ten, nine of whom would be appointed by the President. The tenth member, who would serve ex officio without voting rights, would be the chief executive officer of RFE/RL. *See* Pub. L. No. 97–241, 96 Stat. 273, 296 (1982).

Anderson and Carroon, dated May 28, 1982 (Delaware opinion). The Delaware opinion states that it is a "fundamental concept" of nonprofit corporation law that directors or members of nonprofit corporations may not delegate to outsiders those duties that lie at the heart of the management of the corporation. Since the selection of a corporation's directors is one of the most important decisions regarding the operation of the corporation, the Delaware opinion concludes that Delaware law does not permit the directors of a nonprofit corporation to be chosen by the "holder of an office," such as the President of the United States, "who is neither associated with nor interested in the operations of the corporation and whose decision[s] would be governed by considerations different from and potentially adverse to the best interests of the corporation." Delaware opinion at 5.

II. Delegation of Corporate Decisions

The analysis in the Delaware opinion is based on the traditional doctrine restricting directors of for-profit corporations from delegating management decisions to outsiders. *See* Del. Code Ann. tit. 8, § 141(a)(1974). Under the Delaware opinion's reasoning, the Delaware courts would extend this doctrine to prohibit the directors of RFE/RL, a nonprofit corporation, from delegating the selection of new directors to the President of the United States. As the Delaware opinion recognizes, however, the organization of and laws governing nonprofit corporations are different from those governing for-profit corporations. The Delaware General Corporation law, which regulates nonprofit corporations as well as for-profit corporations, specifically states that the certificate of incorporation of a nonstock corporation "may . . . provide that the business and affairs of the corporation shall be managed in a manner different from that provided in this section." Del. Code Ann. tit. 8, § 141(j). The Delaware General Corporation law also provides that the certificate of incorporation of a nonstock corporation may alter the general rule that each member shall have one vote. Del. Code Ann. tit. 8, § 215. Thus, nonprofit corporations have greater latitude under Delaware law in their organizational structure than for-profit corporations, although the absence of relevant case law leaves unclear what limits the Delaware courts would ultimately place on the organization of nonprofit corporations in a particular context. Accordingly, in reviewing the proposed amendment, we will examine the underlying purpose of the restriction on managerial delegations and attempt to assess how the Delaware courts would apply this restriction to a nonprofit corporation like RFE/RL. We will then consider the relevance of the two cases relied on in the Delaware opinion.

A. Delegation of Managerial Decisions in a For-Profit Corporation

The restriction on the delegation of managerial decisions is derived from Del. Code Ann. tit. 8, § 141(a), which states that "[t]he business and affairs of every corporation organized under this chapter shall be managed by a board of direc-

tors, except as may be otherwise provided in the other provisions in this chapter or in its certificate of incorporation." By providing that a separate group such as the directors manage the corporation, the section furthers two objectives. First, it assures that the business affairs of the corporation are not managed by the equity owners of the corporation. *See Abercrombie* v. *Davies*, 123 A.2d 893, 899 (Del. Ch. 1956), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957).

Second, the provision assures that the group which manages the corporation, the directors, is nevertheless responsible and accountable to the stockholders. This would not be true if an outsider were delegated management duties. In this regard, the directors are the agents of the stockholders and owe a fiduciary duty to exercise their best judgment in coordinating the affairs of the corporation. *See generally* 2 W. Fletcher, Cyclopedia of the Law of Private Corporations, §§ 295–296 (rev. perm. ed. 1982). If an outsider or a stockholder were to run the management affairs of the corporation, that person would be acting without the authority of the stockholders and therefore would necessarily be undermining the directors' "duty to use their own best judgment on management matters." *Abercrombie* v. *Davies*, 123 A.2d at 899. *See generally Clarke Memorial College* v. *Monaghan Land Co.*, 257 A.2d 234 (Del. 1969); *Lehrman* v. *Cohen*, 222 A.2d 800 (Del. 1966).

This section, however, does not require that directors make all corporate decisions. It obviously would not preclude the stockholders as a group from selecting the directors. The selection and removal of directors is not a management decision which must be made by the directors themselves, but a right normally vested in the equity owners of a corporation to choose the management. *See, e.g., Campbells* v. *Loew's*, 134 A.2d 852, 857 (Del. Ch. 1957). Similarly, this section would not prohibit stockholders from selling their stock to individuals who were previously outside the firm, or, subject to the requirements of Delaware's voting trust statute, delegating their choice of directors to outsiders while retaining their equity interest in the firm. *See* Del. Code Ann. tit. 8, § 218. *See generally Adams* v. *Clearance Corp.*, 121 A.2d 302 (Del. 1956); *Ringling Bros.* v. *Ringling*, 53 A.2d 441 (Del. 1947). Finally, under the modern view, § 141(a) would not prohibit the directors from delegating most management decisions to outsiders when specifically authorized by the stockholders in an amendment in the certificate of incorporation. *See Lehrman* v. *Cohen*, 222 A.2d at 808. In such a case, the principal (the stockholders) has expressly authorized the agent (the directors) to delegate his authority. *See* 2 W. Fletcher, Cyclopedia of the Law of Private Corporations, § 496 (rev. perm. ed. 1982).

B. Delegation of Decisions in Nonprofit Corporations

Application of § 141(a) to a nonprofit corporation is complicated because the provision is intended largely to regulate the operation of a for-profit corporation comprised of equity stockholders and a separate board of directors. A nonprofit corporation such as RFE/RL, however, has no stockholders. It is managed *and* controlled by a self-perpetuating Board of Directors charged with furthering the

public goals in its certificate of incorporation. In light of these differences, we believe that the proposed amendment to RFE/RL's certificate of incorporation would not violate § 141(a) as that provision would be applied to nonprofit corporations.

First, it is important to recognize that the proposed amendment would not delegate a *management* decision from the directors of the corporation, but rather would delegate the selection of who may make the management decisions. At least with respect to for-profit corporations, however, § 141(a) is intended to limit only the delegation of management decisions, not the selection of management. Under the proposed amendment, the directors of RFE/RL still would have authority over the management of the business affairs of the corporation. They merely could be replaced if the President were dissatisfied with their decisions or performance, just as the directors of many for-profit corporations can be replaced by the stockholders. *See Everett* v. *Transnation Devel. Corp.*, 267 A.2d 627 (Del. Ch. 1970).[5]

Second, delegating the selection of directors to a person outside a nonprofit corporation raises different issues than directors delegating management decisions to outsiders in a for-profit corporation. A director is prohibited from delegating a management decision to an outsider largely because this would allow a person not selected by the stockholders, for whom the corporation is run, to manage its business affairs. In effect, it takes control of the corporation away from the stockholders. A nonprofit corporation, however, is operated to pursue the public objectives in its certificate of incorporation. Delegating the selection of directors to an outsider in a nonprofit corporation such as RFE/RL does not remove control of the corporation from the group in whose interest it is operated. Rather, in the case of RFE/RL, it merely transfers control from a self-perpetuating Board of Directors, each of whom also holds another institutional position, to a person who technically does not hold an institutional position in RFE/RL.

Finally, in the unusual facts of this case, placing control of RFE/RL in the hands of the President is as likely to protect the public goals of RFE/RL as selection by an internal self-perpetuating Board. For all practical purposes, the President is an insider for purposes of selecting the directors of RFE/RL. The President has prime responsibility for formulating the foreign policy of the United States and is specifically charged by statute with selecting directors of the BIB "distinguished in the fields of foreign policy or mass communications." *See* 22 U.S.C. § 2872(b)(2).[6] He is "chief executive officer" of the "organization" which supplies essentially all of RFE/RL's funds. Moreover, if the Delaware courts refused to uphold the change, RFE/RL might very well cease to exist, at least as incorporated in Delaware. Finally, the existing certificate of incorporation, which the Delaware opinion does not suggest violates Delaware law, already gives the President significant control over the operation of RFE/RL through the

[5] The distinction between management and the selection of management is inherent in § 141(a), at least in the context of for-profit corporations. *See Abercrombie* v. *Davies*, 123 A 2d at 899.

[6] Under the proposed amendment, no more than five members of the Board may be of the same political party.

regulations of the BIB, whose members he selects. Indeed, the BIB itself presently exercises, as pointed out above, veto power over the selection of the membership of the Board of Directors, a power that the Delaware opinion does not suggest to be inconsistent with Delaware corporation law.

In addition, we note that nonprofit corporations incorporated in other states have directors chosen by public officials. Many state-related universities in the Commonwealth of Pennsylvania, which are incorporated under its nonprofit corporation law, have a percentage of their trustees selected by the governor pursuant to state law.[7] Similarly, members of the Board of Directors of the National Science Foundation, incorporated under federal law,[8] are chosen by the President. Thus, selection of the directors by an elected official does not necessarily, or in our view, even presumptively, undermine the public purposes of a nonprofit organization.

Of course, it can be argued that the President may not be as sensitive to the journalistic independence of RFE/RL as would be the private Board. Whatever policy arguments might be made in favor of an autonomous board, we doubt that the Delaware courts would hold this independence to be a requirement for RFE/RL to retain its corporate status under Delaware law. Not only are there many advantages to presidential selection, as described above, but selection by the existing Board does not assure to any greater degree that the public goals of the corporation will be faithfully pursued. Unlike equity stockholders in a for-profit corporation, the directors of a nonprofit corporation have no financial incentive to make decisions to further the stated goals of the corporation. As the Senate report on the Board for International Broadcasting Authorization Act for Fiscal Years 1982 and 1983 observes of RFE/RL's Board, it is a "self-appointed, largely self-perpetuating board of private directors." S. Rep. No. 71, 97th Cong., 1st Sess. 31 (1981). For all of these reasons, we believe that transferring authority over selection of directors from the members to the President does not undermine the public goals of RFE/RL, and therefore that it is unlikely that the Delaware courts would find that it violates § 141(a).

III. Case Law

Finally, we note that the two cases relied on by the Delaware opinion for its conclusion are clearly distinguishable because in both cases the delegation raised a substantial possibility that the public goals of the nonprofit corporation would be undermined.

The first case, *In re Osteopathic Hospital Association of Delaware*, 191 A.2d 333 (Del. Ch.), *aff'd*, 195 A.2d 759 (Del. 1963), dealt with an unusual nonprofit corporation—the Osteopathic Hospital Association of Delaware. The association's by-laws allowed only osteopathic physicians to be general members of the

[7] *See Mooney* v. *Temple University*, 292 A.2d 395, 399–400 (Pa. 1972) (describing selection of university trustees by Governor).

[8] *See* National Science Foundation Act of 1950, Pub. L. No. 81–507, § 4, 64 Stat. 149, 150, as amended, 42 U.S.C. § 1863.

Association, although the members could elect laypersons to serve on the Board of Trustees. As it turned out, a majority of the Board was made up of laypersons. Because the Board had authority to amend the by-laws, it voted to make all the trustees members of the Association. The chancery court struck down the amendment on the ground that "a change of so fundamental a character in the structure of this rather unique organization could not validly be carried into effect by the unilateral action of the trustees taken here," but rather must be achieved by submitting the issue to the members as an amendment to the certificate of incorporation. *See* 191 A.2d at 336. The Supreme Court of Delaware subsequently affirmed for the same reasons. *See* 195 A.2d 759.

In re Osteopathic Hospital Association is distinguishable on two grounds. First, the chancery court only held that a fundamental change such as this must be achieved through an amendment to the certificate of incorporation ratified by the members. *See* 191 A.2d at 338. The court did not hold that the members could not give lay trustees the authority to make decisions on membership.[9] Had the members specifically amended the certificate of incorporation to allow the trustees to make this decision, as the members of RFE/RL would amend its certificate of incorporation to permit presidential selection, the amendment would, we believe, have been upheld under the court's analysis.

Second, the chancery court specifically relied on the fact that the delegation presented a "real" "possibility of abuse." 191 A.2d at 336. Because the Osteopathic Hospital Association was a professional association, there was a divergence of interests between the lay board and the professional osteopathic members. Thus, the amendment "seriously impaired a valuable right of these [association] members under circumstances suggesting opposition by at least a majority of such 'members.'" *Id.* at 338. In contrast, RFE/RL does not serve any private membership interests which would be seriously undermined by presidential selection. It is specifically charged with "engag[ing] in independent, professionally competent, responsible broadcast journalism, and shall thereby promote the right of freedom of opinion and expression . . . ." RFE/RL, Inc., Articles of Incorporation at 2. The President stands in a far different position from the potentially self-serving lay board in *In re Osteopathic Hospital Association.*

The second decision on which the Delaware opinion relies, *Chapin* v. *Benwood Foundation, Inc.*, 402 A.2d 1205 (Del. Ch. 1979), *aff'd sub. nom. Harrison* v. *Chapin*, 415 A.2d 1068 (Del. 1980) (per curiam), involved a challenge to a voting agreement among the trustees of the Benwood Foundation. Two of the four members of the Board of Trustees of Benwood were officers of the Thomas Corporation. The stock of the Thomas Corporation was the sole asset of the Foundation. The two other Board members were directors of a Tennessee bank with which the Thomas Corporation had close dealings. The trustees entered into an agreement whereby each trustee would select his own successor, or, in the event he should fail to name a successor, the directors of the institution

[9] In affirming the chancery court, the Supreme Court of Delaware found that the members had "retained for themselves under the 1955 by-laws . ultimate control over the Board of Trustees on the question of who would be admitted into the Association " 195 A 2d at 764–65 (footnote omitted).

with which he was associated would pick his successor. The arrangement was intended to maintain a balance between the officers of the company, who would be most knowledgeable regarding the value of the Foundation's only asset, and the bank directors, who would possess an independent perspective on its financial affairs. The arrangement continued in operation through several changes in the Board. After the Thomas stock was sold, however, three of the trustees agreed to abolish the procedure because the original rationale supporting it had ceased to exist. The agreement was subsequently challenged in court.

The chancery court struck down the agreement on the ground that it constituted an improper delegation of the duties of trustees. It gave two reasons in support of the decision. First, the justification for this delegation—to keep an even split of the institutional backgrounds of the trustees on the Board—had ended, and therefore there was no continued need for the arrangement. Second, the ratification of this plan by all of the trustees (who were also the "members" of the Benwood Corporation) did not render the agreement valid. Because the trustees were not stockholders with an equity interest in the corporation, the court reasoned that they could not sanction this fundamental change in the operation of the corporation.

It is *possible* to interpret certain language in the opinion of the chancery court in *Chapin* as prohibiting any delegation of corporate responsibility by a nonprofit corporation. We believe, however, that the decision should be limited to its facts—that is, a situation in which there is no indication that the delegation would serve the public goals of the nonprofit corporation.[10] In this regard, we note that the Supreme Court of Delaware affirmed the chancery court solely on the ground that there was no longer any justification for the agreement, and expressly refused to reach "the other matters argued by counsel." 415 A.2d at 1069.

IV. Conclusion

We believe that there is no absolute prohibition against members of nonprofit corporations delegating decisions to individuals who do not hold office within the firm. While there may be restrictions on such delegation in individual cases, the delegation proposed in this case would be as likely to protect the public goals of RFE/RL as selection by a self-perpetuating Board of Directors. Finally, the cases relied on in the Delaware opinion are distinguishable. Accordingly, in our view, it is unlikely that the Delaware courts would strike down the proposed amendment.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

[10] In its conclusion, the chancery court emphasized that the directors' agreement could lead to abuse. "To commit themselves in advance—perhaps years in advance—to fill a particular Board vacancy with a certain named person regardless of the circumstances that may exist at the time that the vacancy occurs, is not the type of agreement that this court should enforce . . ." 402 A.2d at 1211.

Exercise of Transfer Authority Under § 110 of H.J. Res. 370

The substantive authority granted the Secretary of the Treasury by H.J. Res. 370 to transfer funds between appropriation accounts is severable from the unconstitutional "committee approval" provision in that law, and may be exercised by the Secretary within a reasonable period after he has informed the Appropriations Committee of his intent to do so.

September 2, 1982

MEMORANDUM FOR THE GENERAL COUNSEL,
DEPARTMENT OF THE TREASURY

This responds to your request for our opinion whether a "committee approval" provision contained in § 110 of Pub. L. No. 97-92, 95 Stat. 1183, 1194 (1981), is severable from the substantive authority granted in § 110 to the Secretary of the Treasury to transfer funds between appropriation accounts. For reasons stated hereafter, we believe that this substantive transfer authority is severable from the unconstitutional "committee approval" provision. It follows from this conclusion that the substantive transfer authority may be exercised notwithstanding the unconstitutionality of the "committee approval" provision. Thus, the "approval" of the committee is not, in our view, required in order for the Secretary to exercise the transfer authority; that power may be exercised after appropriate notice to the Appropriations Committees has, in the judgment of the Secretary, been given.

Section 110 was enacted as part of H.J. Res. 370, a joint resolution making continuing appropriations for many federal departments and agencies that was enacted on December 15, 1981. Section 110 reads, in pertinent part, as follows:

> [T]he Secretary of the Treasury is authorized to transfer up to 2 per centum from any appropriation account provided by this joint resolution for the Department of the Treasury . . . to any other such appropriation account: . . . *Provided further,* That approval for such transfers is obtained in advance from the House and Senate Committees on Appropriations.

95 Stat. 1194. You have informed us that the Secretary of the Treasury, earlier this year, exercised the transfer authority granted by § 110, with the "approval" of the House and Senate Committees on Appropriations. In addition, the Secretary has, by letters to the Committee chairmen of August 27, 1982, informed those

Committees of his intent to exercise his power under § 110 to make certain transfers, indicating in his letters the need to do so by September 2 in order to continue certain activities in the Internal Revenue Service and the United States Secret Service.[1] The Secretary has, to date, received no response from either of the Committees. The general question presented is whether he may execute the transfers in question, which we assume to be otherwise within the substantive authority granted by § 110, without having secured "in advance" the "approval" of the Committees.

We believe the threshold question which must be addressed is whether the substantive authority granted in § 110 is severable from the "committee approval" provision. As you are aware, the Executive has long regarded these kinds of "committee approval" provisions as unconstitutional. *See, e.g.*, 37 Op. Att'y Gen. 56 (1933); 41 Op. Att'y Gen. 230 (1955); 41 Op. Att'y Gen. 300 (1957). Indeed, Presidents Eisenhower and Johnson explicitly instructed their subordinates to disregard such "committee approval" provisions in signing into law bills that contained such provisions. *See* Public Papers of the Presidents, Dwight D. Eisenhower 688, 689 (1955); Public Papers of the Presidents, Lyndon B. Johnson 104–05 (1963–64).

If, however, the "committee approval" provision is not severable from the substantive authority to which it is attached, here the transfer authority, then the transfer authority itself may not be exercised by the Secretary. Because the Secretary has previously exercised his authority under § 110, this Administration has, at least implicitly, taken the position that the "committee approval" provision is severable from the Secretary's substantive authority because if we believed the provision were inseverable, then it is doubtful that the Secretary could exercise the substantive transfer authority. We believe that position is correct.

The courts will generally presume that Congress intends the unconstitutional portion of a statute to be severed from the remainder of that statute. *See Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 30 (1937) ("'The cardinal principal of statutory construction is to save and not to destroy.'"). Under the law of severability, the invalid portions of a statute are to be severed "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not . . . .'" *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

We believe the presumption of severability governs the "committee approval" provision in § 110 for several reasons. First, we have found no indication in the sparse legislative history of the joint resolution that Congress ever focused on the question whether, assuming the unconstitutionality of the "committee approval" provision, it would refuse to extend to the Secretary the substantive authority contained in § 110. Indeed, we have been unable to find any pertinent reference

[1] According to Acting Secretary Sprinkel's letter, appropriation accounts for these activities will be exhausted on or about September 2, 1982.

whatsoever to § 110 in that legislative history. *See* H.R. Rep. 372, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. S 14956–96 (daily ed. December 10, 1981); *id.*, H 9102–55. Second, although the literal language of § 110 *assumes* that the Secretary will have received the "approval" of the Committees before he exercises the transfer authority, we would not read that language as decisive of the severability issue. We would not do so for two separate but related reasons.

First, Congress concededly assumes the constitutionality of such legislative veto provisions when it includes them in bills. Thus, there is no reason to believe that such an assumption reflects a congressional determination that it would not have granted the substantive authority if the legislative veto provision is indeed unconstitutional. To attribute to Congress such an intent would be to attribute to Congress the intent to enact meaningless legislation, because Congress includes such provisions knowing full well the position of the Executive that such provisions are unconstitutional and at least constructively being on notice that extant court decisions, including a decision of the Ninth Circuit decided almost a year before H.J. Res. 370 was enacted, indicate the correctness of the Executive's position.[2]

Second, and more importantly, there is a long and continuous practice of the Executive's refusing to regard identical or similar language contained in appropriations acts as being determinative of the severability issue. Indeed, this longstanding view of the Executive, well known to Congress, records the Executive as opposing such "committee approval" provisions on constitutional grounds and as asserting the right to exercise the substantive power attached to those provisions without first receiving the "approval" of the Appropriations Committees.

Thus, in 1955, President Eisenhower, in signing into law the Department of Defense Appropriation Act, noted that a section of that Act prohibited use of funds appropriated under it for certain purposes without the approval of the Appropriations Committees of the Senate and House. In a signing statement addressed to Congress, President Eisenhower stated to Congress that the legislative veto aspect of that provision "will be regarded as invalid by the executive branch of the Government . . . ." Public Papers of the Presidents, Dwight D. Eisenhower 688, 689 (1955).

In 1963, President Johnson signed into law the Public Works Appropriations Act. That Act contained a provision preventing the Panama Canal Company from disposing of any real property without first obtaining the approval of the appropriate legislative committees of the House and Senate. In a signing statement, President Johnson stated his view that such "committee approval" provisions were unconstitutional and he stated that the provision was to be treated as "a request for information . . . ." Public Papers of the Presidents, Lyndon B.

[2] *Chadha* v. *INS*, 634 F 2d 408 (9th Cir. 1980), Nos. 80–1832 (1983) Shortly after enactment of H.J. Res 370, a decision was handed down by the D C. Circuit in *Consumer Energy Council of America* v. *FERC*, 673 F 2d 425 (1981), a case currently pending on appeal to the Supreme Court, in which that court broadly condemned all types of legislative veto devices as unconstitutional. Both Houses of Congress participated actively in the litigation of that case as well as *Chadha* and were thoroughly apprised of the Executive's position on the constitutional issue involved.

Johnson 104 (1963–64). President Johnson by separate memorandum directed the Secretary of the Army, entrusted with execution of that provision of the Public Works Appropriations Act, to exercise authority under the Act but to regard the "committee approval" provision as merely requiring the Secretary to keep the congressional committees informed of actions taken under the substantive authority of that Act.

More recently, President Carter signed into law the Foreign Assistance and Related Programs Appropriations Acts of 1977 and 1978 which contained "committee approval" provisions attached to transfer authority virtually identical to the "committee approval" provision in § 110. At the time he signed those bills into law, President Carter directed the Secretary of State by memorandum to regard the "committee approval" aspects as unconstitutional and, therefore, not legally binding. He directed the Secretary to treat the "committee approval" provision as requiring only that the appropriate committees be consulted. Subsequently, as detailed in a letter from the General Counsel of the Agency for International Development to Chairman Inouye of the Subcommittee on Foreign Operations of the Senate Committee on Appropriations of February 12, 1980, the President exercised the transfer authority contained in § 115 without securing in advance the "approval" of the Appropriations Committees. In doing so, the President acted on the advice of this Office, provided to the Director of the Office of Management and Budget on October 28, 1977, that the authority under § 115 could be exercised without the prior approval of the Appropriations Committees.[3]

We believe these historical incidents establish a consistent view of the Executive with regard to "committee approval" provisions in appropriations acts that substantive authority to which such "committee approval" provisions are attached will be exercised and that the "committee approval" provisions will be treated essentially as requiring only that the committees be informed of action taken or to be taken by the Executive. We have no difficulty in concluding that the language of § 110, without more, cannot be read as expressing a congressional intent to overturn this established understanding. In a similar vein, we do not believe that that plain language can, in this overall historical context, be regarded as expressing a congressional intent that the substantive authority granted by § 110 should fall with the "committee approval" provision—in short, the "committee approval" provision is, in our view, severable.

Based on this same historical practice, we believe the Secretary is entitled to exercise his transfer authority under § 110 within a reasonable period of time after he has informed the Appropriations Committees of his intent to do so. In present circumstances, we believe the Secretary could conclude that the August 27, 1982, letters to the Appropriations Committees chairmen regarding

[3] We note that shortly after this full airing of the Executive's position that such authority could be exercised without the prior approval of the Appropriations Committees, those same Committees acted on the Foreign Assistance and Related Program Appropriations Act, Pub. L. No. 97–121, 95 Stat. 1647 (1982). In that Act, the Committees and Congress left intact the transfer authority which had been the subject of contention in 1980. *See* § 514, 95 Stat. 1655, and § 523, 95 Stat 1657 (1982)

transfers currently under consideration provide reasonable notice and that the Secretary may execute such transfers as he determines to be appropriate.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Funding of Attorney Fee Awards Against the United States Under Rule 37

Attorney fee awards may be imposed against the United States for abuse of discovery under Rule 37 of the Federal Rules of Civil Procedure, by virtue of the general waiver of sovereign immunity in 28 U.S.C. § 2412(b) (Supp. V 1981), which was intended to make the United States and private litigants equally liable for a fee award based on the common law or on an applicable fee-shifting statute.

Rule 37 by itself could not provide sufficient authority for a court to award attorney fees against the United States; the requisite waiver of sovereign immunity cannot be accomplished by a court-made rule, but only by explicit legislative action.

A judgment awarding attorney fees against the United States under authority of 28 U.S.C. § 2412(b) is ordinarily paid from the judgment fund. *See* 28 U.S.C. § 2412(c)(2). However, where a fee award is based on a finding of bad faith on the part of a government agency, as is the case here, it must be paid from the agency's general appropriation.

September 13, 1982

MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

This responds to your request for our opinion regarding the appropriate source of funding for the payment of an attorney fee award assessed against the United States pursuant to Rule 37 of the Federal Rules of Civil Procedure. In the particular case at issue, *National Lawyers Guild* v. *Attorney General*, No. 77 Civ. 999 (CLB) (S.D.N.Y.), the magistrate found that the Government's failure to comply with discovery orders was based on "bad faith, willfulness and fault," and awarded $11,231.00 in fees and costs against the United States as a discovery sanction. The question is whether this award is to be paid from the judgment fund or from agency funds. For reasons set forth in detail below, we conclude that the attorney fee award in this case should be paid from agency funds.[1]

Rule 37 of the Federal Rules of Civil Procedure has since 1938 authorized federal courts to impose a variety of sanctions against parties in litigation for abuse of the discovery process, including an award of attorney fees. It is common ground that until 1980 sovereign immunity prevented an award of fees against the

[1] Our conclusion that the award should be paid from agency funds makes it unnecessary to address the second question you raise *viz* . whether and to what extent § 207 of the Equal Access to Justice Act restricts payment of attorney fee awards against the United States from the judgment fund.

United States under Rule 37. The principle of sovereign immunity was recognized in the text of Rule 37(f), which read as follows:

> Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

We say "recognized" because we believe it is clear that even in the absence of subsection (f), Rule 37 would not itself have constituted a waiver of sovereign immunity so as to permit a court to award a money judgment against the United States. This is because Rule 37 was not enacted by Congress, but promulgated by the Supreme Court pursuant to the authority given in the Rules Enabling Act, 28 U.S.C. § 2072. That Act authorizes the promulgation of rules governing court practice and procedure, but by its terms does not permit the enactment of laws abridging, enlarging or modifying "the substantive rights of any litigant." *See Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 7–8 (1941).

In particular, the authority given the court in the Rules Enabling Act "to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction." *United States* v. *Sherwood*, 312 U.S. 584, 589–91 (1941). *See also Sibbach* v. *Wilson*, 312 U.S. at 10 (court rules may not "extend or restrict the jurisdiction conferred by a statute"). It is commonplace that sovereign immunity is jurisdictional, *see, e.g., Soriano* v. *United States*, 352 U.S. 270, 276 (1957), and that "the terms of [the sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. at 586. While the United States as a party to litigation is concededly subject to certain court-imposed sanctions for noncompliance with discovery orders, *see In re Attorney General of the United States*, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979), a court may not impose a monetary penalty upon the United States under Rule 37 in the absence of an explicit waiver of sovereign immunity. *See Land* v. *Dollar*, 330 U.S. 731, 738 (1947) (absent a legislative waiver of sovereign immunity, a court has no power to make an award which would "expend itself on the public treasury or domain . . ."). *See also United States* v. *Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365 (9th Cir. 1980). Therefore, the Rules do not and could not by themselves empower a court to impose a monetary remedy against the government.

Prior to 1980, Congress had consented to the award of attorney fees against the United States in only a few specific situations. *See, e.g.*, 42 U.S.C. § 2000e–5(k). The court-fashioned rule of statutory construction against implied waivers of sovereign immunity was generally held to immunize the United States against attorney fee awards absent very clear authority to the contrary, authority usually found only in compelling language in the text of a statute itself. *See NAACP* v. *Civiletti*, 609 F.2d 514 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980). Indeed, Congress had in 28 U.S.C. § 2412 (1976) expressly prohibited an award of attorney fees against the United States, "[e]xcept as otherwise specifically authorized by statute." *See also Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 265–69, and n. 44 (1975) ("an award [of

attorney fees] against the United States is foreclosed by 28 U.S.C. § 2412 in the absence of other statutory authorization").

In 1980, Congress modified and expanded § 2412 to permit an award of attorney fees against the United States in a variety of different situations. *See* § 204 of the Equal Access to Justice Act, Pub. L. No. 96–481, Title II, 94 Stat. 2325 (1980) (the Act). The provision in the former § 2412, which had permitted an award of costs against the United States, was retained in § 2412(a), and a new provision was added authorizing a court to award attorney fees against the United States in any case in which an award would be available against private parties under common law and statutory exceptions to the "American rule" on fee-shifting. The new § 2412(b) provided as follows:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

At the same time, in § 205(a) of the Act, Congress repealed subsection (f) of Rule 37. Both House and Senate reports explained that the "change reflects the belief that the United States should be liable for fees the same as other parties when it abuses discovery." *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 19 (1980) (Report of the House Committee on the Judiciary) (House Report); S. Rep. No. 253, 96th Cong., 1st Sess. 22 (1979) (Senate Report).

The question you have raised is whether Congress' repeal of subsection (f) made Rule 37 a source of authority for fee awards against the United States independent of the waiver of sovereign immunity in § 2412(b). A memorandum prepared by the Civil Division's Torts Branch points out that it would not have been necessary to repeal subsection (f) in order to allow awards to be made against the United States as a discovery sanction under authority of the new § 2412(b). This is because subsection (f) would have permitted fee awards "to the extent permitted by statute." Therefore, it is argued, the fact that Congress nonetheless repealed subsection (f) indicates that it intended thereby to accomplish a separate waiver of sovereign immunity independent of that contained in § 2412(b).

The question is important because of its implications for the source of funding to pay the award in this case. Section 205 itself does not specify the source of funds to pay awards made under Rule 37. Ordinarily, in the absence of some specific statutory provision to the contrary, an award against the United States would be paid in accordance with the procedures set forth in 28 U.S.C. §§ 2414

and 2517, under authority of the permanent indefinite appropriation for judgments against the United States established by 31 U.S.C. § 724a. However, payment of awards made under authority of § 2412(b) is governed by the provisions of § 2412(c)(2):

> Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

In short, if fee awards against the Government under Rule 37 have been separately consented to by Congress, they must be paid from the judgment fund. If, instead, they are made "pursuant to" § 2412(b), they are subject to the funding provisions contained in § 2412(c)(2). Under that section, in a case such as this one in which the Government has been found to have acted in bad faith, the award must be paid "by any agency found to have acted in bad faith," not from the judgment fund.

We think it theoretically possible for the repeal of subsection (f) to have some independent significance as a legislative act waiving sovereign immunity, even though Rule 37 itself, as promulgated by the Court under the Rules Enabling Act, could not waive sovereign immunity. The question is essentially one of Congress' intent. That is, the question is whether Congress intended by its repeal of subsection (f) to accomplish a waiver of sovereign immunity separate from that in § 2412(b). While the text of § 2412(b) provides no ready answer to that question,[2] the legislative history of the Act indicates that Congress believed § 2412(b) would provide the authority for Rule 37 awards, and that the repeal of subsection (f) was intended merely as a conforming amendment to eliminate a now-meaningless provision from the Federal Rules.

Both the House and Senate Reports explained that the new § 2412(b) was intended to hold the United States "to the same standards in litigating as private parties." House Report at 9; Senate Report at 4. Thus it is "consistent with the history of § 2412 which reflects a strong movement by Congress toward placing the Federal Government and civil litigants on a completely equal footing." *Id.* If § 2412(b) was thus intended to authorize fee awards against the United States in *any* context in which a private party could be held liable, this would include abuse of discovery under Rule 37. In its section-by-section analysis, the Senate Report makes explicit reference to Rule 37 awards in describing the scope of § 2412(b):

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[2] It is not clear, for example, whether a Rule 37 fee award would be considered to fall into one of the "common law" categories, or whether Rule 37 should itself be considered a "statute" providing for such an award. *See, e.g., Sibbach* v. *Wilson*, 312 U.S. at 11 (Rule 37 is a rule of procedure within the authority of the Supreme Court under the Rules Enabling Act, and, under the terms of that law, supersedes "all laws in conflict with [it].").

> Section 2412(b) permits a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving private parties. Thus, under this section, cases involving the United States would be subject to the "bad faith," "common fund," and "common benefit" exceptions to the American rule against fee-shifting. *The United States would also be liable under Rule 37, Federal Rules of Civil Procedure* and under the same standards which govern awards against private parties under federal statutory exceptions, unless the statute expressly provides otherwise.

Senate Report at 19 (emphasis supplied). *See also* Senate Report at 4.

As further evidence of Congress' intent in repealing subsection (f), we think it significant that § 205 of the Act is captioned in the conference report as "Technical and Conforming Amendments." H.R. Rep. No. 1434, 96th Cong., 2d Sess. 11 (1980). And the other provisions of § 205 are plainly so characterized: § 205(b) amended the table of rules of the Federal Rules to reflect the repeal of Rule 37(f) accomplished by § 205(a); and § 205(c) amended 42 U.S.C. § 1988 to strike out language relating to fee awards against the United States in tax cases. With respect to the latter provision, the House Report explained that:

> [t]he deletion of this section is required because it is intended that cases arising under the internal revenue laws be covered by the provisions of § 2412(d) of title 28 as added by this bill.

House Report at 19. *See also* Senate Report at 22. While neither the House nor Senate Report mentioned § 2412(b) in connection with the repeal of Rule 37(f), the fact of their complementary relationship seems inescapable.

Our conclusion that Rule 37 awards are made "pursuant to" 28 U.S.C. § 2412(b), and therefore must be paid in accordance with the funding provisions contained in § 2412(c)(2), is strengthened by reference to Congress' purpose in enacting these provisions, and the Act generally, which was to make "individual agencies and departments accountable for actions pursued in bad faith." House Report at 17; Senate Report at 20. A result which would permit an agency to escape fiscal responsibility for its bad faith under Rule 37 would be inconsistent with Congress' expectation that "[t]he awards and resulting impact on the budget will provide a concrete basis for evaluating agency error." *Id. See also* 126 Cong. Rec. 28106 (1980) ("The implicit assumption in the approach taken by this legislation is that affecting the 'pocketbook' of the agency is the most direct way to assure more responsible bureaucratic behavior") (remarks of Sen. Thurmond on the adoption of the conference report).

We therefore conclude that awards under Rule 37 are subject to the funding provisions contained in 28 U.S.C. § 2412(c)(2), and that the award in this case should accordingly be paid from agency funds.[3]

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

[3] We have no information which bears on the question of which agency should be responsible for paying the award in this case, and express no views on that issue.

Federal Bankruptcy Jurisdiction After October 4, 1982

The Supreme Court's ruling in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), invalidated those parts of the Bankruptcy Act of 1978 which gave power to non-Article III bankruptcy judges, but left its grant of jurisdiction to the district courts intact.

The Supreme Court's invalidation of certain jurisdictional provisions of the Bankruptcy Act of 1978 did not result in automatic revitalization of any part of the bankruptcy laws repealed in 1978. Accordingly, after the effective date of the Court's decision, the district courts will be obliged to rely on some source of authority other than the bankruptcy laws to refer bankruptcy cases to bankruptcy judges, even for limited fact-finding purposes.

September 14, 1982

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY

We have prepared this Opinion in response to several questions which have been raised relative to the bankruptcy jurisdiction of federal courts in light of the Supreme Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

In *Northern Pipeline*, the Court invalidated the grant of jurisdiction to the bankruptcy courts created by the Bankruptcy Act of 1978, Pub. L. 95–598, 92 Stat. 2549 (Act). In so doing, it stayed the effective date of its judgment until October 4, 1982, in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 458 U.S. at 88. The Court's decision does not discuss the issue of where bankruptcy jurisdiction would lie after October 4, 1982, in the event Congress took no action, however. After carefully examining the issue, we have come to the conclusion that, while the issue is by no means free of doubt, *Northern Pipeline* invalidated only those provisions of the 1978 Act which conferred jurisdiction on non-Article III judges, and that it left intact the jurisdiction granted federal district courts by that Act. Thus it is our view that even if Congress takes no action to amend the Act by October 4, and even if the Court does not extend its stay, there would continue to be a basis for an Article III district judge to exercise jurisdiction over bankruptcy and bankruptcy-related matters.

A substantial part of the difficulty of resolving this important issue stems from the fact that we find no clear indication in the Bankruptcy Act of 1978 or in its

legislative history that Congress anticipated and prepared for a Supreme Court finding that the Act's grant of jurisdiction to bankruptcy courts was unconstitutional. And, as noted above, neither the Supreme Court decision in *Northern Pipeline*, nor its various opinions, addressed the issue. However, after reviewing the structure of the Act and scrutinizing its legislative history, we believe that it is correct to conclude that the grant of jurisdiction created by the 1978 Act was invalidated only insofar as jurisdiction vested in the district courts was redelegated to the bankruptcy courts created by the Act.

In Part I of this memorandum we examine the text and history of the jurisdictional provisions of the 1978 Act. In Part II, we analyze the several opinions in the *Northern Pipeline* case and explain why we believe that the Court's decision invalidated only part, and not all, of the jurisdictional grant in the 1978 Act. In Part III we discuss certain other theories which have been advanced as a basis for continued federal court bankruptcy jurisdiction after October 4, 1982, and explain why we do not agree with them.

I. Bankruptcy Jurisdiction Under the 1978 Act

Under the bankruptcy laws in effect prior to 1978, the district courts were established as "courts of bankruptcy," 11 U.S.C. § 11a (1976), and were given original jurisdiction over bankruptcy cases under 28 U.S.C. § 1334.[1] Bankruptcy proceedings were generally conducted by "referees" appointed by the district court, under authority of 11 U.S.C. § 45. Under the Rules of Bankruptcy promulgated by the Supreme Court in 1973, bankruptcy referees were redesignated as "judges." *See* Bankruptcy Rule 901(7), 415 U.S. 1003 (1974).

Section 201(a) of Title II of the 1978 Act established, "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U.S.C. § 151(a) (1976 ed. Supp. IV). Section 241(a) of the 1978 Act contained the Act's jurisdictional sections, codified as 28 U.S.C. § 1471, which provided in relevant part as follows:

> § 1471. Jurisdiction
>
> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the

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[1] Section 1334 provided:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy.

The district courts have had original jurisdiction over bankruptcy cases since the Bankruptcy Act of 1800, the country's first federal legislation pursuant to the grant given Congress by Art. I, § 8, cl. 4 of the Constitution. *See* 1 *Collier on Bankruptcy* ¶ 1.02 (15th ed. 1981). Section 1334 derives from the jurisdictional grant to the district courts in § 2 of the Bankruptcy Act of 1898, Ch. 541, 30 Stat. 545, 552. It was reenacted as part of Title 28 of the United States Code in 1911 in Pub. L. No. 61–475, Ch. 231, 36 Stat. 1087, 1093, and in 1948 by Pub. L. No. 80–773, Ch. 646, 62 Stat. 869, 931.

district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

Section 241(a) of the Act thus vested primary jurisdiction over bankruptcy and bankruptcy-related matters in the district courts, 28 U.S.C. § 1471(a) and (b). It then provided that the bankruptcy courts established by § 201(a) "shall exercise" all of the jurisdiction conferred on the district courts, 28 U.S.C. § 1471(c).

The 1978 Act contained certain provisions governing the transition from old to new law. Section 401(a), 92 Stat. 2682, which repealed all of the old Bankruptcy Act, was to become effective October 1, 1979. *See* § 402(a). Section 402(b) provided that most of the provisions of the Act relating to the creation of the new bankruptcy courts and their jurisdiction would take effect on April 1, 1984. During the transition period, the "courts of bankruptcy" established under the old law (the district courts) would administer the substantive provisions of the new law. *See* § 404(a). Section 405(b) provided that the provisions of § 241(a) would define the jurisdiction of the "courts of bankruptcy" continued by § 404(a) during the transition period. In addition, § 405(a)(1) provided that existing bankruptcy judges would exercise during the transition period all of the jurisdiction and powers conferred on the old courts of bankruptcy by § 405(b). Thus, the transition provisions of the 1978 Act conferred the expanded jurisdiction of § 241(a) on the district courts under § 405(b), but delegated that jurisdiction to the existing bankruptcy judges under § 405(a)(1). Sections 405(a)(1) and 405(b) together allowed existing bankruptcy judges to exercise during the transition period the derivative jurisdiction which 28 U.S.C. § 1471(c) would provide for bankruptcy judges appointed under the new law after April 1, 1984.

II. The Northern Pipeline Decision

At issue is the precise meaning of the Supreme Court's action in the *Northern Pipeline* case. Did the court invalidate *all* of § 241(a) of the 1978 Act, including its grants of jurisdiction to the district courts in 28 U.S.C. § 1471(a) and (b), or did it invalidate only the derivative grant to the bankruptcy courts in § 1471(c)? A careful reading of the plurality and concurring opinions, as well as attention to the scope of the district court's order which the Court affirmed, leads us to conclude that the Court invalidated only that part of § 241(a) which gave power to the non-Article III bankruptcy judges, and left its grant of jurisdiction to the district courts intact.

The district court's order in the *Northern Pipeline* case, entered on April 23, 1981, dismissed the adversary proceeding instituted by Northern against Marathon in the United States Bankruptcy Court for the District of Minnesota,[2] on

[2] Marathon's motion to dismiss had been previously denied by the bankruptcy judge Jurisdictional Statement, App. C. Marathon then appealed to the district court, pursuant to § 405(c)(1)(C) of the Act.

grounds that "the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges . . . is an unconstitutional delegation of authority." *See* Jurisdictional Statement of the United States in the Supreme Court, Appendix A at 1a. In a memorandum opinion filed in the case on July 24, 1981, Judge Lord noted that Act initially vested jurisdiction in the district court under § 1471(a) and (b), but focused his discussion of the constitutional question on the mandatory "assignment or transfer of jurisdiction from the district courts to the bankruptcy courts" in § 1471(c). *Id.*, Appendix B at 5a. Judge Lord's conclusion that the case before him must be dismissed was based on the constitutional infirmities he found in "the delegation of authority in 28 U.S.C. § 1471 to the bankruptcy judges. . . ." *Id.* at 24a.

In the Supreme Court, according to the plurality opinion, the question presented by the *Northern Pipeline* case was "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in . . . § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution." 458 U.S. at 52. In describing the provisions of § 241(a), the plurality opinion focused exclusively on the authority given the non-Article III bankruptcy courts created by the new law. It noted in an early footnote that while 28 U.S.C. §§ 1471(a) and (b) "initially vest[] this jurisdiction in district courts," § 1471(c) required that all of the jurisdiction conferred by the earlier sections be exercised by the bankruptcy courts. 458 U.S. at 54 n.3. The plurality rejected an argument that the bankruptcy court was merely an "adjunct" of the district court, and held that the 1978 Act had "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court. . . ." 458 U.S. at 87. Then, "[h]aving concluded that the broad grant of jurisdiction to the bankruptcy courts contained in [§ 241(a)] is unconstitutional," the plurality affirmed the judgment of the district court. *Id.*

The two concurring Justices agreed with the plurality that the court's judgment should be affirmed. Though they confined their constitutional objections to "so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection," the concurring Justices agreed that the grant of authority was "not readily severable from the remaining grant of authority to Bankruptcy Courts under [§ 241(a)]. . . ." 458 U.S. at 91–92.

The plurality had addressed the question of severability in a footnote, which is worth quoting in full for the light it sheds on the exact scope of the Court's action:

> It is clear that, at the least, the new *bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon.* As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under Title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction

could not constitutionally encompass this and similar claims, it would *simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis*. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. *See* H.R. Rep. No. 95–595, pp. 43–48 (1977); S. Rep. No. 95–989, p. 17 (1978). Nor can we assume, as THE CHIEF JUSTICE suggests, *post*, at 92, that Congress' choice would be to have this case 'routed to the United States district court of which the bankruptcy court is an adjunct.' We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose.

458 U.S. at 87–88, n.40. (Emphasis supplied.)

It is clear from this footnote that those portions of § 241(a) which the plurality declined to sever, and which the concurring Justices agreed were not severable, were those which gave "the new bankruptcy judges . . . jurisdiction to decide this state-law contract claim against Marathon." The plurality declined to sever "the jurisdiction of the bankruptcy court over these matters," from the bankruptcy court's jurisdiction over "other types of claims," so as to leave its remaining jurisdiction "subject to Art. III constitutional challenge on a claim-by-claim basis." It refused to sever these two facets of the "single statutory grant of jurisdiction" to the bankruptcy court in 28 U.S.C. § 1471(c) principally because "one of the express purposes of the Act was to ensure adjudication of all claims in a single forum. . . ." The plurality "could not conclude" that Congress would have chosen to divide jurisdiction over related claims between the bankruptcy court and the district court. Thus *all* of the derivative jurisdiction given the bankruptcy court in § 1471(c) was invalidated.

But nothing in the plurality or concurring opinions suggests that the jurisdictional grant to the district courts under § 1471(a) and (b) was itself unconstitutional, or that those sections would not survive the invalidation of the grant to the bankruptcy courts in § 1471(c).[3] A conclusion that the district courts' jurisdiction

[3] The dissenting opinion's characterization of the Court's holding on the severability issue bears out this interpretation. While Justice White criticized what he described as the plurality's "sweeping invalidation of [§ 241(a)]," he was plainly concerned with the plurality and concurring Justices' refusal to sever the bankruptcy courts' power over state law claims derived from 28 U.S.C. § 1471(b) from the rest of the jurisdictional grant. Justice White would have applied the "presumption" that "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" 458 U S at 96, n.3, quoting *Champlin Refining Co. v. Okla. Corporation Commission*, 286 U.S. 210, 234 (1932). This presumption seemed to Justice White "particularly strong when Congress has already 'enacted those provisions which are within its power, independently of that which is not'—*i.e.*, in the old Bankruptcy Act." *Id.* He thus apparently would at least have severed the bankruptcy court's authority over state law cases derived from § 1471(b), and permitted the bankruptcy courts to exercise derivative jurisdiction under § 1471(c) in all cases over which the district courts would have had jurisdiction under the old Act.

survives the Court's decision is entirely consistent with the plurality's description of the question presented by the case, with the language of its holding, and with the Court's affirmance of the district court's judgment.

This conclusion is also consistent with the applicable test for severability, which looks both to the structure of the statute, and to evidence of what Congress would have chosen to do had it been able to foresee the result of the *Northern Pipeline* decision. *See Champlin Refining Co.* v. *Okla. Corporation Commission*, 286 U.S. 210, 234 (1932). Section 1471(c) is "functionally independent" of § 1471(a) and (b), *see United States* v. *Jackson*, 390 U.S. 570, 586 (1968), and there is no "inherent or practical difficulty in the separation and independent [implementation]" of § 1471(a) and (b). *See Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 435 (1938). Moreover, it seems a reasonable inference from the structure of the 1978 Act and its legislative history that Congress would have intended the bankruptcy jurisdiction of the district courts under 28 U.S.C. § 1471(a) and (b) to be severable from and to survive the delegation to the bankruptcy judges in § 1471(c).

The structure of the jurisdictional provisions of the 1978 Act reflects the debate in Congress over the status of the judges of the new bankruptcy courts created by the Act. As originally proposed in the House bill, which conferred Article III status on the judges of the new bankruptcy courts, the jurisdictional provisions of the Act made no mention of the district courts. *See* § 243(a) of H.R. 8200, 95th Cong., 1st Sess. (1977). The House bill's jurisdictional provisions granted the new bankruptcy courts "broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases." H.R. Rep. No. 595, 95th Cong., 1st Sess. 48 (1977). In contrast, the Senate bill, which created the bankruptcy courts as "adjuncts" of the district courts, gave jurisdiction initially to the district courts, then delegated all of the district court's jurisdiction to the bankruptcy courts in a manner essentially similar to the bill which was ultimately enacted. *See* § 216 of S. 2266, 95th Cong., 2d Sess. (1978). The Senate Report explained that the jurisdictional sections of S. 2266 were drafted in this manner to emphasize that the district courts were the "article III repositories for the broadened jurisdiction essential to efficient judicial administration in bankruptcy cases." S. Rep. No. 989, 95th Cong., 2d Sess. 16 (1978). The Senate version of the Act's jurisdictional provisions prevailed over the House version.[4]

The legislative history of the 1978 Act establishes that both Houses of Congress were fully aware of possible constitutional issues which would be presented if the new bankruptcy courts were not created pursuant to Article III. The House Committee on the Judiciary determined that "a court created without regard to Article III most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions." House Report at 39. As a result, it reported out a bill which gave Article III status to the judges of the new bankruptcy courts. The Senate Committee on the Judiciary was also concerned

[4] Adjustments were made in other sections of the statute to accommodate House concerns that the judges of the new bankruptcy courts be independent of the district courts. *See* 124 Cong. Rec. 32,391 (1978) (remarks of Rep. Butler) (bankruptcy judges to be appointed by the President instead of by the district or circuit courts).

about the possible constitutional weakness of a statutory scheme in which bankruptcy judges were not appointed for life. Its solution, ultimately enacted in § 241(a) of the bill, was to emphasize the "adjunct" status of the new bankruptcy courts, and to devise jurisdictional provisions by which it hoped that "[t]he presently established U.S. district courts can serve as article III repositories for the broadened jurisdiction essential to efficient judicial administration in bankruptcy cases." Senate Report at 16. It seems reasonable to infer from the peculiar two-step formulation of the Act's jurisdictional sections fashioned by the Senate Committee, that it would have intended to vest jurisdiction in the district courts in the event some constitutional defect were found in the structure of the new bankruptcy courts which would serve to invalidate the redelegation of the authority to the bankruptcy courts. By making the district courts the initial "repositories" of bankruptcy jurisdiction, the Senate acted in a manner consistent with the expectation that the district courts would be residual repositories of bankruptcy jurisdiction if the bankruptcy courts were constitutionally unable to function independently.

III. Other Theories of Federal Bankruptcy Jurisdiction After October 4, 1982

We are aware of two other theories which have been advanced as a basis for continued federal court bankruptcy jurisdiction after the Supreme Court's judgment in *Northern Pipeline* becomes effective on October 4, 1982. Both theories rely on the continued vitality, during the transition period provided in the 1978 Act, of the jurisdictional provisions of the old law. We discuss these theories in turn.

A. Theory of the General Counsel of the Administrative Office of United States Courts

In a memorandum dated July 22, 1982, Carl Imlay, General Counsel of the Administrative Office of United States Courts, concluded that notwithstanding the Supreme Court's *Northern Pipeline* decision, the bankruptcy courts "continued" during the transition period by § 404(a) of the 1978 Act may exercise the jurisdiction available to them under the old law until March 31, 1984. After October 4, 1982, when the Supreme Court's judgment becomes effective, the courts of bankruptcy "would effectively revert to their jurisdictional status under section 2a of the old Bankruptcy Act, 11 U.S.C. 11(a) (1976)." Thus the *Northern Pipeline* decision would, in Mr. Imlay's view, have only the limited effect of "invalidating the expanded jurisdiction granted under section 405(b) of the Bankruptcy Act of 1978. . . ." In sum, Mr. Imlay's interpretation of the 1978 Act would confine the interim effect (until April of 1984) of the *Northern Pipeline* decision to controversies over which there was no federal bankruptcy jurisdiction under pre-1978 law, and would permit the existing bankruptcy courts to continue to adjudicate all matters over which they had power under the old law.

While Mr. Imlay does not refer specifically to a residual statutory source of jurisdiction for the bankruptcy courts under the old law, he appears to find the requisite jurisdictional grant in former 11 U.S.C. § 11a. Moreover, he implies that the "courts of bankruptcy" continued by § 404(a) will be able to function after October 4 in much the same way that they did under the old law, with most matters being referred by the district court to bankruptcy judges pursuant to the reference provisions of 11 U.S.C. § 45.

The linchpin of Mr. Imlay's interpretation of the 1978 Act is his apparent assumption that Congress' preservation of the old bankruptcy court structure during the transition period in § 404(a) implied an intention to preserve the old jurisdictional grant to those courts as well. But neither the terms of the 1978 Act nor its legislative history support this conclusion. In § 401(a) of the Act, Congress repealed all of the old bankruptcy law, including 11 U.S.C. § 11a, effective October 1, 1979. While the old "courts of bankruptcy" were continued during the transition period by § 404(a) of the new law, § 405(b) specified that § 241 would "apply" to define the jurisdiction of these courts. Nothing in the terms of the transition provisions suggests that Congress intended there to remain any residual jurisdiction based on provisions which it was simultaneously repealing.

We also do not agree that after *Northern Pipeline* there is any legal authority in the bankruptcy law to refer matters to existing bankruptcy judges or referees. The provision permitting district court reference to bankruptcy judges in the old law, 11 U.S.C. § 45, has been repealed. While § 405(a)(1) of the 1978 Act permits district court reference to bankruptcy judges in the transition period, that section also defines the jurisdiction of the bankruptcy courts as that conferred on the district courts by § 405(b), which in turn incorporates the grant of § 241. Since *Northern Pipeline* struck down that provision insofar as it confers any authority on non-Article III bankruptcy judges, we are unable to find any basis in the transition provisions of the 1978 Act for the exercise of any authority by non-Article III judges.[5]

In short, we cannot agree with Mr. Imlay's conclusion that, in the absence of legislation, the courts of bankruptcy may continue to function through the transition period as they did prior to the passage of the new law.

B. Bankruptcy Jurisdiction Under 28 U.S.C. § 1334

An argument has been made that 28 U.S.C. § 1334, the grant of original bankruptcy jurisdiction to the district courts under the old law, *see* note 1 *supra*, continues to provide a basis for federal jurisdiction over bankruptcy cases until April 1, 1984. Section 238(a) of the 1978 Act amended § 1334, so that it dealt only with the procedure for bankruptcy appeals. However, like § 241(a),

[5] While it is true that the old Rules of Bankruptcy were continued in effect by § 405(d) of the 1978 Act, their provisions relate only to practice and procedure under the bankruptcy laws, and may not be construed to have any substantive effect. *See Sibbach* v. *Wilson*, 312 U.S. 1 (1941). Therefore, the provision in the Rules for reference to bankruptcy judges may not be construed to confer any substantive authority on those judges.

§ 238(a) was not to take effect until April 1, 1984, and appeals during the transition period were to be governed by the provisions of § 405(c). *See* § 402(b). Section 1334 was not affected by the repeal of the old law in § 401(a) because it has been separately enacted into law as part of Title 28 in 1911 and 1948. *See* Pub. L. No. 61–475, 36 Stat. 1093 (1911); Pub. L. No. 80–773, 62 Stat. 931 (1948). Until April 1, 1984, therefore, when its amendment becomes effective, it may be argued that § 1334 continues to provide a basis for district court original jurisdiction over bankruptcy matters independent of any provision of the 1978 Act.

However, whether a court would find continuing vitality in § 1334 in the face of Congress' detailed provision in §§ 404 and 405 of the 1978 Act for jurisdiction over bankruptcy cases during the transition period is problematic. The question is essentially one of legislative intent, and Congress does not appear to have intended § 1334 to determine federal bankruptcy original jurisdiction in any way after the passage of the new Act. It seems more consistent with the 1978 Act as a whole and the transition provisions that § 1334 was intended only to define appellate jurisdiction.[6]

IV. Conclusion

In sum, it is our view that the jurisdiction given the district courts over bankruptcy cases by the 1978 Act under 28 U.S.C. § 1471(a) and (b) was not invalidated by the Supreme Court in the *Northern Pipeline* case, and that district courts may continue after October 4, 1982, to function as courts of bankruptcy, applying the substantive provisions of the 1978 Act.

It does not follow from this conclusion, however, that district courts sitting as courts of bankruptcy may continue to operate as they did under the law in effect prior to 1978. In particular, it does not follow that they may continue to refer cases to bankruptcy judges as they did under the provisions of the old bankruptcy law. *See* former 11 U.S.C. § 45 (1976). The old bankruptcy law has been repealed, and all of the authority given to the bankruptcy judges under the 1978 Act has been invalidated by the Supreme Court's decision, effective October 4, 1982. After that date, the district courts will be obliged to rely upon some other source of authority to refer bankruptcy cases to bankruptcy judges, even for limited fact-finding purposes.[7]

If Congress does not act by October 4, 1982, to amend the 1978 Act, to cure the constitutional defects found by the Supreme Court in *Northern Pipeline*, and if the Court does not extend its stay, the already overburdened district courts will

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[6] Even assuming the continuing efficacy of § 1334 as a basis of district court bankruptcy jurisdiction, the terms of that provision would probably not be construed to extend to some controversies which Congress sought to cover in the new 28 U.S.C. § 1471(b) (matters "arising in or related to cases under title 11"). In addition, as discussed in connection with Mr. Imlay's theory, we do not believe that a district court exercising jurisdiction under § 1334 could continue to administer the bankruptcy laws as it did under the reference provisions of the old law.

[7] The district court's authority to use magistrates and masters for certain purposes, *see* 28 U S C § 636 and Rule 53 of the Federal Rules of Civil Procedure, may serve as an interim device to lessen the burden on district courts until a legislative solution can be implemented.

be solely responsible for adjudicating all of the bankruptcy cases heretofore handled by the bankruptcy judges under old law.[8] The enormously increased caseload of the district courts will inevitably have an adverse effect on the orderly administration of the federal bankruptcy law, not to mention all of the other responsibilities of the district courts. It seems rather obvious that a more permanent solution must be found in the reasonably near future in order to avoid serious damage to the administration of justice in this country.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[8] We understand that there were approximately 685,000 bankruptcy cases pending on December 31, 1981, an that well over 500,000 such cases will be filed in 1982.

Establishment of the President's Council for International Youth Exchange

Proposed establishment of the President's Council on International Youth Exchange (Council) within the United States Information Agency (USIA), for the purpose of soliciting funds from the private sector for the USIA's youth exchange programs, is generally permissible, although the Council's activities would be subject to certain limitations and its continued operation after a year would depend upon a specific congressional appropriation.

Under the Fulbright-Hays Act, employees of the USIA are permitted actively to solicit private contributions to support the USIA's exchange programs. However, under 5 U.S.C. § 3107, any publicity in this connection would have to be carefully tailored to further only the USIA's fundraising activities and not generally to aggrandize the USIA or its officials, in accordance with guidelines of the General Accounting Office.

Under 31 U.S.C. § 673, creation of the Council must be "authorized by law" in order for public funds to be used for its expenses or for USIA employees to assist in its operation. While § 673 does not require specific statutory authorization for the establishment of government councils and commissions, it does require that such entities and their functions be authorized "in a general way" by law. Whether the Council meets this test may depend upon its size and functions.

Under the Russell Amendment, 31 U.S.C. § 696, non-statutory councils and commissions which are vested with authority to take substantive action on the government's behalf must receive specific budgetary support from Congress within a year of their establishment in order to continue operating beyond that date.

The functions of the proposed Council in connection with fundraising and advising activities, as well as its proposed relationship with the USIA, would be such as to require that its members be made employees of the federal government.

September 16, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, UNITED STATES INFORMATION AGENCY

This memorandum responds to your request for our comments regarding the establishment of a new government council within the United States Information Agency (USIA). You and other officials of the USIA have outlined in several letters and meetings the proposed structure and functions of the council, which would be named the "President's Council for International Youth Exchange" (Council). As presently planned, the Council would be composed of approximately 300 private citizens who would solicit contributions from the private sector for the USIA and submit an advisory report to the President and to the

Director of the USIA (Director) outlining ways for the USIA to increase private contributions to the USIA.

For the reasons outlined in detail in this memorandum, we conclude that most of the proposed activities of the Council that you have described are generally authorized by law. We caution, however, that there are certain legal restrictions that may affect the operations of the Council. These are discussed in more detail below. In our view, moreover, the USIA will be required to obtain specific congressional appropriations for the proposed Council within a year of its creation for it to continue to operate beyond that date. In light of these potential difficulties, the USIA may wish to consider seeking legislation authorizing the proposed Council before its creation, rather than rely on existing statutory authority to establish the Council. Securing such explicit congressional authorization would avoid the possibility that Congress may substantially reorganize the Council, or even abolish it, after a year, resulting in a substantial loss of time and effort by members of the Council and the USIA. The decision whether to seek such prior authorization obviously involves an exercise of judgment that you and other officials of the USIA are best equipped to make. We defer to your sound discretion in this matter, and simply raise the issue for your consideration.

I. Background

Because the proposed size and functions of the Council have changed significantly over the past three months, it is appropriate to review the history of this proposal and to outline the current plan for the Council. This Office initially reviewed and expressed no objection to suggested language for a presidential speech announcing the establishment of the Council. According to this language, which was ultimately included in the President's announcement of May 24, 1982,[1] the Council was to be a federal advisory committee organized to advise the President and the Director about ways to increase private contributions to the USIA for its newly planned programs on International Youth Exchange (Youth Exchange Programs). *See* Federal Advisory Committee Act, 5 U.S.C. App. I (FACA) (authorizing establishment of advisory committees to the President and heads of agencies). The Youth Exchange Programs seek to stimulate awareness and appreciation of American society among European youth by subsidizing and generally encouraging private efforts to bring European youths to the United States for study or for work.

Subsequent to the President's speech, we were advised that the proposed functions of the Council had been expanded so that its members would also solicit contributions to the USIA for its Youth Exchange Programs, in addition to advising the President and Director on ways to increase such contributions. This

[1] In announcing the establishment of the Council, the President stated that "I plan to form a Presidential Committee to advise me and to help Charlie Wick [the Director of the USIA], who is my personal representative for this effort, [to] help [him] find ways to stimulate greater private involvement across the country." Remarks of President Ronald Reagan, White House Meeting on International Youth Exchanges, White House (May 24, 1982) at 2.

revision contemplated a Council composed of approximately 50 prominent representatives of corporations, foundations, and educational institutions serving in both an advisory and operational capacity. The solicitation of contributions, as we understood at the time, was to be accomplished by members of the Council making telephone calls and individually contacting persons in the private sector to contribute to the Youth Exchange Programs. Because of the members' operational duties, they were to be appointed by the Director as part-time employees of the USIA. The members, however, were not to receive any salary from the government for their activities, although they would have received reimbursement for their expenses.

More recently, the scope of the Council's proposed operational efforts has been significantly expanded, and the responsibilities within the Council have been divided. Under the latest proposal, as we understand it, the Council would be composed of approximately 300 major corporate leaders, who would be divided into two groups—"directors" and "members." The "directors," who would number about 30, would oversee the operations of the Council through their service on three committees—an Executive Committee, a Public Relations Committee, and a Program Committee. Although the division of responsibilities among these committees has not been determined finally, we understand that the chairman of each committee would serve on the Executive Committee, which would be responsible for overseeing the Council's overall fundraising and advisory activities. The Public Relations Committee would be comprised largely of publicity experts from public relations firms. These advertising experts would develop and run a publicity campaign, which would include television and magazine advertising soliciting contributions to the USIA. Although the responsibilities of the Program Committee have not been finalized, it would probably examine and make recommendations to the Executive Committee on ways to improve the Youth Exchange Programs.

The "members" of the Council, who would apparently number about 270, would not be actively engaged as a group in the direction of the Council, but would be available as a resource to assist in the projects undertaken by the directors. Thus, their contributions, financial and otherwise, would vary from individual to individual. The Council as a group would submit an advisory report to the President and the Director on ways to increase contributions to the USIA, and perhaps also on ways the contributed money should be spent by the USIA. Any final decision on the raising or disbursement of the funds would be made by the Director.

It is contemplated that the proposed Council would be a government entity. Members and directors would be appointed by the Director and would be subject to his control when performing Council activities. This government connection and support is important, we understand, to symbolize the government's commitment to Youth Exchange Programs, to elicit private participation in this effort, and to ensure USIA control over the disposition of contributed funds. Establishment of the Council as a government entity within the USIA would also permit the Council to use the facilities, staff, and funds of the USIA. According to your

most recent proposal, however, the directors and members of the Council would not be employees of the federal government as a result of their Council service. Thus, under the current plan, the Council would be composed of 300 corporate executives who would solicit private contributions on behalf of the USIA, would be appointed and supervised by the Director of the USIA, but would not serve as USIA employees.

In the balance of this memorandum, we identify the following four areas in which the USIA's operation of the Council would be subject to certain restrictions: first, the USIA's authority to undertake an advertising campaign to solicit contributions; second, the USIA's authority to expand the size and operations of the Council beyond that which has been proposed; third, the USIA's authority to operate the Council after a year unless it receives specific budgetary support from Congress; and fourth, the USIA's authority to select and supervise members and directors of the Council, and yet not to make them employees of the USIA.[2]

II. Authority of the USIA to Solicit Contributions to Youth Exchange Programs

We first consider the restrictions on the authority of the USIA to solicit contributions for the USIA's Youth Exchange Programs.

The authority of the USIA to undertake exchange programs is derived from the Fulbright-Hays Act, Pub. L. No. 87–256, 75 Stat. 527, *as amended*, 22 U.S.C. §§ 2451–2459, which was passed in 1961.[3] Section 105 of that Act, 22 U.S.C. § 2455(f), grants the USIA authority to obtain private funding for these exchange efforts. That section states in full:

> Foreign governments, international organizations and private individuals, firms, associations, agencies, and other groups *shall be*

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[2] Pursuant to conversations with members of your office, we have not examined several other issues raised by the creation of the Council. First, we have assumed that the establishment of the proposed Council would satisfy the requirement of § 5(b) & (c) of FACA, 5 U.S.C. App. § 5(b)&(c) This section generally provides that a new advisory committee should not be established if its functions are or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee Second, because we have not been advised as to the specific backgrounds of members and directors of the Council, we have not considered whether their backgrounds would satisfy the requirement in FACA that the committee's membership be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee " 5 U.S.C. App. § 5(b)(2). In this regard, we suggest that you consider whether "points of view" will be balanced if membership is limited to corporate leaders, particularly if the USIA ultimately decides to have the Council advise the Director on the distribution of the funds it collects, rather than simply raising funds and advising on how to raise funds. We are not, of course, expressing any judgment on this issue, but only advising that the subject should be considered. Finally, we have not considered what laws and regulations regarding conflicts of interest would apply to the persons serving on the Council. We note, however, that our conclusion that Council members must be considered government employees, discussed *infra*, necessarily means that some conflicts laws and regulations would apply to the Council members.

[3] The USIA has two authorizing statutes Under the first, the Fulbright-Hays Act, *as amended*, 22 U.S.C. §§ 2451–2459, the USIA is charged with promoting by "grant, contract, or otherwise" "educational" and "cultural" exchanges between the United States and foreign countries. *See* 28 U.S.C. § 2452 These exchanges frequently occur under the auspices of private organizations which receive support through USIA grants, contracts, or other forms of assistance. The proposed Youth Exchange Programs fall within the broad mandate of this Act The USIA also serves, pursuant to the Smith-Mundt Act of 1948, *as amended*, 22 U.S.C §§ 1431–1479 (1976 & Supp. II 1978), as "an information service to disseminate abroad information about the United States, its people, and policies . . ." 22 U.S.C. § 1431. *See also* 22 U.S C. §§ 1461, 1461–1 (Supp. II 1978) In discharging this responsibility, the USIA operates the Voice of America, a government radio network which broadcasts to countries abroad. *See* 22 U.S.C. § 1463.

> *encouraged to participate to the maximum extent feasible* in carrying out this chapter *and to make contributions* of funds, property and services which the [Director] is authorized to accept, to be utilized to carry out the purposes of this chapter. Funds made available for the purposes of this chapter may be used to contribute toward meeting the expenses of activities carried out through normal private channels, by private means, and through foreign governments and international organizations.

(Emphasis added.)[4] Under this provision, the USIA has clear authority to accept and to use contributions to meet the "expenses of activities carried out through normal private channels, by private means," such as youth exchanges operated by private institutions.[5] A separate question is presented, however, whether and in what manner USIA employees may actively solicit such contributions. By providing that private groups, firms, individuals, and organizations "shall be encouraged to participate to the maximum extent feasible . . . and to make contributions," the section raises two questions: may employees of the USIA generally encourage contributions and, if so, may they do so through a media publicity campaign?

A. Who May Encourage Contributions

The use of the phrase "shall be encouraged" leaves some ambiguity regarding the precise scope of the USIA's authority because the phrase could arguably constitute only a congressional statement of encouragement for contributions, rather than an authorization for USIA employees actively to solicit contributions.[6] The use of the term "shall be," however, more likely indicates that entities other than Congress, namely the USIA, have authority to encourage private contributions. If Congress had intended this phrase to serve merely as a statement of congressional encouragement, Congress presumably would have used the words "are encouraged," rather than the phrase "shall be encouraged," thereby indicating an understanding that encouragement would take place in the future and by some persons or entities other than Congress itself.

In support of the foregoing interpretation, we note that § 2455(f) is based on an analogous section in the International Cultural Exchange and Trade Fair Participation Act of 1956, Pub. L. No. 860, § 4, 70 Stat. 778, which, according to one of its sponsors "call[ed] for *continued* encouragement of private contributions in support of this program." 102 Cong. Rec. 14103 (remarks of Rep. Thompson) (1956) (emphasis added). Furthermore, § 2455(f) is not written in a

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[4] When this provision was originally passed, the President was authorized to accept contributions made under this chapter. Reorganization Plan No 2 of 1977, § 7(a)(2), 42 Fed. Reg. 62461, 91 Stat 1637 set out in 22 U.S.C 1461 note, transferred these functions to the Director.

[5] This provision would also give the USIA authority to accept voluntary "services," such as those of the Council's members

[6] Ambiguous language in the two committee reports could be interpreted to provide some support for the view that encouragement was to be provided by Congress rather than the USIA. *See* H Rep No 1094, 87th Cong , 1st Sess. 14 (1961), S. Rep No. 372, 87th Cong., 1st Sess. 16 (1961).

manner which would suggest that Congress was authorizing the USIA simply to accept contributions. By using the phrase "shall be encouraged," Congress seems to have intended that contributions would be an acceptable, indeed desirable, method of augmenting the funds available for the USIA's tasks relative to exchange programs. It seems unlikely that Congress would have enacted this provision if it did not want the USIA to take reasonable steps necessary to make it effective. Thus, the section, in our view, authorizes continued encouragement by the USIA of private contributions, rather than simply announcing Congress' support for private contributions to the USIA's programs.

This interpretation is also consistent with the underlying intent behind the Fulbright-Hays Act to promote close cooperation between the USIA and private entities in undertaking exchange efforts. The USIA is charged generally with "encourag[ing] private institutions in the United States to develop their own exchange activities, and provid[ing] assistance for those exchange activities which are in the broadest national interest." 22 U.S.C. § 1461–1. Since USIA employees are authorized to "encourage" private entities to undertake their own exchange efforts, it is not illogical to conclude that they would also be authorized to solicit private contributions for the USIA's own programs.[7]

B. Publicity Campaigns

The general language authorizing the "encourage[ment]" of private contributions would also appear to authorize the use of a media campaign by the USIA to raise funds, even though a publicity campaign is not specifically authorized. As we have said, Congress viewed the solicitation of private contributions as an appropriate method for the USIA to fund its operations. A media campaign represents a reasonable technique for undertaking such solicitation on a mass scale.

At the same time, however, we must examine carefully the employment of a promotional campaign or publicity effort because of the requirements of 5 U.S.C. § 3107. That section provides that "[a]ppropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose." According to the brief legislative history of § 3107, its purpose is to prevent an agency from employing "publicity" or "press agents" whose business it is to "advertise the work and doings of that department," unless their employment is specifically authorized by Congress. 50 Cong. Rec. 4409 (1913) (remarks of

[7] The prohibition in the Smith-Mundt Act on the USIA's dissemination of political propaganda within the United States does not affect this conclusion. The Smith-Mundt Act, 22 U.S C. § 1461, which authorizes the "dissemination abroad, of information about the United States, its people and its policies," specifically prohibits the dissemination of "such information" within the United States. This restriction, however, only applies to "such information," meaning propaganda information disseminated abroad by the USIA pursuant to the Smith-Mundt Act. *Cf.* 118 Cong. Rec. 19187, 19188 (1972) (remarks of Senators Javits and Fulbright). Neither the language of this provision nor its underlying purpose would restrict the USIA's dissemination within the United States of information on cultural or educational exchanges undertaken pursuant to the Fulbright-Hays Act, 22 U.S.C. § 2455(f). We understand from members of the General Counsel's Office of the USIA that the USIA has traditionally drawn this distinction as the basis for its authority to disseminate information regarding exchange activities, and we agree with this analysis.

Rep. Gillett).[8] Because USIA funds and personnel would necessarily be used, however indirectly, to assist in an advertising campaign run by advertising executives serving on the Council, a question is raised regarding the permissible extent of the USIA's authority to undertake such an effort consistent with § 3107.

In interpreting this provision and an analogous provision discussed below, both this Office and the Comptroller General originally sought to draw a distinction, reflected in the legislative history of the section, between activities that are intended to "give[ ] to the country information as to the work of [a] department," and activities that seek to "extol and exploit the virtues of [a] department." 50 Cong. Rec. 4411 (1913) (remarks of Rep. Lever). Under this view, agencies are authorized to hire employees for their press offices, even without specific statutory or budgetary authority, because these employees are engaged primarily in an informational capacity, and not to extol the virtues of the agency. *See, e.g.*, 31 Comp. Gen. 311 (1952). This Office has conceded at the same time, however, that "[t]he line between information and 'publicity' is almost impossible to draw, since any information about an agency's activities will publicize the agency, and almost all publicity will contain information about the government or about government programs."[9] Similarly, in a book published only last month by the General Accounting Office (GAO), that agency recognizes that this distinction "does not provide adequate guidelines to distinguish the legitimate from the proscribed." Principles of Federal Appropriations Law, 3–148 (1982) (Federal Appropriations Law). *See also* B–194776 (June 4, 1979); B–177704 (February 7, 1973).

Because this is an area in which the line is so difficult to draw, and because the issues are directly pertinent to statutory restrictions on the use of appropriated funds, we believe it is appropriate to accord considerable deference to decisions of the GAO. That agency is charged with enforcing § 3107 and represents the interests of the Congress, whose control of executive activities § 3107 seeks to protect. In Federal Appropriations Law the GAO reviews a series of unpublished Comptroller General opinions on § 3107. After recognizing the difficulty in drawing a line between the legitimate dissemination of information, on the one hand, and "puffing" of agency activities, on the other, the GAO states that it

> does not view 5 U.S.C. § 3107 as prohibiting an agency's legitimate informational functions or legitimate promotional functions where authorized by law. The apparent intent of the statute is to prohibit publicity activity "for the purpose of reflecting credit

[8] When introducing this provision, its author explained that it is not "proper for any department of the Government to employ a person simply as a press agent to advertise the work and doings of that department and it is to prevent that in any department that this amendment is offered." He went on to state that such positions for publicity experts "ought not to exist without, as my amendment suggests, a special appropriation by Congress or special recognition and approval by Congress of such an official." 50 Cong. Rec. 4409 (1913) (remarks of Rep. Gillett). *See also id* at 4410 (remarks of Rep. Fitzgerald) ("no service of the Government should employ a man whose duty is to prepare press matter in order to extol or to advertise the work of the service with which he is connected").

[9] Memorandum from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, to Joseph Dolan, Assistant Deputy Attorney General, "Request of House Subcommittee for Interpretation of 5 U S.C. § 54," at 3 (Mar 1, 1963).

> upon an activity, or upon the officials charged with its administration, rather than for the purpose of furthering the work which the law has imposed upon it."

Federal Appropriations Law at 3–152, quoting A–82332 (Dec. 15, 1936). In the GAO's view, "the statute is not intended to interfere with the dissemination of information which an agency is required or authorized by statute to disseminate, or with promotional activities authorized by law." Federal Appropriations Law, at 3–153; B–139965 (Apr. 16, 1979). *See also* B–181254 (Feb. 28, 1975).[10]

The GAO book gives the same interpretation to a separate but analogous provision routinely included in the USIA's appropriation statute which prohibits the use of any agency funds for "publicity or propaganda purposes not authorized by the Congress." *See* Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1980, Pub. L. No. 96–98, § 601, 93 Stat. 416, 435 (1979).[11] With respect to this provision, the GAO states that it is "reluctant to find a violation where the agency can provide a reasonable justification for its activities." Federal Appropriations Law, at 3–148. *See also* B–184648 (Dec. 3, 1975); B–178528 (July 27, 1973). The GAO cites with approval a Comptroller General opinion which upheld the authority of the Department of Commerce to undertake a "national multi-media campaign to enhance public understanding of the American economic system." Federal Appropriations Law, at 3–149. In the GAO's view, this campaign was a reasonable means of discharging the Department of Commerce's function of promoting commerce and did not "aggrandize" the Commerce Department. *See* B–184648 (Dec. 3, 1975). The GAO book cites only two cases in which the Comptroller General has found an activity prohibited because of the ban on unauthorized publicity. In the first case, the Comptroller General held that a speech by the Deputy Assistant Secretary of Defense apparently seeking public assistance in lobbying for Defense programs was impermissible. *See* B–136762 (Aug. 18, 1958). In the second case, which predated the appropriation statute, the Comptroller General found that attempts by the Federal Housing Administration (FHA) to promote homeowner improvements were prohibited. The opinion reasoned that the creation of demand for housing was not an authorized purpose of the FHA. *See* 14 Comp. Gen. 638 (1935).

In light of the extremely narrow interpretation given to these provisions in the Comptroller General opinions, we believe that the Comptroller General would uphold the limited use of appropriated funds to support a reasonable and carefully controlled advertising campaign by the Council. Like the Departments of Energy and Commerce, the USIA has specific authority to promote an activity in the private sector—namely, the making of contributions of funds, property, and

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[10] For this proposition, the GAO relies on two Comptroller General opinions. These decisions approved a Federal Energy Administration (FEA) advertising campaign to conserve energy on the ground that the FEA had the authority to promote energy conservation. *See* B–139965 (Apr. 16, 1979); B–181254 (Feb. 28, 1975).

[11] This section states in full:

> No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress

services for youth exchange programs. A media campaign represents an effective method for reaching the public and conveying the need, as in the FEA case cited in footnote 10, to conserve energy or, in this case, to support exchange programs. We would caution, however, that the proposed USIA advertising campaign should be carefully tailored and scrutinized so that it does not unduly emphasize the accomplishments of the USIA or aggrandize the agency or its officials. Possibly in contrast with the advertising campaigns previously sanctioned by the Comptroller General and cited in the GAO report, the proposed advertising campaign soliciting contributions to the USIA would undoubtedly involve some degree of favorable comment on the programs of the USIA, albeit with the purpose of promoting an activity which the USIA is generally authorized to promote— the donation of funds. For this reason, we believe that the advertising campaign should focus primarily on the private youth exchange activities, and not place any undue emphasis on the officials or operations of the USIA itself. With this caveat, we conclude that a reasonable media campaign would be approved by the Comptroller General in these unique circumstances.

III. Authority to Establish a Council to Solicit Contributions

A second legal issue arises from the USIA's plan to solicit contributions by creating a new council staffed by persons who would be part-time volunteers of the USIA. Section 673 of Title 31 (1976) states:

> No part of the public moneys, or of any appropriation made by Congress, shall be used for the payment of compensation or expenses of any commission, council, board, or other similar body, or any members thereof, or for expenses in connection with any work or the results of any work or action of any commission, council, board, or other similar body, unless the creation of the same shall be or shall have been authorized by law. . . .

Under this section, the use of any money for the expenses of any council is prohibited "unless the [council] shall have been authorized by law." Thus, while solicitation of contributions by USIA employees may be authorized, creation of the Council itself must be "authorized by law" within the meaning of this section in order for public funds to be used for its expenses or for USIA employees to assist it in its operations.

The requirements of this section have never been clearly articulated, although this section apparently does not require specific authorization for the establishment of committees. Immediately following its passage, the Attorney General in a 1909 opinion concluded that authority for the creation of a council "would be sufficient if their appointment were authorized in a general way by law." 27 Op. Att'y Gen. 432, 437 (1909). The Comptroller General adopted a similar position that a council is authorized if its "duties or functions can be performed only by

such a group or if it is generally accepted that such duties can be performed best by such a group." 40 Comp. Gen. 478, 479 (1961).[12]

Even though § 673 would not require specific statutory authorization for the creation of the Council, a question remains whether the Council will be "authorized in a general way by law." No clear legal lines can be drawn in this area, especially before the Council has begun operations. We believe that, as presently planned, the Council would be authorized in light of Congress' preference for private funding of USIA programs and close cooperation between the USIA and private organizations. In our view, however, the larger the Council and the more diverse its functions and structure become, the greater the risk that Congress or a court could determine that it is not "authorized in a general way by law." We leave it to the judgment of the General Counsel's Office of the USIA to determine at what point it believes the size and operation of the Council may exceed prudent bounds.

IV. Congressional Appropriations

A third limitation on the operation of the Council is the requirement that it obtain specific congressional funding for its expenses after the first year of its operation. Section 696 of Title 31 requires that no money may be spent for any "agency or instrumentality" after it has been in existence for more than one year "if the Congress has not appropriated any money *specifically* for such agency or instrumentality or *specifically* authorized the expenditure of funds by it." (Emphasis added.)[13] The purpose of this provision, commonly referred to as the Russell Amendment after its author, Senator Richard Russell, is "to retain in the Congress the power of legislating and creating bureaus and departments of the Government." 90 Cong. Rec. 3059 (1944) (remarks of Sen. Russell). Before

[12] The passage of the so-called Russell Amendment, 31 U.S.C. § 696, provides further support for the view that § 673 does not require specific statutory authorization for the creation of a committee. Section 696 requires, as we discuss in detail *infra*, that no money may be spent for an "agency or instrumentality" after it has been in existence for more than one year "if the Congress has not appropriated any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it." The purpose of this provision was to assure congressional control over various government commissions that had come into existence over the years without statutory authorization *See generally* 90 Cong. Rec. 3059, 3060, 3064 (1944) (remarks of Sen. Russell). By introducing this enforcement mechanism, Congress may have implicitly recognized that the Executive Branch has some discretion to create commissions, at least for a year, without clear statutory authorization.

[13] Section 696 states in full:

> After January 1, 1945, no part of any appropriation or fund made available by this or any other Act shall be allotted or made available to, or used to pay the expenses of, any agency or instrumentality including those established by Executive order after such agency or instrumentality has been in existence for more than one year, if the Congress has not appropriated any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it. For the purposes of this section, any agency or instrumentality including those established by Executive order shall be deemed to have been in existence during the existence of any other agency or instrumentality, established, by a prior Executive order, if the principal functions of both of such agencies or instrumentalities are substantially the same or similar When any agency or instrumentality is or has been prevented from using appropriations by reason of this section, no part of any appropriation or fund made available by this or any other Act shall be used to pay the expenses of the performance by any other agency or instrumentality of functions which are substantially the same as or similar to the principal functions of the agency or instrumentality so prevented from using appropriations, unless the Congress has specifically authorized the expenditure of funds for performing such functions.

passage of this section, members of Congress had expressed concern over the establishment of various government councils and commissions without specific statutory authority. Section 696 sought to make these entities accountable to Congress by requiring that they receive specific budgetary support within a year of their establishment. *See* 90 Cong. Rec. 3059, 3060, 3064 (1944) (remarks of Sen. Russell).

This Office has previously interpreted this section narrowly. In our view, it does not apply to "entities that exist by virtue of statutory authority."[14] Thus, we have found that "purely advisory committees" do not need to obtain specific budgetary approval because they are established under the Federal Advisory Committee Act (FACA). We have also found that the term "agency or instrumentality," as used within this section, covers only entities that are invested "with actual authority to take substantive action on [an official's] or the government's behalf."[15] Thus, "purely advisory committees" would also not be covered by this section because they take no "substantive action."

Even under this narrow interpretation, however, the proposed Council for International Youth Exchange would be subject to the requirements of 31 U.S.C. § 696. First, as a committee performing both advisory and operational functions, the Council is not specifically authorized by any statute since FACA specifically authorizes the creation of committees which are only advisory. Second, even assuming that the Council would have sufficient revenues of its own to cover operational expenses, it would nevertheless rely on appropriated funds to support its activities because, as we understand it, it would both require the assistance of USIA personnel and the use of USIA facilities. The cost of these USIA personnel and expenses would be covered by appropriated funds, whose use would be unauthorized after one year unless the Council received specific congressional appropriations.[16] Finally, the Council would be an "agency or instrumentality" within the meaning of 31 U.S.C. § 696 because, as contemplated, it would discharge responsibilities vested by law in the USIA and would not be purely advisory. Although this office has interpreted the term "agency or instrumentality" to cover only entities that take substantive action, we have nonetheless indicated that an entity that "acts on behalf of the government or exerts any governmental power," such as a commission, should be covered.[17] Section 696 was specifically passed to regulate the establishment of government councils and

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[14] *See* memorandum from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, to Robert J. Lipshutz, Counsel to the President, "Application of Russell Amendment to Purely Advisory Committees," at 6 (June 27, 1979) (Lawton Memorandum).

[15] Lawton Memorandum, p. 3.

[16] Even if the Council could operate without government assistance after the first year, a question would remain whether the existence of a council operating on contributed funds contravenes the underlying intent of § 696. Section 696 was passed in order to permit Congress to control through the budgetary process the operation of government instrumentalities that exercise governmental power. *See* 90 Cong. Rec. 3059, 3060, 3064 (1944) (remarks of Sen. Russell). Creating and operating "instrumentalities" that perform government functions, but rely on contributed funds, might be said to contravene that intent. *But cf.* 90 Cong. Rec. 3067 (remarks of Sen. Danaher) (arguing that borrowing by government corporation should not be an appropriation within this provision). We have not attempted to resolve this question because we have been informed that the use of USIA facilities, staff, and funds is contemplated.

[17] Lawton Memorandum, p. 5.

commissions, at least if they perform non-advisory functions. *See* 90 Cong. Rec. 3059 (1944) (remarks of Sen. Russell). Thus, the Council, which would take substantive action—fundraising—on behalf of the USIA, would be an "instrumentality" using appropriated funds. Accordingly, we believe that it would be subject to the requirement of § 696 that it obtain specific congressional appropriations within a year of its creation in order for it to continue beyond that date.[18]

V. Employee Status of Council Members and Directors

The final problem raised by the establishment of the Council relates to the fact that the USIA apparently does not wish the Council's directors and members to be employees of the USIA within the meaning of the civil service laws. *See* 5 U.S.C. § 2105. Section 2105, Title 5, defines an employee within the meaning of that Title as a person who is (1) appointed by a federal officer or employee, (2) engaged in the performance of a federal function under law, *and* (3) subject to the supervision of a federal officer or employee. As we understand the proposed functions of the Council, both the director and members would necessarily be employees within the meaning of this provision.[19]

First, they would all be appointed to the Council by the Director of the USIA. This appointment is necessary, we understand, to elicit private participation in the project, to symbolize the government's commitment to Youth Exchange Programs, and to exercise USIA control over the Council. Indeed, even if the USIA did not wish to "appoint" members and directors to the Council, the regulations of the Office of Personnel Management would require that they be appointed by the government if they are to assume their proposed responsibilities. According to the Federal Personnel Manual, Chapter 735, App. C, "Conflicts of Interest Statutes and Their Effects on Special Government Employees," (FPM, App. C), when a person is serving on a government advisory committee, board, or other group in an independent capacity, rather than presenting the views or interests of a particular organization, he must be formally appointed. *See generally* Memorandum from J. Jackson Walter, Director, Office of Government Ethics, to Heads of Departments and Agencies of the Executive Branch, "Members of Federal Advisory Committees and the Conflict-of-Interest Statutes," p. 6 (July 9, 1982) (Walter Memorandum). The members and directors of the Council would not be "invited to appear at an agency in a representative capacity," but rather to render independent advice and to solicit contributions in the name of the agency. Accordingly, they would have to be formally appointed.

Second, the directors and members of the Council would be engaged in the performance of a federal function. In their advisory capacity, these individuals,

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[18] Section 691, Title 31, provides an exemption from the funding requirement of § 696 for "interagency groups engaged in authorized activities of common interest to such departments and establishments and composed in whole or in part of representatives thereof." As the language of § 691 indicates, however, it only exempts committees which are established to coordinate common activities between more than one agency. Thus, it would not exempt the Council, which is organized only to further the exchange activities of the USIA, from the obligation to obtain funding within one year of its creation.

[19] We have assumed that the members of the Council would be actively engaged in assisting the Council.

as we have said, would be rendering independent advice to the USIA. *See generally* Walter Memorandum, pp. 6–7. In their operational capacity, they would be soliciting for and in the name of the USIA. *See* FPM, App. C–5 ("When an advisor or consultant is in a position to act as a spokesman for the United States or a Government agency as, for example, in an international conference—he is obviously acting as an officer or employee of the Government").

Third, the members and directors of the Council would be subject to the supervision of a federal officer or employee. Whether an individual is independent or supervised depends on "the detail with which the party for whom the work is eventually produced actually supervises the manner and means by which the work is performed." *Lodge 1858, AFGE* v. *Webb*, 580 F.2d 496, 504 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978). According to your proposal, the USIA would exercise control over the manner of solicitation, the content and targets of the solicitation, the individuals who would be doing the solicitation, and the manner in which the money so raised would be expended. The Agency also plans to provide staff and offices for the Council, which is generally inconsistent with an independent relationship between the Agency and the Council. Moreover, officials of the USIA have been and wish to continue to be actively involved in the creation of the Council. Finally, officials of the USIA do not plan to enter into a contract with the Council for fundraising, which is generally one indication of an independent relationship.[20] Accordingly, in our view, the activities of the directors and members of the Council, as you have described them, would require that they be employees of the federal government within the meaning of Title 5.[21]

VI. Conclusion

This memorandum has outlined the various legal questions raised by the creation of the proposed Council by the USIA. In our view, the USIA may establish the Council in the manner you have proposed so long as its members and directors are employees of the USIA, and any publicity effort the Council undertakes is carefully tailored to further only the fundraising goals of the USIA, and not unduly to publicize the USIA.[22] We also caution that the larger the size of the Council, and the more diverse its functions, the greater the risk that it could stray beyond the limits of the "authorized in a general way by law" exception to § 673. Because no bright line can be drawn under this statute, we leave it to your

[20] An approach involving a contract between the USIA and the Council for fundraising would raise questions as to whether the USIA has the authority to enter into a contract for fundraising, and whether such a contract with the Council would satisfy the procurement laws. We have not examined these issues, since the current proposal does not contemplate such an approach. In any event, we would generally defer to the initial judgment of your office on questions such as these relating to the authority of the USIA.

[21] As you know, the members and directors of the Council could either be regular government employees or special government employees, depending upon the length and terms of their service. *See* FPM, App. C.

[22] Although we have not specifically considered what conflicts of interest laws and regulations would apply to the solicitation of funds by the Council, our conclusion that Council directors and members must be considered government employees necessarily means that certain conflicts of interest restrictions would apply. More generally, because of the unusual functions of the Council, we recommend that the USIA exercise particular care in the solicitation of contributions to ensure that no improper pressure is placed on members of the public to contribute, and that no conflicts of interest would arise in the course of this solicitation.

informed judgment to decide whether the proposed Council remains, in its current form, within prudent bounds.[23]

If you should like our advice on any more specific aspects of the proposed Council, please feel free to contact us.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[23] You have raised two other questions about the operation of the Council, neither of which, in our opinion, raises a legal problem. First, you have asked whether the President can direct through memorandum rather than executive order that the Council engage in both operational and advisory functions. FACA states that an advisory committee shall be solely advisory unless specifically provided otherwise by statute or "Presidential directive." 5 U.S.C. App. § 9(b) We believe an executive memorandum is all that is required to satisfy the requirement of a presidential directive. *See* Office of Management and Budget Circular A–63, 38 Fed. Reg. 2306, 2308 (1973).

Second, you have asked whether the members and directors of the Council may be appointed by the Director, although the President would recommend their appointment to the Director. We see no legal problem with the director of an agency appointing the members of a committee which advises both him and the President, at least where the President recommends their appointment.

Continuation of Agency Activities During a Lapse in Both Authorization and Appropriation

During a lapse in both an agency's authorization and its appropriation, activities may continue only to the extent they were authorized prior to the enactment of any specific lapsed authorization, and only to the extent they fit within the "emergency" exception to the Antideficiency Act.

September 17, 1982

MEMORANDUM OPINION FOR THE CHIEF COUNSEL, FEDERAL RAILROAD ADMINISTRATION

We understand that the Federal Railroad Administration (FRA) may soon face a lapse in both authorization for certain program activities and appropriations. As discussed in a telephone conversation on August 10, 1982, between members of our respective staffs, it is the view of this Office that, as a general matter, in such a situation the agency may continue program activities that are authorized by currently effective substantive legislation and fit within the "emergency" exception to the Antideficiency Act, 31 U.S.C. § 665 (1976). For this purpose, a "substantive" statute is one authorizing or requiring an agency to conduct program activities (*e.g.*, regulation, education, enforcement).

The general rule relating to a lapse in an agency's authorization[1] is that activities continue to be authorized, notwithstanding the lapse of a specific authorization, to the extent that they were authorized prior to the enactment of the specific authorization. We caution, however, that we have not examined any specific legislation relating to the FRA. Therefore, we are not in a position to advise, and we do not advise, what particular activities of the FRA might continue to be authorized.

The general rules relating to a lapse in appropriations have been thoroughly set forth in two Attorney General opinions and a number of Bulletins from the Office of Management and Budget. Very generally, under the Antideficiency Act, all

[1] As a general rule, most activities carried out by an agency are permanently authorized by that agency's organic legislation or other statutes that do not have expiration dates. If, however, authorization for an agency's activities is extended by Congress in a statute having an expiration date or in bills traditionally adopted annually which authorize both specific activities and appropriations for a particular fiscal year, then the authority to engage in those activities expires unless authority to continue them can be derived from other statutes. In contrast to a lapse in appropriations, discussed in the text below, a lapse in the statutory authority of an agency to conduct a particular activity results in the inability of the agency to continue that activity. In other words, there is no "exception" that permits continuance of previously authorized activity analogous to the exception under the Antideficiency Act which permits the continuance of certain *otherwise authorized* activities during a lapse in appropriations.

activities of the agency must cease except those that are necessary to protect life and property. However, we have not examined, and so we do not advise upon, the extent to which the FRA's activities can properly be considered to be within the emergency exception.

These are the two general rules relating to lapse in authorizations and appropriations. We see no reason why either of these would differ as applied to the situation in which, as we understand it, the FRA now finds itself, that is, faced with a possible lapse of both specific authorizations and the appropriation. Rather, we believe that the scope of the agency's authority to continue program activities, including, as necessary, to obligate funds in support of those activities, must be determined by application of both general rules, as outlined above. The result in such a case is that authorized, emergency activities may continue.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962

The President has authority to upgrade two ferroalloys currently held in the National Defense Stockpile, and remove one of these ferroalloys from the Generalized System of Preferences established under the Trade Act of 1974, in response to a "national security" finding under § 232(b) of the Trade Expansion Act of 1962, § 19 U.S.C. § 1862(b). This authority stems not from § 232(b) itself, but from separate and independent statutory schemes.

The above-described actions will satisfy the President's obligation under § 232(b) to take such actions as are necessary to "adjust imports" in responding to a threat to the national security.

October 5, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked this Office to provide you with our views regarding four questions concerning the scope and flexibility of the President's authority to adjust imports under § 232(b) of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862. The questions relate to a range of actions the President might take in response to a "Report" he has received from the Secretary of Commerce which contains a finding by the Secretary that high carbon ferrochromium and high carbon ferromanganese are "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. . . ." 19 U.S.C. § 1862(b).

The Report, in connection with this finding, recommends to the President: (i) the upgrading to high carbon ferrochromium and high carbon ferromanganese of chromite and manganese ores currently held in the National Defense Stockpile (NDS), an action to be taken pursuant to the Strategic and Critical Materials Stock Piling Revision Act of 1979, 50 U.S.C. §§ 98–98h–4 (Stock Piling Act), and (ii) removal of high carbon ferromanganese from the Generalized System of Preferences (GSP) established under Title V of the Trade Act of 1974, 19 U.S.C. §§ 2461–2465 (1974 Trade Act). We conclude that the President may exercise his authority under the Stock Piling Act to upgrade the two ores and his authority under the 1974 Trade Act to withdraw GSP status of high carbon ferrochromium in response to a "national security" finding under 19 U.S.C. § 1862(b). We are also of the view that such actions would satisfy the statutory requirement that the President, unless he rejects the Secretary's finding, "shall take such action, and for such time, as he deems necessary to adjust the imports of such [ferroalloy]

. . . so that such imports will not threaten to impair the national security. . . ." 19 U.S.C. § 1862(b).

Our responses to your specific questions are as follows:

Question 1. Whether upgrading ores in the National Defense Stockpile (NDS) into ferroalloys would be "action to adjust imports" *authorized by* § 232 of the Trade Expansion Act of 1962.

We are not aware that any department has argued that upgrading the ores in the NDS is, in this particular instance, "action to adjust imports" *authorized by* § 232. To the contrary, the Commerce Department Report recommends that the stockpiling action be taken pursuant to the Stock Piling Act. Although this Department has interpreted the President's authority under § 232 extremely broadly in the past, *see* 43 Op. Att'y Gen. No. 3 (Jan. 14, 1975), and the legislative history mentions stockpiling as an appropriate action,[1] we do not believe that upgrading the stockpile is an action which would be authorized by § 232 standing alone. In light of the cautionary language in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 571 (1976), which warned that "our conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by § 232(b) in no way compels the further conclusion that *any* action the President might take, as long as it has even a remote impact on imports, is also so authorized," we see no reason to reach out unnecessarily to answer question 1 affirmatively since there is clear authority for the stockpiling action under separate statutory authority.

Question 2. If, by action under separate authority, the President were to implement the two remedial actions (stockpiling and GSP removal) recommended in the § 232 Commerce Report, would the requirement of § 232—that action "to adjust imports" be taken—be satisfied?

As a preliminary matter, we would note that this question need not be resolved if the President were to refrain at this time from accepting or rejecting the "national security" finding made in the Commerce Report. That is, the President could take the two recommended remedial actions under independent authority established in the Stock Piling Act and the 1974 Trade Act and simply postpone, in light of changed circumstances that would exist at that point, his determination whether the articles are being imported into the United States in such a manner as to threaten to impair the national security.

Should the President, however, determine to affirm the finding of the Secretary, we believe the requirements of § 232 would be satisfied. The only statutory requirement imposed on the President by § 1862(b) is that he "shall take such action, and for such time, as he deems necessary to adjust the imports of such

[1] *See* 101 Cong. Rec. 5588 (1955) ("[they] will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs") (remarks of Sen. Bennett); 101 Cong. Rec. 5299 (1955) ("It grants to the President authority to take whatever action he deems necessary to adjust imports. . . He may use tariffs, quotas, import taxes, or other methods of import restrictions.") (remarks of Sen Milliken); S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955) (President to have the authority to take "whatever action is necessary to adjust imports").

article . . . so that such imports will not threaten to impair the national security. . . ." As we understand the facts, by upgrading the NDS many domestic producers of high carbon ferrochromium and ferromanganese who might otherwise go out of business will remain economically viable for the ten-year period during which the upgrading would occur. Absent such a remedial measure, the failure of these domestic producers would leave the country dependent on imports of strategically critical ferroalloys. Necessarily then, the President's action will have the result of adjusting imports; the nation will rely less on imports of ferroalloys if some domestic production continues. In addition, the effect of removing high carbon ferromanganese from GSP treatment would be analogous to the imposition of tariffs or fees, which are accepted remedies for purposes of § 232. *See FEA* v. *Algonquin SNG, Inc.*, 426 U.S. at 571. Presumably, raising the price of imports of high carbon ferromanganese would increase the demand for the domestically produced article and thus "adjust imports" within the meaning of § 232.

The language, legislative history, and purpose of § 232 indicate that the proposed remedial actions would satisfy the President's obligations under § 232(b). As the Supreme Court noted in *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. at 561:

> In authorizing the President to "take such action and for such time, as he deems necessary to adjust the import of [an] article and its derivatives," *the language of § 232(b) seems clearly to grant him a measure of discretion in determining the method to be used to adjust imports*. (Emphasis added.)

Nor has this Department ever questioned that the language in § 232 grants the President "the broadest flexibility" in selecting actions "to adjust imports." 43 Op. Att'y Gen. No. 3, at 5.

Section 232 of the Trade Expansion Act also instructs the President to:

> give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, . . . [as well as to] take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, . . . loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports . . . in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(c). Because the statutory language specifically indicates that maintaining the viability of domestic industries perceived to be critical to the national security was a major purpose of § 232, we believe that the proposed remedial actions—which would achieve the statutory purpose of preserving domestic production of articles important to the national security—would "adjust imports" within the meaning of § 232.

The legislative history of § 232(b) and its predecessors[2] similarly indicates that Congress wanted the President both to address himself to the effects of imports on domestic industries deemed critical to the national security[3] and to have broad powers to preserve domestic production needed for national defense requirements. Indeed, Representative Cooper, the floor manager of the bill containing § 232(b), illustrated the meaning of that provision with an example analogous to the present situation. He noted that the conference report "emphasized that if the President sees fit to stockpile critical materials under any other law, that act may be taken wholly aside from the authority contained in this amendment [final version of § 232(b)]. Conversely, action under the new provision may be taken wholly aside from the authority contained in any other law." 101 Cong. Rec. 8160, citing H.R. Rep. No. 745, 84th Cong., 1st Sess. 7 (1955).

Representative Cooper further explained:

> This means that if the President should institute a stockpiling program which would successfully preserve the essential domestic producing facilities in a sound condition and the threat to the national security from increasing imports would thereby be eliminated, there would be no necessity for limiting imports. The President would not only retain flexibility as to the particular measure which he deems appropriate to take, but, having taken an action, he would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made.

101 Cong. Rec. 8160–61.[4]

As noted above, Congress made no attempt to restrict the options available to the President to adjust imports in response to a national security finding under § 232. *See* n.1 *supra*. (President authorized to take whatever action he deems necessary.) *See also* H.R. Rep. No. 1761, 85th Cong., 2d Sess. 13 (1958) (statute provides "those best able to judge national security needs . . . [with] a way of taking *whatever action is needed* to avoid a threat to the national security through imports") (emphasis added). We therefore conclude, based on the language and legislative history of § 232, that stockpiling and removing the GSP status of the relevant ferroalloys under independent statutory authorities are sufficient actions "to adjust imports" in response to a national security finding by the Secretary of Commerce.

Finally, we do not believe that either *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, or *Independent Gasoline Marketers Council* v. *Duncan,* 492 F. Supp. 614

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[2] Section 232(b) was originally enacted by Congress as § 7 of the Trade Agreement Extension Act of 1955, Pub. L. No. 84–86, 69 Stat. 162, 166, and amended by § 8 of the Trade Agreement Extension Act of 1958, Pub. L. No. 85–686, 72 Stat 673, 678.

[3] In directing the President to consider the domestic effects of imports, § 232 contrasts with other statutes which delegate powers to the President to deal with imports but instruct him to focus primarily on international concerns. *See, e.g.*, 19 U.S.C. § 2132 (correcting balance-of-payments disequilibria), 50 U.S.C. §§ 1701–1706 (Supp V 1981) (International Emergency Economic Powers Act).

[4] *See also Hearings on Trade Agreements Extension (H R. 1), before the House Comm. on Ways and Means,* 84th Cong., 1st Sess. (1955); *Hearings on Trade Agreements Extension (H.R. 1), before the Senate Comm. on Finance,* 84th Cong , 1st Sess. (1955)

(D.D.C. 1980), establishes that these actions would be a legally insufficient response to the finding. In upholding the President's authority to impose a license fee system under § 232(b), the Court's opinion in *Algonquin* repeatedly cited to expressions from Congress and the Executive Branch reflecting their understanding of the broad scope of authority granted to the President by the language of § 232(b). *See* 426 U.S. at 564–70. The Court's final caveat that neither its holding nor the legislative history "compels the further conclusion that *any* action the President might take, as long as it has even a remote impact on imports, is also so authorized," 426 U.S. at 571, is simply not applicable in the present instance because we do not deal here with the coercive regulation of private enterprise that was an underlying concern in the *Algonquin* case.

The present actions are also similarly distinguishable from the Petroleum Import Adjustment Program (PIAP) that was created in response to a national security finding concerning oil imports, and was successfully challenged in *Independent Gasoline Marketers Council* v. *Duncan*, 492 F. Supp. 614. The PIAP license-fee system was a demand-side disincentive, ultimately designed to fall on consumers of gasoline rather than users of home heating oil. It imposed a gasoline conservation fee on refiners of *both* domestic and imported crude oil. The court determined that the PIAP system was structured to lower demand for oil generally rather than demand for imports in particular. The court explained the remoteness of the program's effect on imports as follows:

> First, the quantitative impact of the program on import levels will admittedly be slight. Second, the program imposes broad controls on domestic goods to achieve that slight impact. Third, Congress has thus far denied the President authority to reduce gasoline consumption through a gasoline conservation levy. PIAP is an attempt to circumvent that stumbling block in the guise of an import control measure. TEA alone does not sanction this attempt to exercise authority that has been deliberately withheld from the President by the Congress.

492 F. Supp. at 618. The PIAP system clearly was the type of presidential action that the Supreme Court had warned was not authorized by § 232 in the *Algonquin* case.

In contrast to the PIAP system, the proposed remedial actions for ferroalloys in no way penalize domestic industries; rather, the stockpiling action aids them. More importantly, these actions do not constitute coercive regulation taken pursuant to the Act. The removal of GSP status for ferromanganese also discriminates between imports and domestic goods, in conformity with the requirements of § 232. Further, the President would not be relying on § 232 to accomplish indirectly an action that Congress had not authorized him to undertake directly. Accordingly, we conclude that the proposed remedial actions would satisfy the requirements of § 232.

Question 3. If, by independent action and under separate authority, the President implements the two remedial actions (stockpiling and GSP removal) recom-

mended in the § 232 Commerce Report, can the President then either take no action on the report at this point *or* return the report to Commerce for further consideration in light of the remedies taken? What effect would such action have on the other 11 ferroalloys for which there were no positive findings?

Section 232(b), as explained above, requires the President either: (1) to take such action, and for such time, as he deems necessary to adjust imports so as to remove the threat to the national security; or (2) to reject the finding of the Secretary of Commerce that imports threaten to impair the national security. 19 U.S.C. § 1862(b). No time frame constrains the President. Moreover, as this Department has previously indicated, the statutory language and relevant legislative history contemplate a continuing course of action, with the possibility of future modifications. 43 Op. Att'y Gen. No. 3, at 2–3 (Jan. 14, 1975).[5] As noted in a Commerce Department memorandum, the constant monitoring contemplated by § 232 encompasses not only a review of factual circumstances to determine whether a particular remedy is effective, but also a review to determine whether the initial finding of a threat to the national security remains valid. Memorandum to H.P. Goldfield, Associate Counsel to the President, from Irving P. Margulies, Deputy General Counsel, Re: Ferroalloy Investigation at 2 (Sept. 8, 1982). Thus, we see no reason why the President may not retain the Report for further consideration in light of the actions he will have taken under independent statutory authority. Similarly, we see no reason why he may not return the Report to the Commerce Department for further evaluation given the changed circumstances resulting from the actions he will have undertaken.

You have further inquired whether either of these actions would affect the 11 ferroalloys for which no positive national security finding was made. The only potential effect we have been able to identify is whether the President or Secretary of Commerce would be required to publish the Report of the investigation and findings. Section 232(d) requires that:

> A report shall be made and published upon the disposition of each request, application, or motion under subsection (b) of this section. The Secretary shall publish procedural regulations to give effect to the authority conferred on him by subsection (b) of this section.

The Commerce Department regulations promulgated thereunder state that:

> The report, excluding the sections containing national security classified and business confidential information and material, shall be published in the Federal Register upon the disposition of each request, application, or motion made pursuant to [§ 232].

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[5] Representative Cooper, floor manager of the bill which adopted § 232(b), commented:

> The President would not only retain flexibility as to the particular measure which he deems appropriate to take, but, having taken an action, he would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made.

101 Cong. Rec 8160–61 (1955). The conference report on the bill also stated with reference to § 232(b) that "[i]t is . . . the understanding of all the conferees that the authority granted to the President under this provision is a continuing authority. . . ." H.R. Rep. No. 745, 84th Cong., 1st Sess 7 (1955)

15 C.F.R. § 359.10(c). The President's decision either to retain the Report for further study or to return it to the Commerce Department for further evaluation would not constitute a final disposition of the § 232 application by the Ferroalloys Association. Consequently, no publication requirement would be triggered.

Question 4. Whether GSP eligibility may be withdrawn under § 232 of the Trade Expansion Act, without the President (i) considering the factors required in § 504(a) of the Trade Act of 1974, and (ii) issuing an executive order overriding the previous executive order under which GSP status was granted to the product?

We are unaware that any department presently contends that GSP eligibility should be withdrawn under § 232 of the Trade Expansion Act. The consensus has been that withdrawal of duty-free treatment for high carbon ferromanganese should be implemented under the authority of § 504 of the Trade Act of 1974, 19 U.S.C. § 2464. Two reasons supported this consensus. First, § 503 of the Trade Act of 1974 provides that whenever an article is the subject of any action proclaimed under § 232, that article will not be eligible for GSP status. 19 U.S.C. § 2463(c)(2). We understand that there was a policy disagreement as to whether removal of GSP status was therefore a necessary concomitant of other import-adjusting action under § 232, or whether removal of GSP status alone would suffice to adjust imports under § 232. Second, even if withdrawal of GSP status alone were action authorized by § 232, this determination would not establish that the President had acted solely under the authority of § 232 with respect to high carbon ferrochromium, which has no GSP status. One would still have to rely on the proposition that action to "adjust imports" as contemplated by § 232 could be taken under separate authority were the President to stockpile high carbon ferrochromium under the Stock Piling Act.

Assuming that withdrawal of GSP status can be demonstrated to adjust imports sufficiently directly so as to constitute action under § 232, we do not believe the President is required to consider the factors mentioned in § 504(a) of the Trade Act of 1974. (The factors are set forth in 19 U.S.C. §§ 2461, 2462(c).) Those factors, which focus on economic interactions between developed and developing countries, are relevant to withdrawal of GSP treatment under the Trade Act of 1974; they have no bearing on actions taken under § 232 of the Trade Expansion Act to address threats to the national security. We are of the view, however, that should the President remove GSP treatment of ferromanganese, he would be required to issue an executive order overriding the earlier executive order, issued pursuant to 19 U.S.C. § 2463(b), which had designated high carbon ferromanganese to be eligible for GSP treatment.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Propriety of Asserting a Governmental Privilege in Response to a Court Order

Both the common law governmental privilege and the constitutionally based executive privilege may be asserted to protect certain documents reflecting the deliberation of close presidential advisers from disclosure in response to a court order.

October 13, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have requested the advice of the Office of Legal Counsel (OLC) concerning the propriety of asserting a governmental privilege in response to a court order that purports to require the production of certain White House staff documents and presidential Military Manpower Task Force documents. In response to your request, OLC has reviewed the relevant documents and has carefully evaluated your claim of governmental privilege. Based upon this review, OLC has concluded, for reasons set forth more fully below, that the documents identified are properly subject to a claim of governmental privilege and that the privilege may properly be asserted with respect to those documents.

The court order in question was issued in a case involving a prosecution for failure to register for the draft. *United States* v. *Wayte*, Crim. No. 82–630 (C.D. Cal.). In that case, defendant has alleged that his indictment was based upon impermissible selective prosecution. After ruling that defendant had established a *prima facie* case of selective prosecution, District Court Judge Terry J. Hatter, Jr., ordered a full hearing on that issue and required the government to produce certain documents and witnesses. In an order issued from the bench, the court ordered production of documents from the files of the White House, the President's Military Manpower Task Force (MMTF), the Department of Defense, Selective Service, and the Department of Justice. As initially articulated on October 1, 1982, the court order required production of "general policy statements dealing with the prosecution of nonregistrants, including transcripts of meetings at which such policy was discussed." A second statement by the court, which purported to be a clarification of the initial order, seems to require the production of "everything dealing with the active and passive [nonregistration] enforcement systems." In response to the court's order, members of your staff assembled the relevant documents from the files of both the MMTF and the White House itself. Upon review of these documents, the White House has determined

that a number of the documents are within the scope of the deliberative process privilege. You have requested OLC to review that privilege claim.

The documents that have been assembled and for which a claim of privilege is under consideration generally reflect the deliberations of close presidential advisers concerning the policies to be implemented with respect to selective service registration. Most of the documents relate to the MMTF, a special advisory group established by the President to make recommendations concerning the manpower needs of the Nation's military forces, including the possible need for and implementation of a selective service registration system.* These MMTF documents include reports, agendas, and verbatim transcripts of various meetings and deliberations of the MMTF. The MMTF documents also include several drafts and a final copy of the report of the MMTF to the President which sets forth a number of recommendations concerning military manpower policy. In addition to the MMTF documents, the documents include memoranda and notes that reflect pre-decisional discussions among presidential advisers concerning various aspects of selective service policy.

After a careful review of these documents, we have concluded that they are protected by the common-law governmental privilege and the constitutionally based executive privilege for documents reflecting the deliberative process. There is no doubt that the Executive enjoys a privilege for intra-agency memoranda and documents that reflect the deliberative decisionmaking process. *United States* v. *Nixon*, 418 U.S. 683 (1974); *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (Ct. Cl. 1958) (Reed, J.). The Supreme Court has stated that the "privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U.S. at 708 (footnote omitted). There are two principal grounds for this deliberative process privilege. The first ground is

> 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.

United States v. *Nixon*, 418 U.S. at 705 (footnote omitted). The second ground is that pre-decisional analyses or memoranda do not necessarily reflect the basis for the ultimate decision of the agency. As one court recently stated, "[d]ocuments which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Coastal States Gas Corp.* v. *DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980).

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*The MMTF was chaired by the Secretary of Defense and included, among others, the Counsellor to the President, the Chairman of the Council of Economic Advisers, and the Director of OMB

The attached documents seem clearly to fall within the deliberative process privilege outlined above. All of the documents relate to pre-decisional discussions concerning possible implementation of selective service registration. The documents reflect consideration of a wide range of alternatives and possible policy directions. Even the MMTF's final report to the President is simply a recommendation to the President concerning proposed military manpower policy; it is not a final decision itself. The policies that underlie the deliberative process privilege would be impaired by release of these documents. Frank and open discussion would certainly be inhibited if presidential advisers knew that transcripts or other descriptions of their deliberative meetings would be released to the public. Moreover, none of the specified documents reflect the final decisions made by the Executive Branch on any of the issues discussed therein. For these reasons, we have concluded that these documents are within the scope of the deliberative process privilege.

In evaluating the possible release of privileged documents for use in a court proceeding, however, it is necessary to consider not only the basis for the privilege, but also the need for the documents in the court proceeding. *See United States* v. *Nixon*, 418 U.S. 683 (1974). In this case, based upon our review of the specified documents, we have concluded that the documents are of little relevance to the court's consideration of defendant's selective prosecution claim. For the most part, these documents reflect general considerations concerning selective service policy. To the extent that they touch upon selective service prosecution at all, the documents are general and descriptive; they set forth no government policies concerning how selective service violators should be prosecuted. When the limited relevance of these documents is weighed against the clear applicability of the deliberative process privilege, the balance tips heavily in favor of nondisclosure.

In conclusion, it is the opinion of this Office that the specified documents are well within the scope of the deliberative process privilege and that that privilege may be asserted in the Government's response to the court order in the instant case.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Authority of Military Investigators to Request Search Warrants Under Rule 41

There is no legal impediment to the Attorney General's amending 28 C.F.R. § 60.2(g) to add military members of Department of Defense investigative agencies to the list of law enforcement officers authorized to seek and execute search warrants pursuant to Rule 41 of the Federal Rules of Civil Procedure

The Posse Comitatus Act does not prohibit the issuance of search warrants to military investigators engaged in the enforcement of the Uniform Code of Military Justice (UCMJ), since that statute only restricts military involvement in civilian law enforcement activities.

Military investigators engaged in the enforcement of the UCMJ may be regarded as "federal law enforcement officers" within the scope of Rule 41, and federal magistrates would thus be authorized to issue civilian search warrants to them upon the appropriate amendment of 28 C.F.R. § 60.2(g).

October 18, 1982

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to a request originally filed with this Office by the General Counsel of the Department of Defense (DOD) on December 7, 1979, and renewed by the General Counsel on March 26, 1982, concerning the issuance of search warrants to military investigators pursuant to Rule 41 of the Federal Rules of Criminal Procedure.[1] Specifically, DOD seeks an amendment to

[1] This request has had a long and circuitous history. Following the December 7, 1979, request, this Office received a memorandum dated December 18, 1979, from the Criminal Division's Office of Legislation questioning whether DOD investigators who are authorized to enforce the Uniform Code of Military Justice (UCMJ) are "engaged in the enforcement of the criminal laws" within the meaning of Rule 41(h) so as to qualify for authorization by the Attorney General to request search warrants, and, whether a violation of the UCMJ is a "criminal offense" so as to provide a basis for the issuance of a warrant under Rule 41. The memorandum also questioned whether military investigators or civilian investigators under military direction fell within the category of "federal law enforcement officer[s]" authorized by Rule 41(a) to request issuance of search warrants. These issues were discussed with the Defense Department's Office of General Counsel; on April 17, 1980, the Office of General Counsel formally submitted its views on the matter. *See* letter of Apr. 17, 1980, from Associate General Counsel Dondy, Department of Defense, to Assistant Attorney General Harmon, Office of Legal Counsel.

On November 18, 1980, this Office transmitted to the Criminal Division a memorandum setting forth our conclusion that federal courts would generally lack jurisdiction to issue search warrants for violations of the UCMJ On February 27, 1981, the Criminal Division responded with a memorandum supporting the view taken in our memorandum.

On October 8, 1981, this Office advised the General Counsel of the Department of Defense of the Justice Department's views regarding its earlier request and of our intention, based on those views, to recommend to the Attorney General that § 60 2(g) be repealed altogether. On March 26, 1982, the General Counsel responded with a memorandum reiterating DOD's view that there are no legal impediments to extending the § 60.2(g) authority to request search warrants to military Defense investigators and renewed DOD's request for such an amendment.

Upon further reflection and analysis of the issues raised by DOD's request, we have reached the conclusions, set forth in the text above, which are contrary to those tentatively reached by this Office and the Criminal Division in our earlier consideration of the issue.

§ 60.2(g) of Title 28 of the Code of Federal Regulations which would permit military members of the various DOD investigative agencies, as well as the civilian agents presently authorized by that regulation, to request from federal magistrates search warrants to investigate violations of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801–940.

Section 60.2(g) was codified in 1979, pursuant to Attorney General Order No. 826–79, which revised the catalogue of officials authorized to request search warrants under Rule 41 of the Federal Rules of Criminal Procedure to include "[a]ny civilian agent of the Department of Defense who is authorized to enforce the Uniform Code of Military Justice" (UCMJ). Attorney General Order No. 826–79, 44 Fed. Reg. 21785 (1979). The order was issued in response to a request by the Department of Defense for designation of civilian agents of the Defense Investigative Service, Army Criminal Investigation Command, Naval Investigative Service, and Air Force Office of Special Investigations as persons empowered to obtain search warrants under Rule 41 when they are otherwise "authorized to enforce laws of the United States."[2]

At the time that the order was under consideration, the Department's initial concern was whether the grant of such authority to agents of the military departments would violate the Posse Comitatus Act, 18 U.S.C. § 1385, which generally prohibits the use of military personnel for civilian law enforcement purposes.[3] This concern was quickly eliminated in view of the Act's explicit exception from its prohibition of those "cases and . . . circumstances" in which the use of the military is "expressly authorized by the Constitution or Act of Congress." Because 10 U.S.C. §§ 802, 807, 816–26 and 846–47[4] expressly authorize the Armed Forces to enforce the UCMJ, we concluded that the Posse Comitatus Act posed no impediment to military requests for, and execution of, search warrants for that purpose.[5] Because DOD's original request for warrant authority was with respect to civilian DOD agents only, this Office did not consider whether there existed any potential legal impediments to the exercise of such authority by military DOD agents.

In considering DOD's request that § 60.2(g) be expanded "to include all DOD investigators, regardless of whether they are military or civilian, in the enforce-

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[2] *See* Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, "Memorandum for Philip B. Heymann, Assistant Attorney General, Criminal Division, re. Authority of Department of Defense Civilian Agents to Obtain Search Warrants" (Nov. 16, 1978); Harmon, Assistant Attorney General, Office of Legal Counsel, "Memorandum for Philip Heymann, Assistant Attorney General, Criminal Division, re: Department of Defense Request to Amend Attorney General Order 510–73" (Sept. 11, 1978).

[3] The Posse Comitatus Act provides that

> [w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385. *See generally* Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am Crim. L Rev. 703 (1976); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83 (1975)

[4] These sections set forth the arrest and apprehension procedures for persons subject to the Code and procedures for courts-martial

[5] *See* Hammond, "Memorandum for Philip B. Heymann" (Nov. 16, 1978), *supra;* Harmon, "Memorandum for Philip Heymann" (Sept. 11, 1978), *supra.*

ment of the Uniform Code of Military Justice,"[6] we were confronted by two issues: first, whether the Posse Comitatus Act would bar the extension of § 60.2(g) to military investigators engaged in the enforcement of the UCMJ even though it would not bar such activity by civilian employees of DOD; and, second, whether Rule 41 of the Federal Rules of Criminal Procedure authorizes United States magistrates to issue search warrants in aid of the enforcement of the UCMJ. We conclude that the exception contained in the Posse Comitatus Act permitting the Armed Forces to enforce the UCMJ encompasses military as well as civilian DOD investigators, and that DOD investigators may be authorized by the Attorney General to seek search warrants from United States magistrates, pursuant to Rule 41, for the enforcement of the UCMJ.[7]

Nevertheless, although we conclude that no legal impediments exist to granting DOD's request for expanded authority under § 60.2(g), there well may exist policy reasons for the Attorney General, in the exercise of his discretion under Rule 41(h), to deny this authority. This memorandum is therefore being forwarded to you through the Assistant Attorney General in charge of the Criminal Division for any comments that that Division may have on this policy issue.

I. The Posse Comitatus Act

As indicated above, the Posse Comitatus Act excepts from its general prohibition against the use of military personnel for law enforcement purposes those "cases and . . . circumstances" in which the use of the military is "expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385. We relied on this exception—as applied to the military's statutory authorization to enforce the UCMJ—when we made our original determination, regarding Attorney General Order No. 826–79, that the Posse Comitatus Act would not prohibit the involvement of civilian DOD agents in military law enforcement activities even though such agents may be subject generally to military control. Although DOD did not request our opinion at that time regarding the impact of the Posse Comitatus Act on the involvement of *military* agents in the enforcement of the UCMJ, the statutory authorizations for law enforcement activities contained in the UCMJ do not distinguish between military and civilian agents of the Department of Defense. *See, e.g.*, 10 U.S.C. § 807; Manual for Courts-Martial (1969 Rev. ed.) ¶ 19. Indeed, the concerns which gave rise to the Posse Comitatus Act, enacted in 1878, involved the perceived potential for abuse in circumstances where persons subject to military law and discipline—who, because of their higher duty to obey orders without question, were thought to be less sensitive to legal restraints and constitutional rights—might become involved in *civilian* law enforcement.[8] However, there was never any question of the propriety of military

[6] Rushforth, Assistant General Counsel for Intelligence, International and Investigative Programs, Department of Defense, Letter to John Harmon (Dec. 7, 1979)

[7] We note that the regulatory provision pursuant to which DOD seeks warrant authority requires that, except for "in the very rare and emergent case," the agent seeking a search warrant obtain the concurrence of the appropriate United States Attorney's Office. *See* 28 C F R. § 60 1 (1981).

[8] *See, e g* , 7 Cong Rec 3581, 3678–79, 4240–4247 (1878). *See generally* Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Letter to General Counsel, Department of Defense (Mar 24, 1978).

personnel engaging in *military* law enforcement activities—*i.e.*, enforcing the UCMJ against those who are subject to the UCMJ. To the contrary, Congress specifically so provided. *See, e.g.*, 10 U.S.C. §§ 802, 807, 816–26, 846–47. Thus, the same statutory exceptions to the Posse Comitatus Act which permitted us to make our initial determination that civilian investigators could lawfully engage in UCMJ law enforcement activities would also support a similar determination regarding military investigators.

II. Rule 41 Authority to Issue Search Warrants to Enforce the UCMJ

Rule 41 authorizes "federal magistrate[s] [and] judge[s] of . . . state court[s] of record," having jurisdiction over the property to be searched, to issue search warrants upon the request of a federal law enforcement officer, defined as "any government agent . . . who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant." Fed. R. Crim. P. 41(a), (h). Subsection (c) provides that the warrant "shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States." Rule 41 was promulgated pursuant to 18 U.S.C. § 3771, which authorizes the Supreme Court to:

> prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings . . . in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts . . . and in proceedings before United States magistrates.

Two lines of inquiry are suggested by the language of Rule 41 as relevant to our consideration of whether DOD investigators—whether military or civilian—may request search warrants before United States magistrates. One inquiry is whether military and civilian investigators engaged in enforcement of the UCMJ may be regarded as "federal law enforcement officers" for purposes of Rule 41; the other inquiry is whether there is power under Rule 41 to issue search warrants in aid of enforcement of the UCMJ.

A. DOD Investigators as "Federal Law Enforcement Officers"

The first line of inquiry involves a determination whether DOD investigators engaged in the enforcement of the UCMJ may be regarded as "federal law enforcement officers" within the scope of Rule 41. As noted above, subsection (h) of Rule 41 defines "federal law enforcement officer" as a government agent who is both "engaged in the enforcement of the criminal laws" and "authorized by the Attorney General to request the issuance of a search warrant." Without regard to the latter condition, which the Attorney General may, in the exercise of his discretion, provide, the focus of this inquiry is whether agents engaged in the

enforcement of the UCMJ are "engaged in the enforcement of the criminal laws" as contemplated by Rule 41.

We begin our analysis by noting that many offenses which are violations of the UCMJ also constitute violations of Title 18, the federal criminal code,[9] or have counterparts in the civilian criminal laws enforced by the States.[10] In addition, Article 134 incorporates "all . . . crimes and offenses not capital . . . [t]hough not specifically mentioned" in the Code as violations of the UCMJ. Such offenses are no less "criminal" because they are punishable by courts-martial rather than in criminal proceedings in federal or state courts. *See generally O'Callahan* v. *Parker,* 395 U.S. 258 (1969); *Grafton* v. *United States,* 206 U.S. 333 (1907); *United States* v. *Trottier,* 9 M.J. 337 (U.S.C.M.A. 1980); *United States* v. *Harris,* 8 M.J. 52 (U.S.C.M.A. 1979). Moreover, even those offenses which are purely military and would not be punishable as crimes in civilian courts[11] are considered by both civilian courts and military courts to be "crimes" punishable by courts-martial. *See generally O'Callahan* v. *Parker,* 395 U.S. at 265–66 ("Article 134 . . . punishes as a *crime* 'all disorders and neglects to the prejudice of good order and discipline in the armed forces.'") (emphasis added); *United States* v. *Levy,* 39 C.M.R. 672 (1968); petition for review denied, 18 U.S.C.M.A. 627 (1969) (petitioner also filed several habeas petitions in the civilian courts, culminating in *Parker* v. *Levy,* 417 U.S. 733 (1974)).[12]

Secondly, examination of the legislative history of the UCMJ leads to the conclusion that the drafters envisioned the punitive articles of the Code as constituting criminal offenses. In the 1949 hearings before a subcommittee of the House Committee on Armed Services, the chairman of the Committee's working group which drafted the Code described the Committee's efforts to reconcile the various definitions of the punitive offenses used by the military services in their respective service manuals, and noted that the Committee tried to pattern the Code after modern state penal codes. *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before Subcomm. No. 1 of the House Comm. on Armed Services,* 81st Cong., 1st Sess., at 1237–41 (1949). *See also* H.R. Rep. No. 491, 81st Cong., 1st Sess. (1949); S. Rep. No. 486, 81st Cong., 1st Sess. (1949). Throughout these hearings and reports, the punitive articles, including the

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[9] *See, e.g.*, Art. 81 (§ 371) (conspiracy to defraud or commit offense against the United States); Art. 88 (§ 871) (threats against the President), Art. 90 (§ 111) (assaulting certain officers), Art. 94 (§ 2193) (revolt or mutiny of seamen). *See also* Art. 95 (§§ 751–2); Art. 96 (§ 755), Art 104 (§§ 794, 798), Art. 106 (§ 794(b)); Art. 107 (§ 1001); Art. 116 (§ 2101); Art. 118 (§ 1111); Art. 119 (§ 1112); Art 120 (§§ 2031–2), Art. 121 (§§ 641, 661); Art. 122 (§ 2111–12); Art. 124 (§ 114); Art 126 (§ 81), Art. 128 (§ 113); Art. 131 (§ 1621), and Art. 132 (§§ 1002, 1003, 1025)

[10] *See, e.g.*, Art 118 (murder); Art. 119 (manslaughter); Art 120 (rape), Art 121 (larceny); Art. 123 (forgery), and Art. 128 (assault).

[11] *See, e.g.*, Art. 83 (fraudulent enlistment), Art. 85 (desertion); Art. 86 (absent without leave), Art. 87 (missing movement); Art. 89 (disrespect toward superior commissioned officer), Art. 113 (misbehavior of a sentinel); Art. 117 (provoking speeches and gestures); Art 133 (conduct unbecoming an officer and a gentleman).

[12] *See also* 1 W. Winthrop, *Military Law and Precedents* 107–08 (2d ed. 1920):

> [T]he specific military offenses may be divided into (1) those which are purely military and (2) those which are also crimes at the civil law . But in regard to these two forms of offenses it is to be observed that all are criminal and all military—criminal because the jurisdiction of courts-martial is criminal only; military because all offenses of officers and soldiers cognizable by courts-martial are necessarily military offenses

general articles 133 and 134, were referred to as "crimes." *Id.* From these reports it seems fairly clear that Congress' intent in enacting the UCMJ was the passage of a code by which the military could maintain the high level of discipline and order which is so necessary to its proper functioning, infractions of which would constitute criminal offenses.[13]

The Supreme Court's pronouncements in *Parker* v. *Levy*, 417 U.S. 733, 749 (1974), and *Middendorf* v. *Henry*, 425 U.S. 25, 34 (1976), that "the UCMJ cannot be equated to a criminal code," and that a summary court-martial is not a "'criminal prosecution' within the meaning of the Sixth Amendment" do not deter us from our conclusion that the enforcement of the UCMJ constitutes "enforcement of the criminal laws" within the purview of Rule 41. Those pronouncements were made by the Court in the context of challenges to the constitutionality of particular provisions of the Code,[14] and certain aspects of the summary court-martial procedures,[15] and not to the "criminal" nature of the punitive articles of the Code for purposes of securing warrant authority.

An issue related to the authority of DOD agents to request search warrants under Rule 41 concerns the apparent limitation contained in subsection (h) regarding who may execute the warrant. Subsection (c) provides that warrants issued pursuant to Rule 41 "shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof *or* to a person so authorized by the President of the United States." (Emphasis added.) While we

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[13] In a memorandum to the Assistant Attorney General of this Office dated April 17, 1980 at pp 2–3, the Associate General Counsel of DOD pointed out numerous other indicia of the UCMJ's character as a code of "criminal" laws.

> The Congress has provided that persons convicted by courts-martial are to be treated as other convicted felons and denied the right to receive Government annuities or retirement pay (5 U.S C § 8312). The executive branch of the Federal Government also recognized that the UCMJ is a "criminal code" when the Rules Governing Petitions for Executive Clemency were promulgated in October of 1962. 28 C.F.R § 1.1 These rules deal with convictions both in federal criminal courts and military courts-martial where persons convicted in these tribunals seek to be pardoned by the President In addition, a large percentage of states treat convictions by courts-martial as a federal conviction for purposes of denying the right to vote in general elections. (AFP 211–4)
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> In the context of "search and seizure," the UCMJ constitutes a body of "criminal laws," subjecting the enforcers thereof to the potential sanction of the exclusionary rule should they violate the Fourth Amendment's proscription against unreasonable searches and seizures. *See United States* v *Fimmano*, 8 M J 197 (C.M A. 1980), *United States* v *Ezell*, 6 M J 307 (C M A 1979) . . [In addition, the Department of Justice] has promulgated a regulation that provides for the operation of interagency criminal information exchange systems entitled "Criminal Justice Information Systems " 28 C F R Part 20. All arrests for violations of the punitive articles of the UCMJ, even those with no civilian counterpart, are routinely reported to the DOJ for inclusion in the individual's criminal record. Indeed, DOJ treats the purely military offense of AWOL as a felony and authorizes their law enforcement officials to arrest and detain [any] AWOL suspect without a warrant and without the suspect having committed any offense in the presence of the arresting officer.

[14] In *Parker* v. *Levy*, 417 U.S. at 749, the Court upheld Articles 133 (10 U.S C § 933, which punishes a commissioned officer for "conduct unbecoming an officer and a gentleman") and 134 (10 U S.C. § 934, which punishes any person subject to the Code for, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces") against First and Fifth Amendment challenges that those provisions were overbroad and unconstitutionally vague in violation of the Due Process Clause, observing that, because of the peculiar exigencies of the military community, the UCMJ regulates "a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians " *Id.* at 750.

[15] In *Middendorf* v. *Henry*, 425 U S. at 38, the Court held that the Sixth Amendment right to counsel did not attach in summary court-martial proceedings because such proceedings are sufficiently distinct from "traditional civilian criminal trial[s]" as to fall outside the scope of "criminal proceeding," as contemplated by the Sixth Amendment.

have no doubt that "civil officer" in this context means "nonmilitary officer,"[16] we do believe that military and civilian investigators engaged in the enforcement of the UCMJ are persons "authorized by the President" "to enforce or assist in enforcing" the laws of the United States, so as to come within the limitation contained in subsection (h) setting forth to whom warrants under Rule 41 properly may be issued.

Paragraph 19a of Manual for Courts-Martial (Rev. ed. 1969), E.O. 11476 (June 19, 1969) 34 Fed. Reg. 10503, which authorizes "[a]ll commissioned officers, warrant officers, petty officers, noncommissioned officers, and, when in the execution of their . . . police duties, Air Force security police, military police, members of the shore patrol, and such persons as are designated by proper authority to perform . . . police duties, *including duties as criminal investigators*" to enforce the UCMJ by apprehending persons reasonably believed to have violated the Code, provides the requisite presidential authority (emphasis added). As no serious question can be raised regarding the UCMJ's status as "law[s] of the United States," we believe that DOD investigators, both military and civilian, are entitled to receive civilian search warrants upon proper application pursuant to Rule 41.

B. United States Magistrates' Authority to Issue Warrants to DOD Agents

The second line of inquiry concerns the authority of United States magistrates to issue search warrants pursuant to Rule 41 for the enforcement of the UCMJ. The prerequisites for a magistrate's or court's issuance of a lawful search warrant are: (1) that the court have jurisdiction over the place to be searched; (2) that the warrant is based on probable cause to believe that the items to be searched for will be found on the premises; and (3) that the warrant specify with particularity the items or physical effects to be obtained. *See generally* 8A Moore's Federal Practice ¶ 41.02 (2d ed. 1981). There is no requirement that the offenses for which evidence is sought with warrants issued pursuant to Rule 41 be violations of Title 18 of the United States Code—it is sufficient that, once probable cause is established by a federal law enforcement officer, as required by Rule 41(a), the issuing authority have territorial jurisdiction over the place to be searched. *See United States* v. *Strother*, 578 F.2d 397 (D.C. Cir. 1978). Thus, while the needs of

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[16] Prior to the promulgation of Rule 41, the statutory provision governing search warrants authorized the issuance of warrants "to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States." Title XI of the Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217, 229. The legislative history reflects that, as referred to the Senate Committee on the Judiciary, the Espionage Act expressly permitted the issuance of warrants to military or naval officers as well as civil officers and persons authorized by the President to enforce the laws. The Senate accepted an amendment by the Committee deleting the inclusion of military or naval officers from the classes of persons eligible to execute warrants, but added a proviso permitting the issuance of warrants to naval or military officers in time of war. 55 Cong. Rec. 1866 (1917). That proviso was deleted without explanation when the search warrant section was completely rewritten in conference. H.R. Conf. Rep. No. 69, 65th Cong., 1st Sess. 14, 20 (1917).

In construing this provision, the Supreme Court has held that the term "civil officer" was intended by Congress to be a limitation "that the person designated shall be a civil and not a military agent of the government." *Steele* v. *United States*, 267 U.S. 498, 507 (1925). *See also United States* v. *Pennington*, 635 F.2d 1387 (10th Cir. 1980).

DOD investigators to search persons subject to the Code and premises under military control are met by "search authorizations" issued by military commanders or judges, their needs to search private dwellings or other premises beyond the military's jurisdiction for evidence of UCMJ violations can *only* be met by their obtaining the authority to conduct such searches from civilian judicial authorities, whether state or federal. If the civilian authorities are federal, the proper procedure for obtaining search authority is that which is set out in Rule 41.

As circumstances presently exist, DOD investigators may obtain "authorizations to search" from military commanders or their delegees, judges, or magistrates upon a showing of probable cause to conduct searches of persons subject to military law, military property, persons, and property within military control, or nonmilitary federal property within a foreign country. Rule 315 of the Military Rules of Evidence, Manual for Courts-Martial (Rev. ed. 1969, as amended by Exec. Order No. 12198, Mar. 12, 1980, 45 Fed. Reg. 16932, 16953). To conduct investigations beyond the jurisdiction of these military "authorizations to search," DOD military agents under a military chain of command must now enlist the aid of civilian federal investigative agencies to obtain and execute civilian search warrants on their behalf. *See* Letter from Associate General Counsel, DOD to Assistant Attorney General, Office of Legal Counsel (April 17, 1980), *supra*. In contrast, *civilian* agents of the DOD, by virtue of Attorney General Order No. 826–79, now may seek directly from U.S. magistrates, with the concurrence of the local United States Attorney's office and pursuant to Rule 41, search warrants for the enforcement of the UCMJ. Although military agents and, prior to 1979, civilian DOD agents, are completely dependent upon a determination by civilian agencies to expend time and human resources to obtain, and in some cases, execute warrants for investigation of offenses over which they exercise no particular law enforcement responsibilities or otherwise have very little interest, the fact remains that without regard to whether the warrant is ultimately issued to military *or* civilian investigators, DOD agents or Assistant U.S. Attorneys, United States magistrates have been exercising their authority properly under Rule 41 to issue search warrants for the enforcement of the UCMJ.

The use of civilian search warrants in military investigations has been contemplated at least since the 1909 Articles of War, Art. 106 of which provided for civilian apprehension of military deserters. *See* 35 Stat. 622 (1909); 34 U.S.C. § 1011 (1946), and the present-day Art. 8, 10 U.S.C. § 808 (1976). In addition, the Military Rules of Evidence, recently amended by E.O. 12198 (March 12, 1980), specifically define "search warrant" as permission to search and seize issued by "competent civilian authority." *See* Rule 315(b)(2). Were such use not contemplated, there would exist a gap between investigations for which the military courts and commanders had authority to order searches and those over which civilian courts exercised jurisdiction, into which would fall a rather large number of military investigations of UCMJ offenses for which crucial evidence is lodged off-base. Such an occurrence was evidently not within the contemplation of Congress (in placing no "civilian" limitations on Rule 41), the President (in

issuing the Manual for Courts-Martial), the military courts, or indeed, the Supreme Court.[17]

III. Policy Considerations

While we do not believe that any purely legal problems are presented by DOD's request that military agents be granted the authority, under § 60.2(g), to seek and execute Rule 41 search warrants directly, we believe that the appropriateness of such authority and its implications, as a policy matter, should be examined carefully before a decision to grant DOD's request is made. For example, a primary area of concern might be whether adequate safeguards exist to protect the privacy interests of civilians, whose premises could be searched as a subject of third-party searches by military agents for evidence of UCMJ violations by persons subject to the Code. Although this situation does not raise Posse Comitatus Act problems of military involvement in civilian law enforcement, the concerns which gave rise to the proscriptions contained in the 1878 Act could be raised as potentially legitimate concerns today.

This concern, however, may be more abstract than real. The practical difference made by granting military agents § 60.2(g) authority is arguably negligible. Without § 60.2(g) authority, a military agent must now find a civilian law enforcement officer to accompany him to the courthouse and officially request the search warrant on his behalf. It is not clear whether warrants obtained in this manner also require civilian execution, although DOD has informed us that once the warrant has been obtained, military investigative agents do execute the warrant, unaccompanied by civilians. *With* § 60.2(g) authority, military agents, like their civilian counterparts, may, upon obtaining the concurrence of the appropriate United States Attorney's office, go to the courthouse, unaccompanied by a civilian law enforcement officer, to request search warrants which they may execute during the course of their investigations. Thus, assuming that military agents already have been executing search warrants obtained for their investigations, the only practical difference that designating military agents under § 60.2 would make is that military agents would no longer have to wait for civilian law enforcement authorities to physically accompany them to the courthouse. Such designation would *not*, except for "in the very rare and emergent case," relieve the agent of the responsibility under § 60.1 to obtain approval from civilian authorities before seeking the warrant.

In addition, with respect to third-party searches, the Attorney General's guidelines promulgated pursuant to the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, so severely restrict the propriety and scope of third-party searches as to minimize substantially the concerns expressed above regarding military searches of civilian premises. *See* 28 C.F.R. § 59 (1981). The guidelines

[17] *See* statement of facts in *Schlesinger* v. *Councilman*, 420 U S. 738, 741 (1975), in which the Court recounts the apprehension of a military defendant by civilian law enforcement authorities who, based on probable cause established by military investigations, searched defendant's off-post apartment and found illegal drugs Defendant was then turned over to military authorities for prosecution under the UCMJ.

establish strict criteria and procedural requirements which must be met before a search warrant may be used to obtain documentary evidence held by disinterested third parties. Nevertheless, the guidelines would not apply in circumstances where the "third-party" civilian is a participant in the criminal activity, or is believed by the investigator to have reason to harbor or protect the alleged offender. Nor would the guidelines apply to "contraband, the fruits or instrumentalities of a crime, or things otherwise criminally possessed,"[18] such as drugs—the detection of which, and subsequent prosecution of military offenders, is a very high priority for DOD investigators. Thus, the impact of these guidelines on military investigations remains to be determined.

IV. Conclusion

For the reasons stated above, we have concluded that there are no legal impediments to granting DOD's request to include military agents among the list of law enforcement officers in § 60.2 who are authorized to request search warrants pursuant to Rule 41. We would add that, in view of some of the issues raised in part III above, the policy implications of such authority should be explored further.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[18] *See* 28 C.F.R. § 59 2(c).

Applicability of 21 U.S.C. § 952(a) to the Importation of Morphine Sulfate by the General Services Administration

The provision in 21 U.S C. § 952(a), which prohibits importation of certain controlled substances except in certain specified circumstances, applies to importation by the United States Government.

Notwithstanding the canon of statutory construction that a law should not be read to impose new burdens on the government in derogation of its preexisting rights and privileges, well-established and consistent administrative practice and interpretation of the coverage of 21 U.S.C. § 952(a), as well as its legislative history, indicate that that law covers importations by the United States government.

October 18, 1982

MEMORANDUM OPINION FOR THE COMMISSIONER, FEDERAL PROPERTY RESOURCES SERVICE, GENERAL SERVICES ADMINISTRATION

This responds to your request for our opinion whether 21 U.S.C. § 952(a) applies to the importation of controlled substances by the United States or its agents. This question has arisen in the context of a proposed importation of morphine sulfate from Turkey, with which your agency has been involved.

Section 952(a) of Title 21, U.S. Code, is a central provision of the Controlled Substances Import and Export Act of 1970 (the Act).[1] The broad terms of § 952(a) provide that it "shall be unlawful" to import into the United States controlled substances except in certain circumstances.[2] On its face, § 952(a) does not exclude the United States from its coverage. On the other hand, it also does not specifically include the United States. Accordingly, in view of the fact that the provision imposes limitations on those whom it covers, and in light of the longstanding canon of statutory construction that statutes imposing burdens should not lightly be read to deny governments preexisting rights or privileges,[3] a

[1] Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is entitled the Controlled Substances Import and Export Act of 1970. As its name indicates, Title III places a number of restrictions on the import into and export from the United States of controlled substances *See* Pub. L. No. 91–513, Title III, 91st Cong., 2d Sess , 84 Stat. 1285, 21 U S C. §§ 951–966

[2] The language of 21 U.S C § 952(a) is quoted in its entirety in part II *infra*

[3] This canon of statutory construction is stated in a number of judicial opinions. *See, e.g., Hancock* v *Train*, 426 U S. 167, 179 (1976); *United States* v. *Wittek*, 337 U S. 346 (1949); *United States* v. *United Mine Workers of America*, 330 U S. 258, 272–73 (1947); *United States* v *Herron*. 87 U.S. (20 Wall) 251 (1874); *United States* v. *Knight*, 39 U.S. (14 Pet) 301 (1840)

question arises whether the statute does in fact cover importations by the United States, such as that proposed in this case.

We have concluded that, despite the canon of construction referred to in the previous paragraph, the statute and pertinent legislative materials do demonstrate Congress' intention that the law's limitations apply broadly. This intention would not be consistent with implying a general exception for actions by the United States or its agents. This view is strongly buttressed by the fact, discussed below, that the federal agency most directly responsible for enforcing the Act—the Drug Enforcement Administration (DEA)—consistently has taken the position that the statute does reach actions by the United States. In such circumstances, we find no adequate justification in the canon of interpretation—a device for use in doubtful cases—for concluding that 21 U.S.C. § 952(a) does not apply to actions by the United States. In practical terms, this means that the importation by the United States of controlled substances referred to in § 952(a) is prohibited unless one of the exceptions in § 952(a) is found to pertain.

I. Background Facts

Your opinion request follows an earlier opinion of this Office, dated July 19, 1982, which also dealt with the proposed importation of morphine sulfate from Turkey.[4] In that opinion, we assumed *arguendo* that § 952(a)'s proscription on the importation of controlled substances, except in certain circumstances, does cover actions by the United States.[5] Passing that issue, we noted that further attention might profitably be paid to the exceptions themselves, viewed in light of the particular facts concerning the proposed importation of morphine sulfate.

Specifically, we suggested that the involved agencies should ascertain whether the "emergency" exception in 21 U.S.C. § 952(a)(2)(A) could apply to the proposed importation of morphine sulfate for purposes of replenishing the National Defense Stockpile's supply of such substances. We noted that we were not aware of whether the facts would establish the basis for invoking such an exception. Nevertheless, we sought to identify the appropriate lines of inquiry.[6] Having done so, we indicated that if the facts would not support the use of the emergency exception, we would be glad to address the underlying legal question regarding 21 U.S.C. § 952(a)'s applicability to the United States.

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[4] *See* Memorandum for Francis M. Mullen, Jr., Acting Administrator, Drug Enforcement Administration, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, entitled "Importation of Morphine Sulfate from Turkey" (July 19, 1982). [NOTE: The July 19, 1982 opinion is reprinted in this volume at p. 455, *supra*. Ed.]

[5] We noted in the July 19, 1982 opinion not only that an argument could be made that 21 U.S.C. § 952(a) does not apply to the United States, but also that a contrary argument could be advanced. In view of the lack of any sure footing for the contention regarding the nonapplicability of § 952(a) to the United States, we suggested that further attention be paid to the possibility of utilizing the statutory exception for an emergency in present circumstances.

[6] For instance, we noted that, in order to make the requisite finding for using the emergency exception in 21 U.S.C. § 952(a)(2)(A), it would be "essential first to identify precisely what that need [for morphine sulfate] is, second to determine whether failure to fulfill that need creates an emergency situation, and finally to examine whether domestic supplies are adequate to meet the need as identified. . . ." Memorandum, *supra* note 4, at 4.

II. Analysis of the Statute

The question before us is one of statutory construction. The pertinent language is as follows:

> It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—
>
> (1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and
>
> (2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—
>
> (A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or
>
> (B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,
>
> may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.[7]

There is no question that morphine sulfate—a refined derivative, or salt, of opium—is a schedule II controlled substance within the meaning of § 952(a).[8] It is not "crude opium" for purposes of § 952(a)(1). Accordingly, its importation into the United States in present circumstances is barred unless one of the exceptions in § 952(a)(2) applies, or unless—and this is the issue about which you have sought our opinion—§ 952(a) as a whole does not cover actions of the United States but rather is limited to actions by private, nongovernmental parties.

On the one hand, it may be argued that the broad terms of § 952(a) should not be read to cover actions by the United States in light of the canon of construction

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[7] 21 U.S.C. § 952(a)

[8] *See* 21 U.S.C. § 812(c), 21 C.F.R. § 1308.12. Morphine is the principal alkaloid, or organic base, of opium, which is the coagulated juice of the opium poppy plant, *papaver sommferum*. Morphine in the form of a soluble salt—such as morphine sulfate—is used as an analgesic or a sedative. See Webster's Third New International Dictionary 1471 (1976); 15 Encyclopaedia Britannica 856 (1971)

identified at the outset of this opinion. This canon holds that, absent contrary indication in relevant legislative materials, a statute imposing burdens normally should not be read to impose those burdens on the government in derogation of its preexisting rights or privileges.[9]

Historically, this rule originated in the English doctrine that the Crown is presumed to be unaffected by acts of Parliament unless the acts are directed specifically at the Crown.[10] Because in the United States sovereignty always has resided by theory and practice in the people, rather than in a monarch, transplantation of the English rule to this country necessarily has led to its subtle transformation. The rule's chief policy basis in American case law is the notion that Congress is presumed to have intended to preserve on behalf of the people the efficient functioning of government, and therefore a statute generally should not be read to impose new burdens on government without indications that this in fact was Congress' intention.[11] In the present context, this rule of construction could be used as a basis for arguing that § 952(a) was not intended to impose new burdens on the United States, for the provision does not clearly state that it was so intended.

On the other hand, the foregoing canon of construction should not be viewed as an absolute guide to the construction of any statute. One commentator has stated that although the canon has been useful in a number of cases, "[i]t is questionable . . . whether the rule still continues to command the same influence today." 3 C. Sands, Sutherland Statutory Construction § 62.03 (4th ed. 1974). The "rule" that the government normally is to be excluded from coverage of statutes imposing burdens is, in fact, subject to numerous exceptions. It is merely a guide to the most plausible construction of legislative intent when other indications of such intent are not present or dominant. The central inquiry when faced, as we are here, with possible application of the canon of construction is to determine whether there are other specific grounds on which to rest an interpretation of the statute that are more definite and ultimately more helpful than the canon of construction itself.[12]

In present circumstance, one of the most striking features is the existence of a longstanding, consistent, and specific administrative construction of the statute in question on the very point at issue here. In conversations with officials of the Drug Enforcement Administration—which is responsible for administering the statute of which § 952(a) is a central part—we have learned that for years the agency has interpreted § 952(a) as applying not only to importations of con-

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[9] *See United States* v *United Mine Workers of America*, 330 U S 258, 272–73 (1947), *United States* v *Herron*, 87 U.S. (20 Wall.) 251 (1874), *United States* v. *Knight*, 39 U S. (14 Pet.) 301 (1840)

[10] *See United States* v. *California*, 297 U.S. 175, 186 (1936); *see also* 3 C Sands, Sutherland Statutory Construction § 62 01 (4th ed 1974).

[11] *See Hancock* v *Train*, 426 U S. 167, 169 (1976), *Leiter Minerals, Inc* v. *United States*, 352 U S. 220, 224–25 (1957); *United States* v *Wittek*, 337 U S 346 (1949); *Guaranty Trust Co* v. *United States*, 304 U.S. 126, 132–33 (1938).

[12] As the Supreme Court has noted, the canon of construction is merely "an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." *United States* v *California*, 297 U.S 175, 186 (1936). *See United States* v *Wittek*, 337 U S 346, 358–59 (1949); 3 C Sands, Sutherland Statutory Construction § 62 02 (4th ed. 1974)

trolled substances by private parties, but also to importations of such substances by the government itself, specifically including federal agencies. Thus, in the course of the routine administration of this statute, the DEA and its predecessor agency[13] have confronted precisely the issue that has been put to us. The federal agencies involved have been required to meet all statutory and regulatory requirements pertaining to importations of controlled substances.[14]

For instance, we have been told that when an agency, such as the National Institute on Drug Abuse of the Department of Health and Human Services, has sought to import quantities of controlled substances for laboratory tests, the agency has been required by the DEA to comply with applicable registration and permit requirements. These requirements, authorized by statute, *see* 21 U.S.C. §§ 957 & 958, are set forth in the DEA's regulations, *see* 21 C.F.R. §§ 1311 & 1312 (1981). Among other things, these regulations require importers of controlled substances to obtain an annual registration, unless specifically exempted from the requirement. *See* 21 C.F.R. § 1311.21. Among those who are exempt from this requirement are officials of the United States Army, Navy, Marine Corps, Air Force, Coast Guard, or Public Health Service, *see* 21 C.F.R. § 1311.24, and officials of the United States Customs Service, the Food and Drug Administration, and "any other Federal officer who is lawfully engaged in the enforcement of any Federal law relating to controlled substances. . . ." *See* 21 C.F.R. § 1311.25. By exempting these federal officials, the DEA has plainly indicated its understanding that otherwise, the requirements would have applied to the officials—as they do to officials not exempted. Furthermore, before any person may import a controlled substance, a permit must be issued. *See* 21 C.F.R. § 1312.11. Specific grounds for the issuance of such permits are set forth in the DEA's regulations. *See* 21 C.F.R. § 1312.13. These permit requirements, the DEA has told us, also have regularly been applied to federal agencies seeking to import quantities of controlled substances for official purposes.

The existence of such a consistent agency interpretation of its own authorizing legislation is viewed by courts as being of substantial importance. The Supreme Court has underscored that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). The reason for this deference is that agencies have considerable familiarity with the nuances of their authorizing legislation and its application in practice, and may generally be presumed to be expert in its construction. *See generally Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969); *Zemel* v. *Rusk,* 381 U.S. 1, 11–12 (1965). Of course, courts remain ultimate arbiters of the law in contested cases. *See, e.g., Volkswagenwerk Aktiengesellschaft* v. *FMC,* 390 U.S. 261, 272 (1968). However, courts give

[13] The Drug Enforcement Administration was created by a reorganization plan in 1973 The description in text of DEA's interpretation of § 952(a), enacted in 1970, also applies, we are told, to its predecessor, the Bureau of Narcotics and Dangerous Drugs

[14] Our discussion of the DEA's interpretation of § 952(a) necessarily relies on factual representations made to us by DEA officials

significant weight to a plain and longstanding administrative construction. The Supreme Court has explained that such a construction has the power "to persuade," if not "control," judicial analysis:

> We consider that the rulings, interpretations and opinions of [agencies], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

General Electric Co. v. *Gilbert*, 429 U.S. 125, 141–2 (1976), quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

In this case, the DEA's understanding of the coverage of federal agencies by § 952(a) is well-established and consistent. Moreover, it would appear to be the product of informed judgment. Certainly, the DEA has been confronted repeatedly with situations in which it has had to determine how to treat federal agencies under § 952(a). Each time, we are told, it has reached the view that such agencies are subject, as are private parties, to applicable statutory and regulatory requirements. Furthermore, this interpretation, we understand, dates back at least to the time of the passage of § 952(a) in 1970, if not to earlier years when § 952(a)'s immediate predecessor (which was similar in nature) was in effect. In such circumstances, courts would pay even greater attention to the agency's view. *See, e.g., SEC* v. *Sloan*, 436 U.S. 103, 120 (1978); *E.I. DuPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134–35 (1977); *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976); *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 87 (1975); *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 101 (D.C. Cir. 1978).

Our own review of the statute's legislative history tends, at a general level, to confirm the DEA's understanding of § 952(a)'s coverage. First, there are unmistakable indications that Congress intended the importation restriction to operate as a critical element in the statute's scheme of controlling the importation of controlled substances.[15] Furthermore, there are indications that *any* importation of controlled substances by *all* importers—whether or not a private importer that might be suspected of seeking to engage in illicit conduct—was intended to be covered. Thus, the major committee report on the bill containing § 952(a) that was enacted in 1970 stated that the importation restriction refers "to *any* article, *any* bringing in or introduction of such article into any area. . . ." H.R. Rep. No. 1444 (Pt. 1), 91st Cong., 2d Sess. 74 (1970) (emphasis added). In floor debate on the predecessor provision, the Narcotic Drugs Import and Export Act of 1922, Pub. L. No. 227, 67th Cong., 2d Sess., 42 Stat. 596, 21 U.S.C. § 173 (1964), the provision's proponent stated that the predecessor importation restriction was

[15] *See* H.R. Rep. No. 1444 (Pt. 1), 91st Cong., 2d Sess. 71–80 (1970). *See also* 116 Cong. Rec. 33317 (1970).

an effort to use "best efforts to control or cause to be controlled *all those who import* or export morphine, cocaine, or their respective salts." 62 Cong. Rec. 6334 (1922) (emphasis added). These references in the legislative history to "any importation" and "all those who import" morphine or a salt of morphine suggest that Congress intended a broad coverage of the importation restriction. It is consistent with this intent to construe § 952(a), as the DEA has done, to cover actions of the United States.

Furthermore, there is some indication in the legislative history that one purpose served by the importation restriction is to prevent drug manufacturers in foreign countries from having access to the domestic American market in finished narcotic drugs. Thus, the relevant Committee report on the 1922 predecessor to § 952(a) stated that the restriction on the importation of finished narcotic drugs (as opposed to raw opium and coca leaves) "will also . . .close the legitimate domestic market to foreign manufacturers." H.R. Rep. No. 852, 67th Cong., 2d Sess. 7–8 (1922).[16] Although the precise reasons for closing the domestic market to foreign manufacturers may not be entirely clear, they may reasonably be understood to include the desire to protect the American drug industry from foreign competition—as well as simply to shut off importation in order to prevent illicit trafficking in drugs. Certainly, domestic drug industry representatives involved in manufacturing finished narcotics have so understood the intent of § 952(a). *See, e.g., Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings Before the House Committee on Ways and Means,* 91st Cong., 2d Sess. 458–62 (1970) (testimony of Stephen Ailes on behalf of three American firms licensed in 1970 to import opium for processing for legitimate medical purposes). Moreover, we understand from our conversations with DEA officials that the DEA itself is of the view that one—although not the major—statutory aim served by § 952(a) is the protection of the domestic American drug industry from foreign competition.

We would not want to rest an interpretation of § 952(a) entirely on the few indications of a "protectionist" purpose that we have found in the legislative

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[16] The full passage in the course of which this comment occurs is the following:

> The existing law in section 1 of the narcotic drugs import and export act [of 1909, as amended by the Harrison Act of 1914] . . . prohibits the importation of smoking opium, but permits the importation for medical purposes of other opium products . . The United States manufactures more than a sufficient amount of narcotic drugs for domestic medical and scientific uses. The committee therefore believes it desirable to restrict our importation to raw opium and coca leaves, and to admit these only in amounts found by the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce to be sufficient to provide our manufacturers with enough of the raw products for the domestic and scientific uses of this country, and for foreign exportation as required by the opium convention for medical and scientific uses of legitimate foreign consumers. This restriction will also aid in enforcing our export restrictions. . . . *It will also* aid in preventing evasions of the Harrison Act, by means of the unlawful importation into this country of narcotic drugs previously imported by us and sent into the export trade, and will *close the legitimate domestic market to foreign manufacturers*. By proper action in authorizing the importation of the raw products, it is believed that the three Secretaries can curb any tendency to increase the price of the manufactured narcotic drugs which might otherwise result from the prohibition of their importation, and by such action also take account of increased domestic consumption beyond the ordinary needs for medical and scientific uses, due either to diversion of drugs into illegitimate domestic channels .. or to epidemic or war conditions. (Emphasis added.)

H.R Rep. No. 852, 67th Cong., 2d Sess. 7–8 (1922).

history. However, we must acknowledge that, however ambiguous they may appear to be, such indications do exist, and they directly support the notion that § 952(a) should be interpreted to apply to the United States, as well as to private parties.[17]

In sum, in view of the longstanding and consistent agency interpretation of § 952(a) and its predecessor as applying to importations of controlled substances by private parties and federal agencies, in view of suggestions in the legislative history that Congress intended a broad construction of § 952(a) in order to fulfill its purposes, and in view of the absence of any indication in the legislative history to the contrary, we conclude that § 952(a) should be understood to apply to importations by the United States. It thus applies to the proposed importation of morphine sulfate from Turkey that is presently the subject of negotiations involving the General Services Administration.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[17] An argument can be made that Congress did not intend to cover the United States in § 952(a), for it provided for a means of enforcing § 952(a), namely, by possible criminal penalty, *see* 21 U.S.C. § 960, that is not appropriately applied against the United States. The problem with this argument is that it ignores that the criminal enforcement provisions are not exclusive. 21 U.S.C. § 964 states that any penalty imposed for violation of the import and export restrictions "shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law." It is not inconceivable that an aggrieved private party may be able to achieve judicial review of an importation of a controlled substance by the United States, and seek in a judicial proceeding a civil remedy predicated on an alleged violation of § 952(a). Accordingly, we cannot give definitive weight to the existence of criminal enforcement provisions in the statute. To us, the central question is what Congress' intent in imposing the importation restriction itself appears to have been. That question is best resolved by referring to § 952(a)'s own legislative history and, in this case, the longstanding agency construction of the provision.

Recess Appointments Issues

[The following memorandum reviews a number of legal and constitutional issues relating to the President's power to make appointments during a recess of the Senate, concluding that there have been no developments which call into question the conclusions of a 1960 Attorney General opinion, 41 Op Att'y Gen. 463. It also contrasts the language, effects and purposes of the Pocket Veto and Recess Appointments Clauses.]

October 25, 1982

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This is in response to your memorandum regarding the recess appointments issues. That memorandum's appendix, entitled "Legal Issues re: Recess Appointments," addresses a number of questions which may arise with respect to appointments during the current Senate recess. The current recess is an intrasession recess of the second session of the 97th Congress of almost two months duration. The Senate adjourned on October 2, 1982 to a date certain, November 29, 1982. *See* H. Con. Res. 421, 97th Cong., 2d Sess., 128 Cong. Rec. S13410, and 128 Cong. Rec. D1325 (daily ed. Oct. 1, 1982). You have asked us to (a) confirm that there have been no developments that would call into question the validity of the (Acting) Attorney General's 1960 opinion on recess appointments (41 Op. Att'y Gen. 463), and (b) advise whether we see any problem with the appendix's summary of the pertinent legal rules governing the exercise of recess appointment authority under Article II, § 2, clause 3 of the Constitution, and of the effects of the provisions of 5 U.S.C. § 5503, setting limits on the circumstances under which recess appointees may be paid.

With respect to your second question, we believe that the legal summary contained in the appendix to your memorandum, in general, correctly states the applicable legal principles. As you note, the key provisions governing recess appointments are Article II, § 2, clause 3 of the Constitution[1] and 5 U.S.C.

[1] Article II, § 2, clause 3 provides.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

§ 5503 (1976).[2] It has long been established that Article II, § 2, clause 3 gives the President the power to fill vacancies by recess appointments both when the vacancies occur during the recess and when they existed prior to the recess but had not been filled, either because a nomination had not been made or because a nominee had not been confirmed prior to the adjournment. 41 Op. Att'y Gen. at 465. However, as you note, § 5503(a) prohibits payment of recess appointees if the vacancies to which they are appointed existed while the Senate was in session, unless one of three conditions contained in that subsection is satisfied.

We agree that:

1. Recess appointments may be made during extended intrasession recesses of the Senate, like the present recess of well over 30 days duration, and such appointees may be paid under § 5503 where that section's conditions are satisfied. *See* 41 Op. Att'y Gen. at 466–67, and the authorities cited therein. In this connection, it is perhaps worth repeating a point made in the 1960 Attorney General opinion. 41 Op. Att'y Gen. at 472–73, n.13. The Comptroller General has interpreted § 5503(a)(2) as prohibiting payment only where the person receiving the recess appointment was already serving under a prior recess appointment. 52 Comp. Gen. 556, 557 (1973); 36 Comp. Gen. 444 (1956). Thus, if someone other than a prior recess appointee whose nomination was pending at the time of adjournment is appointed, § 5503(a)(2) does not bar payment.

2. The prevailing view is that the language "next Session" in Article II, § 2, clause 3 refers to the session following the adjournment *sine die* of the current one. Thus, a recess appointment made during an intrasession recess expires upon the adjournment *sine die* of the session of Congress which follows the adjournment *sine die* of the session during which the intrasession recess occurs. It follows that, at least in the absence of a special session, recess appointments made during the current recess (or prior recesses of the current session) would expire when the first session of the 98th Congress adjourned *sine die*. 41 Op. Att'y Gen. at 465. The Comptroller General has ruled that recess appointees may be paid consistently with § 5503 for the same period. 28 Comp. Gen. 30 (1948).

3. In the event the 97th Congress were recalled for a special session after the adjournment *sine die* of its second session, an unsettled question might arise

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[2] Section 5503(a) prohibits paying the salary of a recess appointee to an office required by law to be filled by and with the advice and consent of the Senate, where the vacancy in the office existed while the Senate was still in session, unless one of three conditions is met:

(1) if the vacancy arose within 30 days before the end of the session of the Senate;

(2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or

(3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

Section 5503(b) requires a nomination to fill the office of a recess appointee who has been paid under one of these three exceptions to be submitted to the Senate within 40 days after the beginning of its next session.

Present 5 U.S.C. § 5503 is the 1966 codification of former 5 U.S.C. § 56, 54 Stat. 751 (1940). *See* Pub. L. No. 89–554, 80 Stat. 378, 475 (1966). The Senate and House reports both state simply that "[s]tandard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report." H.R. Rep. No. 901, 89th Cong., 1st Sess. 85 (1965); S. Rep. No. 1380, 89th Cong., 2d Sess. 105 (1966). Thus, any changes in wording since the times of the 1960 Attorney General opinion and the post-1940 Comptroller General's opinions would appear to have been made without any intention to make substantive changes.

whether appointments made during the present election recess would expire at the end of the special session, or at the end of the first session of the 98th Congress, *i.e.*, whether the "next Session" under Article II, § 2, clause 3 was the special session or the first session of the 98th Congress. A parallel unsettled question might arise with respect to their pay under § 5503(a). We agree that a special session should probably be viewed as the "next Session" for purposes both of the constitutional provision and § 5503(a).

4. Section 5503(b) requires the submission of a nomination to the Senate for any post filled by a recess appointment covered by § 5503(a) "not later than 40 days after the beginning of the next session of the Senate." The effect of a violation of § 5503(b) is to terminate the pay of the recess appointee. 52 Comp. Gen. at 557–58. It remains unsettled whether the language "next session" in § 5503(b) refers to a post-recess reconvening of the same Congress, or to the beginning of the session of Congress which succeeds the adjournment *sine die* of the current one. We agree that the safer course is to adhere to the advice of the 1960 Attorney General opinion and submit nominations of recess appointees to the Senate when it reconvenes after its intrasession election recess. *See* 41 Op. Att'y Gen. at 477.[3] We believe this is the safer course even though the post-recess session of the Senate is likely to last less than 40 days, and it might plausibly be argued that compliance with § 5503(b) is unnecessary where the Senate adjourns before the President is required to submit a nomination. If a nomination is submitted, no question can arise whether the recess appointee is entitled to be paid under § 5503(b). If § 5503(b) is violated, of course, a recess appointee may continue to serve, but cannot be paid after the 40th day following the beginning of the next session until he is nominated and confirmed by the Senate, though his right to pay would relate back to the 41st day if he were so nominated and confirmed. 52 Comp. Gen. at 558. As noted in the 1960 opinion, 41 Op. Att'y Gen. at 478–79, the Comptroller General has interpreted § 5503(a)(2) as not terminating the pay of such subsequently nominated recess appointees prior to the time they would otherwise have terminated. 28 Comp. Gen. 121 (1948). *I.e.*, § 5503(b)(2) will not operate to terminate the pay of recess appointees when the Senate next adjourns after reconvening on November 29 as a result of submitting their nominations.

5. Since the Senate adjourned to a date certain and not *sine die* existing recess appointments made prior to the current recess will continue to be valid through the current recess. The adjournment *sine die* of the 97th Congress after it reconvenes on November 29, 1982, will terminate those existing recess appointments which were made prior to the beginning of the second session of the 97th Congress.

6. When the Senate reconvenes on November 29, 1982, questions may arise with respect to resubmission of the nominations of persons holding recess appointments. We agree that the better course is to submit the nominations of

[3] The 1960 Attorney General opinion recommends the submission of nominations for those who received recess appointments to vacancies which opened after the adjournment of the Senate, even though § 5503 does not cover those appointments. 41 Op. Att'y Gen. at 478 n.21.

prior as well as current recess appointees after the Senate reconvenes in November unless there has been unanimous consent to suspend Standing Rule XXXI(6) of the Senate with respect to their nominations. Standing Rule XXXI(6) provides:

> Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.[4]

Our search of the Congressional Record indicates that there was unanimous consent to suspend the operation of that rule with respect to all but seven pending nominations.[5] Resubmission of the one recess nomination would avoid the risk that § 5503(b) might be interpreted to terminate his pay. Section 5503(a)(2) has been interpreted as not risking premature termination of the pay of recess appointees as a result of such submissions. *See* paragraph (5) *supra* and 41 Op. Att'y Gen. at 478–79, *citing* 28 Comp. Gen. 121 (1948).

With respect to your first question, we agree that there have been no developments which call into question the validity of the pertinent conclusions in the 1960 opinion of Acting Attorney General Walsh. As your memorandum notes, the two intervening reported cases involving recess appointments are not inconsistent with either the 1960 opinion or your appendix's summary.[6] Also, two recent cases challenging recess appointments made by President Reagan do not cast any doubt on the conclusions of your summary.[7]

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[4] Senate Manual 1981, at pp. 58–59 (Senate Doc. No. 97–1)

[5] 128 Cong. Rec. S13269 (daily ed. Oct. 1, 1982). Those seven nominations were

> Harvey J. Staszewski, Jr. To be a member of the U.S. Metric Board; Frederic V. Malek, to be Governor, U S Postal Service; John Van de Water to be Chairman of the National Labor Relations Board; Wendy Borcherdt, to be Deputy Undersecretary for Intergovernmental and Interagency Affairs, Department of Education; and . . Robert A. Destro, . . . Constantine Nicholas Dombalis, . . . and Guadalupe Quintanilla, to be . . Member[s] of the Commission on Civil Rights.

Only Mr. Van de Water was a recess appointment. 17 Weekly Comp Pres Doc. 883 (Aug 13, 1981)

[6] *United States* v. *Allocco*, 305 F 2d 704 (2d Cir. 1962); *Staebler* v. *Carter*, 464 F Supp 585 (D D.C. 1979).

In the *Staebler* case, the District Court rejected a challenge to the recess appointment of his successor by a holdover member of the Federal Election Commission The Court stated, *inter alia:*

> There is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity. . . There is no justification for implying additional restrictions not supported by the constitutional language.
>
> Recess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session

464 F. Supp at 597.

In *Allocco*, the criminal defendant unsuccessfully challenged the recess appointment of his trial judge The Second Circuit held that President Eisenhower had authority under the Recess Appointments Clause to fill the district court vacancy which occurred two days before the Congress adjourned *sine die* on August 2, 1955. The Court rejected the argument that the Recess Appointments Clause covers only vacancies which open during a recess 305 F.2d at 709–15.

[7] *Bowers* v. *Moffet*, Civil Action No. 82–0195 (D.D.C. 1982), was dismissed voluntarily without opinion after Judge Hart indicated that he intended to dismiss the case It involved, *inter alia*, a challenge to President Reagan's

Continued

We also do not believe that the two recent pocket veto cases cast any doubt on our conclusions. These two cases, *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974), and *Kennedy* v. *Jones*, 412 F. Supp. 353 (D.D.C. 1976),[8] even if we agreed with the legal conclusions contained in them, which we do not,[9] would not call into question the conclusion in the 1960 Attorney General's opinion with respect to recess appointments. While the Pocket Veto and Recess Appointments Clauses deal with similar situations, that is, the President's powers while Congress or the Senate is not in session, their language, effects and purposes are by no means identical. First, the language of the two clauses differs significantly. The Pocket Veto Clause speaks of an adjournment of the Congress which prevents the return of a bill; the Recess Appointments Clause speaks of filling all vacancies during a recess of the Senate. Had the two clauses been intended to cover the same situation, it is reasonable to assume that they would have been worded more similarly. Even if "recess" and "adjournment" do not have clearly distinguishable meanings in the Constitution, an adjournment which prevents the return of a bill appears to be addressed to a different situation than is "a recess." Second, the effects of a pocket veto and of a recess appointment are different. Legislation which is pocket vetoed can be revived only by resuming the legislative process from the beginning. A recess appointment, on the other hand, results only in the

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recess appointment of Kenneth E. Moffet to be Federal Mediation and Conciliation Service Director on January 11, 1982, during the intersession recess of the 97th Congress.

McCalpin v *Dana*, No. 82–0542 (D D.C. 1982), which was decided on cross motions for summary judgment in the District Court on October 5, 1982, involved a challenge to President Reagan's appointments of seven members of the Board of the Legal Services Corporation, also during the intersession recess of the 97th Congress in December and January of 1981 Although the President nominated nine of the appointees after the Senate convened for the second session, none of them has been confirmed. The Legal Services Corporation Act provides for appointment of the Board members by the President with the advice and consent of the Senate However, the Act contains no express provision for recess appointments, and also provides that the Board members are not Officers of the United States The Court concluded that the legislative history of the "Act reflects Congress' intent that the President should have no restraint imposed upon his power to make recess appointments to the LSC Board of Directors " *McCalpin* v *Dana*, slip op at 5 Neither the statute's declaration that the LSC Board members are not Officers of the United States nor congressional concern with the Board's political independence suggests a contrary conclusion:

> The ability to make recess appointments is a very important tool in ensuring that there is a minimum of disruption in governmental operations due to vacancies in office, . and there is no reason to believe that the President's recess appointment power is less important than the Senate's power to subject nominees to the confirmation process. In fact, the presence of both powers in the Constitution demonstrates that the Framers of the Constitution concluded that these powers should co-exist. The system of checks and balances crafted by the Framers remains binding and strongly supports the retention of the President's power to make recess appointments

Id at 14 The Court went on to say that had such a restraint on the President's recess appointments power been intended it would have been of doubtful constitutionality under the functional analysis of *Buckley* v *Valeo*, 424 U.S. 1, 124–43 (1976) (per curiam) *Id*. at 16.

[8] *Kennedy* v *Sampson* stated broadly that the Pocket Veto Clause of Article I, § 7, clause 2 of the Constitution does not apply to intrasession adjournments, however, the case involved a pocket veto made during an intrasession adjournment of only six days' duration In *Kennedy* v *Jones* the government entered into a consent judgment for the plaintiff in a case challenging the validity of two pocket vetoes: one, an intersession pocket veto, the other an intrasession pocket veto during an election recess of 31 days President Ford, at the time judgment was entered in the *Kennedy* v. *Jones* case, announced publicly he would not invoke his pocket veto powers during intrasession or intersession recesses where the originating House of Congress had specifically authorized an officer or other agent to receive return vetoes during such periods Department of Justice Press Release, Apr 13, 1976. President Reagan has not made any similar announcement

[9] Lifetime Communities, Inc is seeking to litigate the validity of President Reagan's intersession pocket veto of H.R. 4353 on rehearing in its New York bankruptcy proceeding now pending before the Second Circuit, No. 82–5505. Appellee, The Administrative Office of the U.S Courts, represented by the Civil Division of the Department of Justice, filed a response on September 27, 1982, agreeing that the newly raised pocket veto issue should be reheard on the merits by the panel

temporary filling of a position for a period prescribed by the clause itself. Finally, the purposes of the clauses are different. The Pocket Veto Clause ensures that the President will not be deprived of his constitutional power to veto a bill by reason of an adjournment of Congress. The Recess Appointments Clause enables the President to fill vacancies which exist while the Senate is unable to give its advice and consent because it is in recess. In light of the different wording, effects, and purposes of the two clauses, we do not believe the pocket veto cases should be read as having any significant bearing on the proper interpretation of the Recess Appointments Clause.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Committee Approval Provision in Department of Housing and Urban Development Appropriations Act

Provision for prior congressional committee approval of an executive officer's exercise of statutory authority is an unconstitutional legislative veto, and is of no legally binding effect. Accordingly, such a provision in the Department of Housing and Urban Development (HUD) appropriations act cannot operate to prohibit the Secretary of HUD from undertaking certain otherwise authorized actions in connection with a planned departmental reorganization.

October 27, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

This responds to your request for our opinion regarding the legal effect of a provision in the Housing and Urban Development-Independent Agencies Appropriations Act, 1983, Pub. L. No. 97–272, 96 Stat. 1160, 1164 (1982), (HUD appropriations bill), which purports to require that no appropriated funds be used prior to January 1, 1983, "to plan, design, implement or administer any reorganization of the Department without the prior approval of the Committees on Appropriations."

For reasons set forth in detail below, we believe that this so-called "committee approval" provision is unconstitutional, and therefore has no legal effect. Because it is attached to the general HUD appropriations bill and not to specific authority conferred on the Secretary, we do not believe that its unconstitutionality prevents the Secretary from exercising the substantive powers which this committee approval device was apparently intended to control. As several Presidents have stated in similar circumstances, such provisos in general appropriations legislation, because they are unconstitutional, are not to be regarded as controlling the actions of executive agencies. We will set forth the constitutional analysis that leads us to this result in part I. In part II, we will apply this analysis to the two particular questions you raised in your October 19 letter.

I. Constitutional Principles

The Executive Branch long has taken the position that "committee approval" provisions such as contained in your agency's appropriations legislation are unconstitutional. *See, e.g.*, 37 Op. Att'y Gen. 56 (1933); 41 Op. Att'y Gen. 230 (1955); 41 Op. Att'y Gen. 300 (1957). Based upon these historic assertions of

unconstitutionality, Presidents Eisenhower and Johnson, in signing into law bills containing such provisions, explicitly instructed their subordinates to disregard them. *See Pub. Papers of Dwight D. Eisenhower* 688–89 (1955); *Pub. Papers of Lyndon B. Johnson* 104–105 (1963–1964).

The reasoning underlying this long-held view is the same as that underlying the Executive Branch's position in pending litigation before the Supreme Court, which has been accepted unanimously by the full Court of Appeals for the District of Columbia Circuit and by the Court of Appeals for the Ninth Circuit. *See Consumer Energy Council of America* v. *Federal Energy Regulatory Commission;* 673 F.2d 425 (D.C. Cir. 1982), pending before the Supreme Court as Nos. 81–2008, 81–2020, 81–2151, 81–2171 and 82–209; *Consumers Union of the United States* v. *Federal Trade Commission*, 691 F.2d 575 (D.C. Cir. 1982) (en banc); *Immigration and Naturalization Service* v. *Chadha*, 634 F.2d 408 (9th Cir. 1980), pending before the Supreme Court as Nos. 80–1832, 80–2170 and 80–2171.* Congress may not by a resolution of one or two Houses of Congress or, in this case, one or more of its committees, impose new legal responsibilities or limitations on the Executive Branch unless the resolution is first adopted by both Houses of Congress and presented to the President for approval or veto. *See* Art. I, § 7, cls. 2 & 3. Furthermore, committees of Congress may not, by the approval resolution mechanism contemplated by the HUD appropriations statute, control the execution of the laws by an executive agency, because such control, if accomplished other than by plenary legislation, violates the principle of separation of powers. Under that principle, it is for Congress to legislate, and for the Executive to execute the laws.

It would be no response to suggest that appropriations acts are in some ways distinguishable from other acts and thus should be treated differently for purposes of constitutional analysis. As Attorney General William D. Mitchell wrote in 1933:

> Congress holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. *Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution.* If such a practice were permissible, Congress could subvert the Constitution. It might make appropriations on condition that the executive department abrogate its functions.

37 Op. Att'y Gen. at 61 (emphasis added).

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* NOTE: The Supreme Court's opinion in *Chadha*, affirming the Ninth Circuit, can be found at 462 U.S. 919 (1983). *See also* the Supreme Court's affirmance of the D.C Circuit in *Process Gas Consumers Group* v *Consumer Energy Council of America*, 463 U S. 1215 (1983). Ed

See also United States v. *Lovett*, 328 U.S. 303 (1946) (establishing the principle that exercises of Congress' spending power must be scrutinized in terms of other applicable constitutional requirements); *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (stating that Congress may not exercise its powers "in such a manner as to offend . . . constitutional restrictions stemming from the separation of powers").

II. Particular Issues

You have asked not only for our general views on this "committee approval" provision—which, as we have stated, is in our view unconstitutional and of no legally binding effect—but also for our response to two particular questions, as follows.

(1) First, you note that 42 U.S.C. § 3535(p) provides that a plan for reorganization of any regional or field office of the Department may take effect only upon the expiration of 90 days after publication in the Federal Register of a cost-benefit analysis of the plan's effects. You state that such an analysis has been prepared with respect to certain planned reorganization measures. You also state that publication of the cost-benefit analysis in the Federal Register has been deferred in deference to the wishes of the chairman of the pertinent subcommittee of the House Committee on Appropriations. You ask whether the cost-benefit analysis may be published in the Federal Register before January 1, 1983, in view of the limiting language of the "committee approval" provision quoted at the outset of this memorandum.

We will assume *arguendo* that the "committee approval" provision's ban on spending funds prior to January 1, 1983, to "plan" a reorganization would comprehend the publication of a cost-benefit analysis for purposes of 42 U.S.C. § 3535(p). Even so, we do not believe that the "committee approval" provision has legal force in this context because of the provision's constitutional infirmities as discussed above. In our view, the provision cannot operate to prohibit publication of the cost-benefit analysis prior to January 1, 1983.[1]

(2) Second, you state that a limited reduction-in-force (RIF) at the Department's central headquarters has been instituted. You state that although there is doubt that a RIF is a "reorganization" as that term is generally understood, there is some legislative history that could be interpreted to suggest that this RIF would be subject to the "committee approval" provision in your Department's appropriation statute.[2] For present purposes, you have assumed that a RIF would be covered by the plain terms of the "committee approval" provision, and on that basis you have asked whether that provision would prohibit the RIF absent committee approval.

Once again, for the same reasons laid out above, we conclude that the "committee approval" provision does not have legally binding effect, and that it

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[1] At the same time, we do not believe that the unconstitutionality of the "committee approval" provision would affect the legally binding nature of the requirements set forth in 42 U.S.C. § 3535(p), which, as you have recognized, must be followed before a reorganization covered by that section takes effect.

[2] *See* H.R. Rep. No. 720, 97th Cong., 2d Sess. 10 (1982).

cannot prevent the Secretary from undertaking action otherwise authorized by applicable statutes.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Information Sharing Between Supervisory Agencies Under the Right to Financial Privacy Act of 1978

The Office of the Comptroller of the Currency (OCC) may make available to the Federal Deposit Insurance Corporation (FDIC), in its capacity as a receiver of a failed national bank, OCC examination reports on that bank, notwithstanding the general prohibitions on disclosure in the Right to Financial Privacy Act of 1978. Such disclosure falls within two exceptions in that Act for information exchanges between government "supervisory" agencies, whether or not the FDIC is actually performing a "supervisory" function in its capacity as a receiver. 12 U.S.C. § 3412(d) and (e).

October 29, 1982

MEMORANDUM OPINION FOR THE CHIEF COUNSEL, COMPTROLLER OF THE CURRENCY

This responds to your request for our opinion regarding the following question: May the Office of the Comptroller of the Currency (OCC) make available to the Federal Deposit Insurance Corporation (FDIC), in its capacity as a receiver of a failed bank, OCC reports of examination of that bank? You indicate that the OCC would like to provide the FDIC with OCC examination reports of banks that the FDIC, in its capacity as receiver of failed national banks, 12 U.S.C. § 1821(c), routinely requests. However, the OCC is concerned that, because such reports contain names and information about bank customers, such disclosure may be prohibited by the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3422 (Supp. II 1978) (RFPA). We conclude that disclosure of OCC examination reports to the FDIC falls within a recently enacted amendment to the RFPA which excepts information exchanges between supervisory agencies of the Federal Financial Institutions Examination Council from the general prohibitions on information disclosure in that Act. Pub. L. No. 97–320, § 432(a), 96 Stat. 1469, 1527 (1982). We also believe that the exception in the RFPA for information exchanges between supervisory agencies, 12 U.S.C. § 3412(d), would permit disclosure of OCC examination reports to the FDIC.

I. Background

A. The Right to Financial Privacy Act

The Right to Financial Privacy Act of 1978 was enacted in the wake of *United States* v. *Miller*, 425 U.S. 435 (1976), which held that a bank customer has no

protectable Fourth Amendment interest in information about his account in a bank's files.[1] The RFPA created a statutory right of privacy on behalf of a customer of a financial institution in the records of the institution pertaining to him or her. 12 U.S.C. §§ 3403, 3410. The RFPA prohibits financial institutions from providing any governmental authority access to, or copies of, information in the financial records of any customer unless the customer has authorized such disclosure or unless certain legal requirements—such as compliance with an administrative subpoena, search warrant or judicial subpoena—have been met. 12 U.S.C. § 3402. Certain exceptions authorize financial institutions to provide information relevant to possible violations of the law, 12 U.S.C. § 3403(c); to provide copies of records necessary to perfect a security interest, prove a claim in bankruptcy, or otherwise collect on a debt owing to the institution, 12 U.S.C. § 3403(d); and to disclose financial records in response to special enforcement needs, such as the conduct of foreign counter-intelligence activities, and in emergency situations. 12 U.S.C. § 3414.

The RFPA also prohibits the transfer from one government agency to another of financial records originally obtained in compliance with the requirements of the Act, unless the requesting agency certifies that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry. 12 U.S.C. § 3412(a). However, there are two exceptions, important for present purposes, to this prohibition on exchange of information and financial records among government agencies. Section 3412(d) of the RFPA states in relevant part: "Nothing in this chapter prohibits any supervisory agency from exchanging examination reports or other information with another supervisory agency." A recent amendment further clarifies the permissibility of information exchanges among certain supervisory agencies. It provides that:

> Notwithstanding section 1101(6) or any other provision of this title, the exchange of financial records or other information with respect to a financial institution among and between the five member supervisory agencies of the Federal Financial Institutions Examination Council is permitted.

Pub. L. No. 97–320, § 432(a) (1982), to be codified at 12 U.S.C. § 3412(e).

Thus, supervisory agencies have a special status under the RFPA. Banks may provide these agencies with otherwise protected information under certain conditions, *see* 12 U.S.C. § 3413(b),[2] and supervisory agencies may exchange among themselves otherwise protected information concerning financial records. 12 U.S.C. § 3412(d),(e). For purposes of the RFPA generally, supervisory agencies are defined as follows:

> "supervisory agency" means, with respect to any particular financial institution any of the following which has statutory authority

[1] The Right to Financial Privacy Act was enacted as Title XI of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95–630, 92 Stat 3641.

[2] 12 U S.C. § 3413(b) authorizes disclosure of financial records or information to any supervisory agency "in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution "

to examine the financial condition or business operations of that institution—

(A) the Federal Deposit Insurance Corporation;

(B) the Federal Savings and Loans Insurance Corporation;

(C) the Federal Home Loan Bank Board;

(D) the National Credit Union Administration;

(E) the Board of Governors of the Federal Reserve System;

(F) the Comptroller of the Currency;

(G) the Securities and Exchange Commission;

(H) the Secretary of the Treasury, with respect to the Bank Secrecy Act [12 U.S.C. 1951 et seq.] and the Currency and Foreign Transactions Reporting Act [31 U.S.C. 1051 et seq.] (Pub. L. No. 91–508, title I and II); or

(I) any State banking or securities department or agency;

12 U.S.C. § 3401(6). But under new 12 U.S.C. § 3412(e), the restrictive definition of "supervisory agency" in § 3401(6)—that is, an agency having "statutory authority to examine the financial condition or business operations of that [particular] institution"—is not applicable. Rather, new subsection (e) permits, without apparent qualification, exchanges of financial records and information between member agencies of the Federal Financial Institutions Examination Council (Council). Both the FDIC and the OCC are member agencies of the Council. 12 U.S.C. § 3302(1).[3]

Your request, in essence, focuses on whether the FDIC can be viewed as a "supervisory agency" as defined in § 3401(6) and employed in § 3412(d), or as a member agency of the Council for purposes of § 3412(e), when it is acting as a receiver of a closed national bank.

B. The FDIC as Corporation and as Receiver

Under the Federal Deposit Insurance Act (FDIA), 12 U.S.C. §§ 1811–1832, *as amended* by the Deposit Insurance Flexibility Act, Pub. L. No. 97–320, the FDIC has the duty to insure to $100,000 each deposit made in national banks that are members of the Federal Reserve System. 12 U.S.C. §§ 1811, 1813(m), 1821(a), (f). The FDIC meets its responsibility as insurer from an insurance fund created from assessments paid by the insured banks. 12 U.S.C. §§ 1817, 1821(a). Whenever an insured bank is closed because of its inability to meet the

[3] The regulatory agencies represented in the Council are the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration 12 U.S C. § 3302(1).

demands of its depositors, the FDIC is obligated to make payment of the insured deposits in that bank as soon as possible. 12 U.S.C. § 1821(f). In exercising these duties, the FDIC is acting in its corporate capacity, as insurer of deposits. *See First Empire Bank* v. *FDIC*, 572 F.2d 1361, 1363–64 (9th Cir.), *cert. denied*, 439 U.S. 919 (1978).

The FDIC also must accept appointment as receiver of closed state banks if appointment is tendered and authorized by state law, 12 U.S.C. § 1821(e), and whenever the Comptroller of the Currency appoints a receiver for a closed national bank, he must appoint the FDIC. 12 U.S.C. § 1821(c). In its capacity as receiver of a closed national bank, the FDIC has the duty to "realize upon the assets of such closed bank . . .; to enforce the individual liability of the stockholders and directors thereof; and to wind up the affairs of such closed bank in conformity with the provisions of law relating to the liquidation of closed national banks, except as herein otherwise provided." 12 U.S.C. § 1821(d). Further, "[w]ith respect to any such closed bank, the Corporation as such receiver shall have all the rights, powers, and privileges now possessed by or hereafter granted by law to a receiver of a national bank or District bank and notwithstanding any other provision of law in the exercise of such rights, powers, and privileges the Corporation shall not be subject to the direction or supervision of the Secretary of the Treasury or the Comptroller of the Currency." *Id.*

As courts have noted, these various statutory responsibilities often place the FDIC in the position of acting in two capacities with respect to closed national banks: in its corporate capacity, as insurer of deposits, and in its capacity as a receiver. *See FDIC* v. *Lauterbach*, 626 F.2d 1327, 1330 n.4 (7th Cir. 1980); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 366 (7th Cir.), *cert. denied*, 444 U.S. 829 (1979); *First Empire Bank* v. *FDIC*, 572 U.S. at 1364. For purposes of federal jurisdiction, Congress has discriminated between the FDIC's dual capacity as federal insurer and *state* receiver by providing that any "suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States." 12 U.S.C. § 1819 Fourth. *Cf. FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d at 367 (federal jurisdiction exists because FDIC was acting in corporate capacity as assignee of certain assets from FDIC as receiver). While the FDIC therefore could be functioning solely in its capacity as receiver with respect to a particular closed bank, it frequently functions in its two roles simultaneously. *See FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d at 367 (FDIC acting in corporate capacity as assignee of certain assets from FDIC as receiver); *FDIC* v. *Ashley*, 585 F.2d 157, 163–164 (6th Cir. 1978) (same).

The recent amendments to the FDIA made by the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97–320, 96 Stat. 1469, increase the probability that the FDIC will be acting in both capacities with respect to national banks closed by the Comptroller of the Currency. The amendments expand the forms of financial assistance and the circumstances under which such assistance may be granted to closed or failing institutions. The FDIC has expanded powers

to facilitate mergers or acquisitions of closed or failing banks with insured institutions willing to purchase the assets and assume the liabilities of the closed or failing insured institution. *See* Pub. L. No. 97–320, § 111; H.R. Conf. Rep. 899, 97th Cong., 2d Sess. 85 (1982). Consequently, the FDIC will likely be in the position of dealing with itself as receiver and insurer in an increasing number of situations. It is in this context that Congress also enacted the amendment to the RFPA providing that notwithstanding any provision of the RFPA, "the exchange of financial records or other information with respect to a financial institution among and between the five member supervisory agencies of the Federal Financial Institutions Examination Council is permitted." Pub. L. No. 97–320, § 432(a). We note, initially, that not only will the FDIC be performing insuring, supervisory, and liquidating functions simultaneously, but also that Congress declined to distinguish between those roles for purposes of information sharing in this recent amendment.

II. Statutory Analysis

Our starting point is, of course, the language of the statutory provision itself. *See Watt* v. *Alaska*, 451 U.S. 259, 265–66 (1981); *Rubin* v. *United States*, 449 U.S. 424, 429 (1981). We believe that Congress meant precisely what it said. That is, without condition or qualification, "[n]otwithstanding . . . any other provision of this [RFPA] title, the exchange of financial records or other information with respect to a financial institution among and between the five member supervisory agencies of the Federal Financial Institutions Examination Council is permitted." Pub. L. No. 97–320, § 432(a). Moreover, in construing a statute, a court is obliged, if possible, to give effect to every word Congress used. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). For this new subsection to have any substantial meaning, it must be construed as a broad exemption permitting information exchange between the five agencies.

Prior to enactment of subsection (e), Congress had already provided in 12 U.S.C. § 3413(b) that: "Nothing in this chapter prohibits examination by or disclosure to any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution." Thus, access to financial records in conformity with § 3413(b) would appear to be conditioned on the exercise of a particular supervisory, regulatory, or monetary function by the involved supervisory agency. *See Electronic Funds Transfer and Financial Privacy, Hearings on S. 2096, S. 2293, S. 1460 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 2d Sess. 416, 419 (1978) (Letter to Honorable William Proxmire, Chairman, Committee on Banking, Housing, and Urban Affairs from George Lemaistre, Chairman, FDIC, questioning whether exemption as presently worded was adequate to cover the FDIC when acting in its insuring or liquidating functions) [hereinafter *Hearings*].[4] In

[4] The internal legal memorandum of April 28, 1982, from your Office relied on this subsection and its legislative history in concluding that none of the exceptions in the RFPA permit disclosure of OCC examination reports to the FDIC in its capacity as receiver That memorandum concluded "that principles of logic require that some concept of regulatory functions must be read into the [existing RFPA] exemption." Apr. 28, 1982, Memorandum at 4.

light of more pertinent statutory exemptions, however, we need not reach the question whether the FDIC is acting in a "supervisory, regulatory, or monetary function" when it acts as receiver of a closed national bank.[5]

Congress had further provided in subsection (d) of § 3412 for the exchange of information between supervisory agencies, presumably as defined in § 3401(6). Under the § 3412(d) exemption then, a supervisory agency must have "statutory authority to examine the financial condition or business operations of [an] institution," 12 U.S.C. § 3401(6), in order to obtain examination reports from another supervisory agency without complying with the RFPA's notice procedures. The FDIC does have statutory authority to examine national banks and any closed insured bank. 12 U.S.C. § 1820(b). It is also granted access to any examination reports made by the Comptroller of the Currency. 12 U.S.C. § 1817(a)(2). Nothing in § 3401(6) or § 3412(d) indicates that the FDIC's statutory authority to examine national banks ceases when it functions as a receiver. Based on the plain language of the statute, we conclude that § 3412(d) authorizes the FDIC to obtain access to OCC examination reports.[6]

Any questions whether the FDIC is permitted access to OCC reports were, we believe, answered by enactment of § 3412(e). If new subsection (e) is to mean anything, it must be interpreted as permitting exchanges of examination reports between the five member agencies of the Council regardless whether they are acting in any particular "supervisory, regulatory, or monetary functions," *see* § 3413(b), or whether they have "statutory authority to examine the financial condition or business operations of [a particular] institution." *See* § 3401(6).[7] Because the OCC did not have statutory authority to examine state banks, this new amendment undoubtedly is designed to ensure OCC access, wherever necessary, to such examination reports. The five agencies on the Council previously had access to each others' reports and records for purposes of carrying out their supervisory and reporting duties under the Federal Financial Institutions Examination Council Act of 1978. 12 U.S.C. § 3308. But if the new amendment broadened the OCC's ability to obtain reports concerning institutions it had no existing statutory authority to examine irrespective of the particular supervisory or regulatory purpose involved, it concomitantly broadened and clarified the FDIC's access rights to other agencies' reports in instances where its statutory authority may have been questionable. Thus, even were one to maintain that the FDIC's statutory authority to examine national banks did not extend beyond the

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[5] Indeed, given Congress' refusal to enact language suggested by the FDIC that would have clarified its authority to have access to reports under § 3413(b) when acting as receiver, we are reluctant to conclude that § 3413(b) is the proper basis for such authority. *See Hearings* at 416, 419, 476

[6] We have also examined the legislative history of 12 U.S.C. § 3412(d) and find nothing which conflicts with what we perceive to be the plain meaning of subsection (d). *See Hearings* at 424, 449–50 (statement and accompanying memorandum of Philip E. Coldwell, Member, Board of Governors of the Federal Reserve System) (recommending language of § 3412(d) to permit information sharing among supervisory agencies and noting that FDIC has statutory authority to obtain information and reports), 124 Cong. Rec. 33838 (1978) (statement of Rep. Goldwater) (offering amendment, the present § 3412 statutory language, and commenting that prohibitions in RFPA would "not apply to supervisory agencies properly conducting their responsibilities . . ")

[7] Neither the conference report, H R Conf. Rep. 899, 97th Cong., 2d Sess. (1982), nor the earlier House report, H.R. Rep. No. 550, 97th Cong., 2d Sess. (1982) accompanying H R. 6267, which became the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97–320, explain further this amendment to the RFPA.

insuring duties it performed in its corporate capacity and therefore under § 3412(d) the FDIC was prohibited from obtaining access to such reports when functioning as a receiver, the recent amendment to § 3412 must be read as permitting access to OCC reports by the FDIC regardless of what particular function it is performing.[8]

The RFPA was one title among twenty in an omnibus statute primarily concerned with strengthening the powers of supervisory agencies.[9] Similarly, the recent amendment to the RFPA was one provision of a comprehensive statute aimed at revitalizing the housing industry by strengthening the financial stability of lending institutions and enhancing the ability of the FDIC to aid failing or failed institutions. H.R. Conf. Rep. 899, 97th Cong., 2d Sess. 1, 85 (1982). It would be anomalous to conclude that statutes intended to strengthen the supervisory agencies' ability to regulate and stabilize financial institutions contained information sharing exemptions insufficient to accomplish those purposes.

We therefore conclude that the OCC is permitted to exchange examination reports of closed national banks with the FDIC.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[8] In addition, several practical considerations militate in favor of interpreting § 3412(d) and (e) to permit FDIC access to OCC examination reports. As noted above, in many instances the FDIC acts in the dual role of receiver and regulator/insurer with respect to closed national banks. It would be anomalous for the FDIC to have access to OCC examination reports when acting as insurer as well as receiver but not when acting solely as receiver. Indeed, were such a distinction imposed, the FDIC might be accused at times of asserting that it was functioning as an insurer solely to obtain access to examination reports. As we understand the facts, the FDIC also has routine access to examination reports of state banks When a state bank fails, the FDIC does not divide itself institutionally and, as receiver, act as if those examination reports do not exist It is thus only with respect to closed national banks that access authority has been questioned. We think it unlikely that Congress intended the FDIC to have access to examination reports of closed state banks but not the reports of closed national banks

[9] *See* Pub L. No 95–630, 92 Stat 3641, Financial Institutions Regulatory and Interest Rate Control Act of 1978, Title I (upgrade machinery of Federal financial regulation); Title VI (power of supervisory agencies to monitor takeovers of federally insured institutions), Title IX (disclosure to supervisory agencies of material facts on bank activities and officials); Title X (establishment of Federal Financial Institutions Examination Council). *See generally* H.R. Rep. No. 1383, 95th Cong., 2d Sess. 1–35 (1978).

Acceptance of Legal Fees by United States Attorney

United States Attorney would be prohibited by 18 U.S.C. § 205(1) from accepting an attorney's fee generated in a case that he handled while in private practice, if the lawsuit were determined to constitute a claim against the United States, and if his interest in the fee was of a contingent nature at the time he began government service.

Whether a matter in litigation constitutes a claim against the United States for purposes of 18 U.S.C. § 205 depends not upon whether the United States is a plaintiff or defendant, but upon whether the United States has a significant monetary interest at stake in the lawsuit.

November 4, 1982

MEMORANDUM OPINION FOR THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

You have asked for our views on the propriety of a United States Attorney accepting an attorney's fee generated in a case that he handled while in private practice. While we do not have sufficient information to reach a conclusive determination on this question, the following discussion should assist you in making your decision in the matter.

You have advised us that prior to his appointment as United States Attorney, Mr. A negotiated a proposed settlement for his clients in a suit you characterized as "a title dispute between relatives" where the United States was named as a "nominal party" because the Farmer's Home Administration (FmHA) held a mortgage on the property. Mr. A states that although he negotiated the settlement prior to assuming his position as the United States Attorney, a final consent decree was not entered in the case until the defendants were able to obtain a loan from the FmHA to pay the settlement. The settlement was entered approximately a year and a half after Mr. A assumed his position as the United States Attorney. During this year and a half, Mr. A's former clients were represented by another lawyer, who has tendered to Mr. A $1,265.50, which constitutes one-half of the contingent fee collected from the clients.[1]

[1] We presume that the 50-50 split of any attorney's fee collected was agreed upon between the lawyers before Mr. A assumed his position as United States Attorney. We also understand that the total attorney's fee collected was based upon Mr A's original agreement with his clients that they would pay as an attorney's fee one-third of any amount recovered in the suit.

As you know, the applicable conflict of interest statute is 18 U.S.C. § 205. In pertinent part this statute prohibits officers or employees of the United States from receiving any share of or interest in any claim against the United States. 18 U.S.C. § 205(1). As a preliminary matter, you will want to determine whether this suit can reasonably be said to constitute a "claim against the United States." In our view, this is primarily a question of fact that you must determine by reviewing the nature of the interests of the FmHA in this lawsuit.[2]

As you know, there is some judicial authority to support the proposition that not every case involving the monetary interests of the government necessarily constitutes a claim against the United States. In *United States* v. *679.19 Acres of Land*, 113 F. Supp. 590, 593 (D.N.D. 1953) the court held that the predecessor statute to § 205(1) did not bar an employee of the Soil Conservation Service from testifying under subpoena as an expert witness in a land condemnation suit. In reaching this conclusion, the court stated that the suit did not constitute a claim against the United States because the United States was the plaintiff rather than the defendant in the suit. While we agree with the court that giving expert testimony was not within the intended purview of § 205 as it then read,[3] we do not agree that the position of the United States as plaintiff or defendent is controlling in determining the application of § 205(1). Rather, we suggest that the inquiry into whether a matter is a claim against the United States should be focused on whether the United States has a significant monetary interest at stake in the lawsuit. *See also* Office of Legal Counsel Memorandum of November 9, 1966, to the Assistant Attorney General, Land and Natural Resources Division.

If you determine that this lawsuit does constitute a claim against the United States, the transaction described in your memorandum would seem to fall within the prohibition of § 205(1). If, however, the problem of this contingent fee had been raised at the time Mr. A was appointed United States Attorney, it may have been possible to arrange for him to receive *quantum meruit* compensation for his past service without contravening § 205(1). More specifically, Mr. A might have eliminated his interest in the claim by (1) reducing his fee to a sum certain calculated on the basis of work actually performed (rather than percentage of the amount recovered) and (2) collecting this amount (or a lesser amount discounted to account for the speculative nature of the fee entitlement) from his succeeding counsel. As you know, the Department routinely recommends this method to incoming attorneys who must eliminate contingent fee interests in litigation involving the United States. *See e.g.*, Office of Legal Counsel Memorandum of November 9, 1966, *supra*.

We recognize that it is not factually possible to turn back the clock in this case to remove the contingent nature of the tendered fee. On the other hand, a thorough review of the facts may reveal that the contingent aspect of this fee was effectively eliminated by the settlement agreement arranged prior to Mr. A's

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[2] We are not in a position to make this determination based on the scant facts provided by Mr. A, and we will defer to your judgment on this point.

[3] This view was incorporated into the statute when it was amended in 1962 *See* 18 U.S C § 205 (last clause) [exempting the giving of testimony under oath from the application of the statute].

assumption of federal office.[4] If your review of the facts convinces you that this was the case, we would not object to after-the-fact arrangement of the sort described above. That would simply mean that Mr. A's fee would have to be scrutinized and, if necessary, reduced to ensure that it represents no more than a fair hourly fee for services actually rendered.

In the future you may wish to take steps to encourage employees to make arrangements to eliminate contingent fees at the time that they begin government service. In the case of persons required to file financial disclosure forms, you will have an opportunity to raise and resolve such problems at the time that you review their financial disclosure reports. In some cases this issue will be raised by the report itself in the section disclosing relationships with former employers. In our view it would be a good practice to question prospective employees specifically about any interests in contingent fees, whether or not the issue is raised in their reports.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[4] In reviewing the facts, you should inquire into the reasons why (1) the settlement was not made final for a year and a half, (2) Mr. A was willing to give a full 50 percent of the fee to the succeeding counsel, and (3) the FmHA was willing to fund the settlement In addition, you should satisfy yourselves that Mr A played no role, as the United States Attorney, in convincing the FmHA to provide the loan that funded the settlement.

Applicability of the Uniform Relocation Assistance Act to the Community Development Block Grant Program

The Uniform Relocation Assistance and Real Property Acquisition Act (URA), which authorizes compensation for persons displaced by federally funded urban redevelopment, applies to the projects funded out of the Community Development Block Grant (CDBG) program, as amended by the Omnibus Budget Reconciliation Act of 1981.

The statutory language and legislative history of the Housing and Community Development Act of 1974 indicate that Congress intended the URA to apply to grants made under authority of that law, including grants under the CDBG program. Administrative practice and legislative consideration of the CDBG program since 1974 reflect that intention. The amendments made to the CDBG program by the Omnibus Budget Reconciliation Act of 1981 simplified the CDBG program and reduced the level of federal involvement; however, these amendments make no explicit reference to the URA and are not inconsistent with continued application of the URA. Therefore, they cannot be said to affect the continuing applicability of the URA to community development block grants.

November 5, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AND FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

I. Introduction

This memorandum responds to your request for our opinion concerning the applicability of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA), 42 U.S.C. §§ 4601–4655, to the Community Development Block Grant (CDBG) program, as recently amended by the Omnibus Budget Reconciliation Act of 1981 (Reconciliation Act). Pub. L. No. 97–35, 95 Stat. 357. The CDBG program was originally established by the Housing and Community Development Act of 1974 (HCDA). Pub. L. No. 93–383, 88 Stat. 633.

A similar issue was raised by a request submitted to this Office last year concerning the applicability of four cross-cutting civil rights statutes to the education and social services block grants created by the Reconciliation Act. In response to that earlier request, we determined that the specified cross-cutting statutes did apply to the education and social services block grants. Memoran-

dum for Michael Horowitz, Counsel to the Director, Office of Management and Budget, "Applicability of Certain Cross-Cutting Statutes to Block Grants Under the Omnibus Budget Reconciliation Act of 1981," January 18, 1982 (OLC Memorandum of January 18, 1982).* Although your recent request concerns a different cross-cutting statute and a different block grant program, several of the issues and principles discussed in the OLC Memorandum of January 18, 1982, are relevant to the question posed by your current request. We have therefore referred to its conclusions where appropriate.

In responding to your request, we have reviewed the relevant statutes, their legislative history, cases involving the URA and the HCDA, and related secondary sources. In brief, we have concluded (1) that Congress intended the URA to apply to the original CDBG program established in 1974, and (2) that Congress did not intend to alter this result when it amended the CDBG program in the Reconciliation Act.

These conclusions are set forth below as follows. In Section II, we discuss the statutory background of the URA and the original HCDA and describe the relevant provisions of each statute. In Section III, we consider the applicability of the URA to the original HCDA by reviewing the language and policy of the URA, the language and legislative history of the HCDA, HUD's prior interpretations of the applicability of the URA to the HCDA, relevant case law concerning this issue, and finally, legislative action between the original adoption of the HCDA and the adoption of the Reconciliation Act. In Section IV, we describe the specific changes made to the HCDA by the Reconciliation Act. Finally, in Section V, we discuss the applicability of the URA to the amended CDBG program.

II. Statutory Background: The URA and the HCDA

A. The URA

The URA was adopted in 1970 in order to establish a uniform program of relocation assistance for those displaced by federal and federally assisted projects. In the words of Section 201, 42 U.S.C. § 4621, the purpose of the URA was

> to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

Congress specifically linked the need for a uniform relocation assistance policy to the increasing involvement of the federal government in urban redevelopment.[1] The House Report stated:

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* NOTE: The January 18, 1982, memorandum is reprinted in this volume at p. 83, *supra*. Ed

[1] This point is further highlighted by the fact that the provisions of the URA were taken in substantial part from the relocation assistance provisions of the Housing and Urban Development Act. S Rep No. 488, 91st Cong , 1st Sess. 2 (1969).

> As the thrust of Federal and federally assisted programs have [sic] shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. When applied to densely populated urban areas, with already limited housing, the result can be catastrophic for those whose homes or businesses must give way to public needs. The result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs.

H.R. Rep. No. 1656, 91st Cong., 2d Sess. 2 (1970). Thus, Congress concluded that, particularly in the context of urban land acquisition, basic principles of fairness and equitable treatment required compensation to displaced persons beyond that which was constitutionally mandated.

A second major concern of Congress was that the basic right to receive adequate compensation when displaced by a federal or federally assisted program should be uniformly applied with respect to all such programs. Prior to the URA, various relocation assistance provisions were scattered throughout a number of federal statutes, and benefits to displaced individuals and businesses varied widely. For example, a person displaced by a federally assisted project in one state might have received extensive relocation assistance, while a person displaced by a similar project in another state might have received no assistance at all. The URA was designed to remedy this inequitable treatment by applying one set of compensation standards to all federally assisted projects. H.R. Rep. No. 1656, 91st Cong., 2d Sess. 2–3 (1970), Code Cong. & Admin. News 5850, 5851–52. *See* Note, *Relocation—The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970—An Empirical Study,* 26 Mercer L. Rev. 1329, 1341–42 (1975).

Finally, with respect to the general policy of the URA, it is important to note that relocation assistance was intended to compensate equitably not just individuals, but businesses as well. The definitions of "person" and "displaced person" (for whom relocation benefits must be provided) were drafted specifically to include partnerships, corporations, and associations, in addition to individuals. 42 U.S.C. §§ 4601(5) & 4601(6). In addition, the URA contains specific provisions relating to the manner in which businesses will be compensated when they are required to move as a result of federally assisted programs. 42 U.S.C. §§ 4622(a) & 4622(c). Thus, the URA is not a welfare measure, but rather a method of fairly compensating both individuals and businesses for the special burdens they may have to bear in connection with the acquisition of property for federal or federally assisted programs.

The URA imposes several specific requirements in order to fulfill this purpose. First, the Act requires certain payments to displaced individuals and businesses in order to compensate them for the actual financial losses involved in moving their homes or businesses, obtaining new mortgages, or locating replacement

housing. 42 U.S.C. §§ 4622–4624. Second, the Act provides for certain relocation assistance advisory services to those who are displaced. 42 U.S.C. § 4625(a). Finally, the Act requires the responsible agency to assure that substantially equivalent housing will be available within a reasonable period of time prior to displacement. 42 U.S.C. § 4625(c).

The URA applies these requirements not only to federal agencies, but also to state agencies that obtain federal financial assistance. Section 210 of the URA states that unless the head of the responsible federal agency receives satisfactory assurances from a state agency that the state will comply with the requirements set forth above, then "the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person. . . ." 42 U.S.C. § 4630. The term "federal financial assistance" is defined in the URA as "a grant, loan, or contribution provided by the United States. . . ." 42 U.S.C. § 4601(4). Thus, in order to receive federal funds for the purpose of acquiring property, a state must certify that it will comply with the requirements of the URA.

B. The HCDA

The HCDA was adopted in 1974 to consolidate and simplify a number of different housing and community development programs. *See* Pub. L. No. 93–383, 88 Stat. 633 (1974). The most notable feature of the HCDA was the creation of the Community Development Block Grant program, which transformed ten existing federal categorical grants into a single block grant program under which the federal government would allocate funds to local governments, which would then plan and administer their own community development programs with these federal funds.[2]

The principal purpose in adopting the block grant formula was to give the local governments the power to determine the projects on which the federal funds they received would be spent. As President Ford observed in signing the bill,

> In a very real sense, this bill will help to return power from the banks of the Potomac to people in their own communities. Decisions will be made at the local level. Action will come at the local level. And responsibility for results will be placed squarely where it belongs—at the local level.

10 Weekly Comp. Pres. Doc. 1060 (Aug. 22, 1974). *See* Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 Urban Lawyer 189, 190–91 (1975).

At the same time, however, Congress rejected revenue sharing's "no strings" approach. Congress defeated the Administration-supported revenue-sharing pro-

[2] For a description of the relationship and distinction between categorical grants, block grants, and revenue sharing, see our memorandum of January 18, 1982, at 17–19

posals and instead "adopted the block grant approach primarily to insure that Federal funds would be used with a priority to eliminate slums and blight and to upgrade and make the Nation's cities more livable, attractive and viable places in which to live." S. Rep. No. 693, 93d Cong., 2d Sess. 2 (1974). Thus, although the states were given the right to select the projects on which the funds would be spent, Congress at the same time intended to ensure that all the funds would be spent to further the specified goals of the HCDA.

This balance is reflected in the procedures adopted for implementation of the new CDBG program. These procedures can generally be divided into four separate categories: (1) Application Requirements; (2) HUD Review of Applications; (3) Allocation and Distribution Procedures; and (4) Performance Review. These categories are analyzed below in some detail in order to determine the level of federal involvement mandated by the HCDA and to establish a basis for comparing the changes in federal control wrought by the Reconciliation Act amendments to the CDBG program.

1. Application Requirements

The HCDA required all applications for CDBG funds to contain the following four elements: (1) a summary of a three-year community development plan that identified specific needs and objectives, set forth the activities that would be undertaken to meet community development needs and objectives, and was designed to eliminate or prevent slums and to provide improved community facilities and public improvements; (2) a housing assistance plan that surveyed the condition of available housing and specified an annual goal for the number of dwelling units or persons to be assisted; (3) satisfactory assurances that the program would be conducted in conformity with certain civil rights provisions; and (4) satisfactory assurances that the applicant had provided citizens with information about the proposed plan and had given them an opportunity to participate in the development of the application. These application requirements were far more limited than those previously required under the categorical grant programs, and they were designed to simplify the "lengthy, burdensome, and generally frustrating process by which HUD approves applications for various community development grants. . . ." H.R. Rep. No. 1279, 93d Cong., 2d Sess. 6 (1974).

2. HUD Approval Process

Under the HCDA, HUD was required to approve an application unless: (1) the description of needs was "plainly inconsistent" with the facts and data available to HUD; or (2) the activities identified in the application were "plainly inappropriate" to the needs identified; or (3) the application did not comply with the HCDA or other applicable laws. Congress intended that the presumption would be in favor of approval of an application and that HUD's review "should be limited in its scope. . . ." S. Rep. No. 693, 93d Cong., 2d Sess. 55 (1974), H.R.

Rep. No. 1279, 93d Cong., 2d Sess. 127–28 (1974); *see* Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 Urban Lawyer 189, 194 (1975). Congress intended to "reduce significantly the unnecessary 'second-guessing by Washington' that has been criticized under existing programs," and it expected that "the shift from project to program review will accomplish this, in large measure." S. Rep. No. 693, 93d Cong., 2d Sess. 56 (1974). This policy was underscored by the requirement that any application would be deemed approved unless HUD set forth specific reasons for disapproval within 75 days after receipt of the application.

3. Allocation and Distribution Procedures

The HCDA replaced the more discretionary allocation procedures contained in the previous categorical grant programs with a formula approach to be developed by HUD on the basis of several specified factors.[3] Once HUD developed this formula, the distribution procedures operated automatically.

4. Performance Review

The HCDA also contained specific procedures for HUD review of a grantee's performance under the CDBG program. HUD was required to make an annual review and audit of the grantee's performance in order to determine whether the grantee had carried out the program as described in its application, whether the program conformed to the requirements of the HCDA and other applicable laws, and whether the applicant maintained a continuing capacity to carry out the program. § 104(d), 88 Stat. 633 (1974). HUD was required to make appropriate adjustments in the amount of annual grants in accordance with its findings during the annual performance review. Thus, the performance review was designed to be a backup for the review of the original application.

III. Applicability of the URA to the HCDA

A. Statutory Language and Policy of the URA

By its terms, the URA seems to apply to community development block grants under the HCDA. The URA is applicable to "any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person. . . ." 42 U.S.C. § 4630. A CDBG award is clearly a grant to a state agency, and it is well within the definition of "federal

[3] "The formula amount is determined on a 4-factor basis including population, extent of poverty counted twice, and housing overcrowding." H.R Rep No. 1279, 93d Cong., 2d Sess. 131 (1974). Other than the discretion inherent in the development of the formula itself, HUD lacked discretion with respect to the distribution of the great bulk of the funds under the HCDA.

financial assistance."[4] In addition, the HCDA specifically contemplated assistance to state "programs" (such as the community development programs outlined in CDBG applications) which were likely to "result in displacement" of individuals or businesses. The CDBG program established by the HCDA seems to fall squarely within the contemplated scope of the relief provided by the URA.

Moreover, this result is consistent with the general policy of the URA. The principal policy judgment underlying the URA was the conclusion that, particularly in the context of the increasing federal subsidization of urban renewal, some form of statutorily required relocation assistance was necessary to compensate displaced individuals and businesses. Congress decided that since federal funds were being used to dislocate persons and businesses, federal funds ought to be available to pay for the full costs of each dislocation. Community development was one of the critical areas upon which Congress focused when it enacted the URA, and relocation assistance was regarded not as a welfare program, but rather as the only fair method of spreading the burden imposed by projects undertaken on behalf of the public.[5] Thus, even though the HCDA permitted the states to determine what types of projects to pursue, it did not supplant Congress' determination that federal funds should not be used to displace individuals and businesses without adequate compensation. In addition, the important goal of uniform treatment of persons displaced by federally assisted projects regardless of the project's location[6] could not accomplished if relocation assistance were merely optional under the HCDA.

B. Statutory Language and Legislative History of the HCDA

Having determined that community development block grants under the HCDA are the type of federal assistance that the URA was intended to govern, the question remains whether there is anything in the statutory language or legislative history of the HCDA itself that is antithetical to the application of the URA. On the whole, both the statutory language and the legislative history of the HCDA suggest that Congress assumed that the URA would apply to block grants under the HCDA. The statutory language does not specifically refer to the URA, but it does require the Secretary to disapprove an application not in compliance with the requirements of "other applicable law." Thus, Congress expected that at least some laws other than the HCDA would govern block grants.

The legislative history of the HCDA suggests that Congress assumed that the URA was among the statutes that would apply to block grants. Two sections proposed as part of the Senate bill that became the HCDA were included to expand the coverage of the URA.[7] Although these provisions were not ultimately

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[4] 42 U S C § 4601(3) defines state agency to mean, *inter alia*, "any department, agency, or instrumentality of a State or of a political subdivision of a State . . ." 42 U.S.C. § 4601(4) defines "Federal financial assistance" as "a grant, loan, or contribution provided by the United States "

[5] In this sense, the URA is more akin to a cross-cutting civil rights statute than to a welfare statute or other federal grant program. Although it results in the payment of money, in essence it establishes certain rights to fair and equitable treatment

[6] *See supra.*

[7] These provisions are discussed in your memorandum of July 30, 1982, at pages 11–13.

adopted, they strongly suggest that at least the Senate understood that the URA would apply to the HCDA block grants.

Proposed § 309 would have provided for additional federal payments to compensate a local community development agency for required relocation payments beyond the amounts to which the local agency would otherwise have been entitled under the URA. The Senate Report explained the need for this provision as follows:

> The Committee took cognizance of the fact that the Uniform Relocation Assistance Act of 1970 requires that the Federal government no longer pay the full relocation cost after July 1, 1972. Under this act the Federal contribution for relocation assistance will be significantly reduced. Many localities have already notified members of the Congress that this change will drastically curtail their ability to carry out community development activities. The Committee, therefore, includes this provision [proposed § 309] in order to express its serious concern about the expected adverse effect of the pending relocation provisions on housing and community development programs, and records its view that Federal contributions for relocation costs associated with Federally-assisted development programs should remain at their present level.

S. Rep. No. 693, 93d Cong., 2d Sess. 51 (1974). As your memorandum of July 30, 1982, recognizes, this provision indicates that the Senate "believed the URA to be applicable to displacement resulting from acquisition for title I. . . ." *See* your memorandum of July 30, 1982, at 12.

In addition, proposed § 315 of the Senate bill was an amendment to the URA to extend its coverage of only those who were displaced by actual acquisitions of property to those who were displaced by code enforcement, rehabilitation, and demolition as a result of activity assisted under the HCDA. The Senate Report described this provision as follows:

> UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970
>
> Sec. 315—Would extend the definition of a person displaced as a result of the acquisition of real property to include those who are required to discontinue business or move from their dwelling as a direct result of activity assisted under this Chapter.

S. Rep. No. 693, 93d Cong., 2d Sess. 136 (1974). This provision also suggests that the Senate understood that the URA would apply to the HCDA, and by this provision it sought to extend the URA beyond those persons to which it would otherwise have been applicable. There would have been no reason to broaden the range of persons eligible for URA benefits if the Senate had concluded that the URA would not apply to the HCDA.

Although these proposed expansions of the URA were not ultimately adopted as part of the HCDA, there is no evidence that they were rejected because the Senate believed the URA would not apply. To the contrary, the inclusion of these provisions to expand the coverage of the URA in the proposed HCDA indicates that there was little question, at least in the Senate, that the URA would apply to the HCDA.[8] Thus, although the legislative history is not conclusive, it strongly suggests that Congress assumed that the URA would be applicable to community development block grants.

C. HUD's Contemporaneous Construction of the Applicability of the URA to Block Grants

HUD's regulations implementing the URA and the HCDA are unquestionably relevant to the issue whether the URA is applicable to the HCDA. The Supreme Court has noted that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Court has also stated that an agency's interpretation is particularly persuasive "when the administrative practice at stake 'involves a contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961) (citation omitted). On this basis, the Court has concluded that to sustain an agency's interpretation of a statutory term, the Court "need not find [the agency's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153 (1946). Thus, HUD's construction of the URA and the HCDA is entitled to considerable weight in determining the applicability of the URA. *See* 2A, C. Sands, Sutherland Statutory Construction, §§ 49.01–49.11 (4th ed. 1973); McMillan and Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action*, 1982 Duke L. J. 333, 373–74.

Since the enactment of the HCDA, HUD has consistently construed the URA to be applicable to community development block grants. Shortly after the adoption of the HCDA, HUD adopted regulations for the implementation of that Act, which included a requirement that grantees comply with the URA. 39 Fed. Reg. 40144 (Nov. 13, 1974). Subsequently, in a revision of its regulations

[8] Contrary to your suggestion (*see* your memorandum of July 30, 1982, at p 13), we do not regard these provisions as being consistent with merely discretionary application of the URA; nor do we believe that their deletion suggests that Congress intended all relocation assistance to be at the choice of the grantee Similarly, we do not believe that the inclusion of relocation assistance in § 105's list of authorized uses of block grant funds means that the provision of relocation assistance is discretionary. That Congress included relocation assistance as one of the permissible uses to which block grant funds could be put does not indicate congressional intent that application of the URA be permissive rather than mandatory. *See* § 105, 88 Stat. 633 (1974). Rather, § 105 by its terms was intended simply to set forth the permissible uses of block grant funds. The section sets boundaries for local programs; it does not make otherwise-required activities merely permissive

concerning the URA, HUD set forth as first on a list of HUD grants to which the URA was applicable, "community development block grant[s] under title I of the Housing and Community Development Act of 1974." 40 Fed. Reg. 7602, 7604 (Feb. 20, 1975). HUD's regulations concerning the URA were subsequently revised in 1978, at which time HUD stated, "[t]he basic objectives of the proposed revision are to adopt requirements appropriate to the community development block program authorized by Title I of the Housing and Community Development Act of 1974. . . ." 43 Fed. Reg. 13836 (March 31, 1978). Thus, from the adoption of the HCDA in 1974 until the enactment of the Reconciliation Act in 1981, HUD consistently interpreted the URA to apply to community development block grants.

D. Case Law Concerning the Applicability of the URA to the HCDA

As your memorandum points out, no cases have ever directly considered the issue whether the URA is applicable to community development block grants. Since HUD regulations have specifically provided for application of the URA to block grants, no litigation has arisen concerning that basic issue. HUD did, however, impose certain restrictions on the extent to which the URA applied to situations other than where the federal or local government acquired property as part of an urban renewal project. These restrictions prompted litigation on the scope of the URA.

For example, in *Alexander* v. *HUD*, 441 U.S. 39 (1979), the Supreme Court resolved a split in the circuits concerning whether the URA applied to individuals who were displaced when HUD foreclosed mortgages after private parties defaulted on federally guaranteed loans. In that case the Court agreed with HUD's interpretation that the URA applied only to acquisitions of property that occurred as part of a comprehensive program, and not to individual mortgage foreclosures. In other cases, the lower courts were called upon to resolve similar disputes. In *Devines* v. *Maier*, 494 F. Supp. 992 (E.D. Wis. 1980), a district court concluded that the URA did not apply to non-acquisition activity such as intensive housing code enforcement programs carried on with block grant funds. In *Young* v. *Harris*, 599 F.2d 870 (8th Cir. 1979), the Eighth Circuit decided that the URA did not apply to redevelopment projects undertaken by private developers, even if the private developers were indirectly aided by CDBG funds.

Although none of these cases dealt specifically with the question at issue here, several of the cases assume (as your memorandum recognizes) that the URA is generally applicable to community development block grants. In *Young* v. *Harris*, for example, the court stated the applicable test as follows:

> Whether the project has received federal financial assistance depends upon an evaluation of the city's use of the Community Development Block Grant funds. Since we have already concluded that the city's agreement with the developer clearly did not render the developer's project a joint undertaking, financial assist-

> ance for municipal services cannot necessarily be equated with financial assistance to the private redevelopment project. This is especially true if the city was not required directly to apply or channel the Community Development Block Grant funds to the municipal services it provided in the Pershing-Waterman area. In any event, federal financial assistance to a private project is insufficient to bring the project into the realm of the URA.

599 F.2d at 878 (footnote omitted). *See also Devines* v. *Maier*, 494 F. Supp. at 996. Your memorandum also cites two unreported cases in which courts have commented (although not held) that the URA is applicable to community development block grants. *Grand Boulevard Improvement Ass'n.* v. *City of Chicago*, No. 80–C–4760, (N.D. Ill., Oct. 14, 1981); *Campbell* v. *Hills*, No. 75–1331 (W.D. Pa., Oct. 15, 1975). Thus, although no court has expressly and categorically held that the URA is applicable to community development block grants, every court that has dealt with the subject has assumed that result. We are aware of no contrary holding or even contrary *dictum*.

E. Legislative Action After the HCDA and Prior to the Reconciliation Act

After the enactment of the HCDA, Congress reconsidered the CDBG program several times prior to the Reconciliation Act. The HCDA was reauthorized and amended in both 1977 and 1980. Housing and Community Development Act of 1977, 91 Stat. 1111 (1977); Housing and Community Development Act of 1980, 94 Stat. 1614 (1980). At each of these times during the reauthorization and amendment of the HCDA, Congress could have altered HUD's well-known determination that the URA applied to community development block grants, but it chose not to do so.[9] When Congress reenacts a statute that has been contemporaneously interpreted by the administrative agency responsible for its enforcement, courts presumptively regard the administrative interpretation to be correct. *Snyder* v. *Harris*, 394 U.S. 332, 339 (1969). This rule is "based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon reenactment." 2A, C. Sands, Sutherland Statutory Construction, § 49.09 at 256–57 (4th ed. 1973). In this instance, the reauthorization of the HCDA in 1977 and 1980 is strong evidence that Congress intended the URA to apply to community development block grants.

Moreover, Congress passed certain amendments to the HCDA in 1978 that provide additional evidence of its intent to apply the URA to the CDBG program.

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[9] In fact, as the House Report noted in 1977, "[w]hen the program was enacted in 1974, it was recognized that experience with the program and that further study of the mechanics of grant allocations to various recipients could lead to extensive changes in the program in the course of reauthorization." H.R Rep. No. 236, 95th Cong., 1st Sess 2 (1977). When Congress reauthorized the HCDA in 1977, the House Housing and Communities Subcommittee "undertook a thorough review of the program. . ." and ultimately made "numerous changes in the program's operations." *Id.*

Congress adopted an amendment to the HCDA designed to permit grantees to utilize block grant funds to provide relocation payments and assistance to those displaced by private developer projects.

The Senate Report described this provision as follows:

> Section 103(b) would enable localities to use community development block grant funds to provide relocation payments and assistance when the communities determine these are appropriate to the community development program. Under the existing program, only displacements caused by activities assisted under the block grant program are eligible for assistance. This provision would permit assistance where there is a displacement of tenants under private developer-Section 8 projects, or as a result of other public or private actions which cause displacement but are not presently covered by the Uniform Relocation Act.

S. Rep. No. 871, 95th Cong., 2d Sess. 12 (1978). A similar passage is set forth in the House Report, which indicates that the provision was designed to give more discretion to local communities to make relocation payments with CDBG funds, "except as may be required under the Relocation Act." H.R. Rep. No. 1161, 95th Cong., 2d Sess. 14 (1978). These statements suggest that although certain types of displacements might not have been covered by the URA, at least some aspects of the community development block grant program were covered.

This conclusion is confirmed by the Conference Report on the same provision:

> [T]he conferees understand that the Department *has narrowly interpreted the Uniform Relocation Act* to exclude displacement caused by certain public or private actions which have been undertaken with the use of Federal funds. The validity of this interpretation is currently before the courts. Both the Senate bill and the House amendment contained a provision which would enable localities to use Community Development Block Grant funds to provide relocation payments and other assistance to persons who are displaced by private or public activities, when such payments or assistance are appropriate to the locality's community development plan. The conferees wish to make clear that the enactment of that provision shall not be read as an endorsement of any interpretation of the URA; rather, the adopted provision is intended to permit CDBG funds to be used for relocation payments, whether or not the displacement is covered by the URA.

H.R. Rep. No. 1792, 95th Cong., 2d Sess. 99–100 (1978) (emphasis added).

This statement demonstrates that Congress was aware of the cases previously cited concerning the issue whether the URA was applicable to situations other than acquisitions undertaken by state or local governments as part of an urban renewal plan. The statement also shows that the Committee regarded HUD's

interpretation of the URA as a narrow one. Although the Committee purports not to pass judgment on the issue then before the courts (whether a broader interpretation was required by the URA), at the very least, the statement shows that Congress accepted HUD's interpretation that the URA applied to some aspects of the CDBG program. Thus, Congress has implicitly endorsed HUD's conclusion that the URA is applicable to the HCDA.

F. Summary

On the basis of the foregoing evidence, we have concluded that there is little doubt that Congress intended the URA to apply to the CDBG program enacted by the HCDA. This conclusion is consistent with the statutory language and legislative history of both acts, their administrative construction, relevant court cases, and subsequent legislative action. On the basis of this conclusion, we now proceed to an analysis of the effect of the Reconciliation Act.

IV. The Omnibus Budget Reconciliation Act of 1981

A. Background

The Reconciliation Act was an unprecedented piece of legislation that, through the new mechanism of the budget reconciliation process, converted numerous existing federal categorical grant programs into a series of block grants to state and local governments. The general background of the block grants enacted by the Reconciliation Act is described in our memorandum of January 18, 1982, concerning the applicability of cross-cutting civil rights statutes to two of the Reconciliation Act block grants. *See* OLC Memorandum of January 18, 1982. [*See* p. 83 of this volume.] In many instances, the new block grants marked a radical departure from the existing system of federal categorical grants.[10]

The changes made by the Reconciliation Act to the CDBG program, however, were relatively limited. The community development aid program was already in the form of a block grant, and no federal categorical grants were added to the CDBG program. Instead, the program was simplified and streamlined, particularly in the application process, as described in greater detail below.

B. Specific Changes in the CDBG Program

The Senate Report described the purpose of the Reconciliation Act amendments to the CDBG program as follows:

> Our intent is to greatly reduce burgeoning administrative hurdles forced in the path of local governments seeking "entitlement" community development grants. In so doing, it is our

[10] This was particularly true, for example, with respect to the education block grant discussed in our previous memorandum.

> purpose to lessen significantly this improper Federal intervention in the local decision making process.

S. Rep. No. 139, 97th Cong., 1st Sess. 226 (1981).

To a great extent, Congress seems to have viewed the Reconciliation Act amendments to the CDBG program as designed to recapture the spirit of the original HCDA. The principal criticisms of the CDBG program related not to the specific provisions of the HCDA, but rather to HUD's implementation of the statute and specifically its tendency to substitute its own judgment for that of local officials. *See* Williamson [Assistant to the President for Intergovernmental Affairs], *Community Development Block Grants*, 14 Urban Lawyer 283, 288–90 (1982). For example, the Senate Report noted with approval that the HCDA had made possible a reduction in federal regulations from 2600 pages to only 52 pages, but then commented with dismay that in the ensuing years, the number of pages of regulations had begun to "approach the 2600 replaced in 1974." The Report concluded, "[f]ederal intrusion into the local policy making machinery is real and direct. The notion of entitlement is, at best, clouded by the events of recent history." S. Rep. No. 139, 97th Cong., 1st Sess. 227 (1981). In other words, Congress objected to the recent HUD regulations, which had the effect of converting a program where states were entitled to certain funds into a program that was administered in a style appropriate to categorical grants. Thus, Congress acted to simplify the administration of the CDBG program and return the program to the more limited HUD involvement contemplated by the drafters of the HCDA.

Congress implemented this purpose by streamlining the application process. In place of the more detailed statements of needs and objectives and projected uses of block grant funds, the Reconciliation Act required only "a final statement of community development objectives and projected use of funds. . . ." Section 302(b), 95 Stat. 384, 42 U.S.C.A. § 5304(a)(1) (1982 Supp.). HUD's previous right to review the statements to determine whether they were "plainly inconsistent" or "plainly inappropriate" was eliminated because Congress found that "[t]he HUD regional and area office staff has used the application process far too frequently as a means for imposing HUD's views of acceptable program activity on local entities." S. Rep. No. 139, 97th Cong., 1st Sess. 227 (1981). In addition, the Reconciliation Act eliminated the complex citizen participation procedures of the old statute, but retained requirements for publication of the proposed community development activities and public hearings in order to assure full participation by affected citizens. *See* 42 U.S.C.A. § 5304(a)(2) (1982 Supp.); S. Rep. No. 139, 97th Cong., 1st Sess. 228 (1981).

Other application requirements remained as part of the CDBG program. Communities are still required to make a number of certifications "to the satisfaction of the Secretary," including certifications that the grantee has complied with the public notice and hearing requirements, that the grant will be conducted and administered in conformity with certain civil rights statutes, that the projected use of funds will "give maximum feasible priority to activities

which will benefit low- and moderate-income families or aid in the prevention or elimination of slums or blight," and that "the grantee will comply with the other provisions of this chapter and with other applicable laws." 42 U.S.C.A. § 5304(b)(3)–(4) (1982 Supp.). In addition, the Reconciliation Act continued to require entitlement communities to certify that they are following a HUD-approved housing assistance plan. 42 U.S.C.A. § 5304(c) (1982 Supp.).

Outside of the application process, the CDBG program remained substantially the same. The Senate Report pointed out, for example, that the allocation process for the entitlement program remained "essentially unchanged." S. Rep. No. 139, 97th Cong., 1st Sess. 241 (1981). States were, however, given the option of administering block grant distribution for non-metropolitan areas.[11] If a state declines to administer the small cities program, HUD will administer the program in accordance with the provision governing the entitlement program. 42 U.S.C.A. § 5306(a) (1982 Supp.).

The Reconciliation Act also left intact the requirement for annual performance review by HUD. HUD is authorized to make adjustments in the block grants based upon its annual performance review. *See* S. Rep. No. 139, 97th Cong., 1st Sess. 227 (1981). Thus, the underlying theory of the Reconciliation Act changes to the CDBG program was that HUD's review of initial applications should be replaced by the annual review of actual performance under the CDBG program.

V. Applicability of the URA to the Amended CDBG Program

A. Applicable Legal Standard

The ultimate legal issue addressed in this memorandum is whether the URA applies to the CDBG program as amended by the Reconciliation Act. As discussed above, it seems clear that the URA was intended to apply to the original HCDA. Therefore, the remaining question is whether, in amending the HCDA, Congress intended that the URA no longer apply to the CDBG program. As your memorandum suggests, there is no direct discussion of the URA in the Reconciliation Act. Thus, since the Reconciliation Act did not create a new statute, but simply modified the CDBG program, the question is whether there is evidence that Congress intended to alter the applicability of the URA to community development block grants, *i.e.*, whether the Reconciliation Act impliedly repealed the URA with respect to the CDBG program.[12]

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[11] The Reconciliation Act also shifted the balance of funding between the entitlement metropolitan communities and non-metropolitan areas from 80–20 percent to 70–30 percent. Although a number of states have chosen to take over the small cities CDBG program, several of the larger states, including California and New York, have chosen not to take over the program. Williamson, *Community Development Block Grants*, 14 Urban Lawyer 283, 296 n.82 (1982)

[12] Your memorandum suggests that "the present inquiry does not raise the issue of implied repeal, but concerns the applicability *vel non* of the URA itself." (Your memorandum of July 30, 1982 at p. 20, fn 3.) Since we have determined, however, that the URA was intended to apply to the original HCDA, the question of the effect of the Reconciliation Act necessarily involves the issue of implied repeal. It is axiomatic that new amendments and an existing statute must be read together as one statute *Kirchner v. Kansas Turnpike Authority*, 336 F 2d 222, 230 (10th Cir 1964); *see* 1A. C. Sands, Sutherland Statutory Construction, §§ 22.34–35 (4th ed. 1972) Thus, the Reconciliation Act amendments must be read as a part of the existing CDBG program, to which, as we have demonstrated, Congress clearly intended the URA to apply.

In our memorandum of January 18, 1982, we set forth the applicable legal standard for determining whether Congress has impliedly repealed an earlier law. As we stated there, repeals by implication are disfavored, and, in general, courts will require clear and convincing evidence that a later statute is impossible to reconcile with the earlier law. OLC Memorandum of January 18, 1982, at 23–28. Thus, this question must be resolved

> by first attempting to ascertain if Congress made a "clear and manifest" expression of such intention, especially whether it made an affirmative expression of such intent. If it did not do so, we must then examine whether the [statutes] are irreconcilable.

OLC Memorandum of January 18, 1982, at 28.

B. Applicability of the URA

That the Reconciliation Act does not refer to the URA is not an indication that Congress intended it not to apply to block grants in the future. To the contrary, since Congress was unquestionably aware that URA was being applied to the CDBG program, if Congress had intended the URA not to apply, it would have explicitly stated that it wished to change current law. Regardless of the extent of the changes made in the CDBG program, the Reconciliation Act did not purport to create a new statute; it simply amended the existing CDBG program. Thus, the fact that Congress made no mention of the URA is evidence that it intended the URA to continue to apply to the CDBG program, rather than the contrary.

This conclusion is confirmed by Congress' acknowledgment that, except for the specified changes in the application process, Congress intended that its actions not change the existing law. The Senate Report stated that the amended act

> retains the thrust and purposes of the 1974 Act but eliminates the application, application review and citizen participation requirements of the current law. In all other major respects the bill retains current law or its intent.

S. Rep. No. 139, 97th Cong., 1st Sess. 237 (1981).

In addition, the specific changes made by the Reconciliation Act are not incompatible with continued application of the URA to the amended CDBG program. The principal changes made by the Reconciliation Act were designed to streamline the application process and reduce the role of HUD in evaluating and approving applications. These procedural changes to reduce initial federal review, however, do not conflict with HUD enforcement of the URA. States can continue to certify that they will comply with the requirements of the URA without imposing any additional burden upon the application process. That Congress intended to simplify the application procedures does not necessarily mean that it also intended to eliminate substantive requirements such as the URA. To the contrary, the Senate Report states, "[i]t should be emphasized that

the Committee's intent is to cause procedural simplification rather than substantive change." S. Rep. No. 139, 97th Cong., 1st Sess. 227 (1981).

Moreover, although Congress intended to reduce federal review, particularly at the time of application, substantial responsibility remains with HUD to review local CDBG programs. HUD retains the discretion to review the certifications made by the applicant under Section 5304(b),[13] and the Secretary must have approved a housing assistance plan for any entitlement area to receive a CDBG award. Finally, each recipient of CDBG funds must be reviewed annually by HUD to determine whether its use of CDBG funds is consistent with the requirements of the Act. Thus, the elimination of HUD review of an applicant's statement of needs and contemplated uses does not mean that there will ultimately be any less review by the federal government; it simply changes the timing of that review. The remaining provisions for federal review are more than adequate to ensure continued compliance with the URA.

This conclusion is reinforced by the self-enforcing nature of the URA. If local grantees do not make proper relocation payments or provide the assistance specified by the URA, affected property owners may vindicate their rights in court. *See Devines* v. *Maier*, 494 F. Supp. 992 (E.D. Wis. 1980). Thus, the URA could be enforced without any federal intervention at all.

Finally, continued application of the URA would not conflict with the underlying policy of the Reconciliation Act to reduce federal involvement in the selection of community development projects. The URA was not designed to tell federal grantees how to design or implement a community development plan; rather, it was intended to spread more equitably the burden imposed by whatever choices were made in the implementation of a community development plan. Moreover, the Reconciliation Act was designed to recapture the purpose and intent of the original HCDA, to which the URA was clearly intended to apply. Thus, the URA is fully consistent with the underlying policy of the Reconciliation Act to permit more local autonomy in the selection of community development programs.

C. Arguments That the URA Should Not Apply to the Amended CDBG Program

In your memorandum you suggest several reasons why the URA should be interpreted as not applicable to the amended CDBG program. First, you suggest that although block grant funds are clearly "federal financial assistance" within the meaning of the URA, "it is less clear whether a provision applicable to programs in which an agency must 'approve' a 'grant' to defray a cost of 'program or project,' can be considered applicable to the amended Community Development Block Grant program, in which the Secretary distributes funds on a nondiscretionary basis to states, according to a statutory formula, and in which the states then use the funds for programs or projects at their own discretion,

[13] As previously noted, these certifications must be made "to the satisfaction of the Secretary."

within the constraints of categories of eligible activities." *See* your memorandum of July 30, 1982, at 21.

The language of the URA, however, seems clearly to cover the type of program envisioned by the amended CDBG program. Although an application need not identify each project in detail, the grantee must describe a "program" that will utilize federal funds. As a technical matter, there is little doubt that HUD must "approve" these grants. Although HUD no longer reviews the statement of needs and projected uses at the time of application, HUD does have discretion in reviewing the acceptability of the required certifications and the Housing Assistance Plan, which must accompany applications from all entitlement areas. Moreover, HUD has the power during its performance review to adjust grants on the basis of its findings. Thus, the amounts of the subsequent grants are inevitably based upon HUD approval of the grantees' prior performance. We have found no evidence in either the statutory language or the legislative history of the URA to suggest that Congress expected that a greater degree of federal involvement would be necessary before states could be required to follow the provisions of URA in using federal funds as part of a community development program.

Finally, we note that this argument simply extends too far in that it would also apply equally well to the original HCDA. Since the URA seems clearly to apply to the original HCDA (an interpretation that not only seems apparent on the face of the statutes, but which has also been accepted by HUD, Congress, and the courts), this argument does not provide a basis for concluding that the Reconciliation Act amendments to the CDBG program were intended to foreclose application of the URA.[14]

You have also suggested that non-applicability of the URA is supported by *Goolsby* v. *Blumenthal,* 590 F.2d 1369 (5th Cir.) *(en banc), cert. denied,* 444 U.S. 970 (1979). In that case, the Fifth Circuit decided that the URA was not applicable to the Revenue Sharing Act, 31 U.S.C. §§ 1221–1265. This conclusion was based on three factors: (1) the relationship between the specific provisions of each statute; (2) the legislative history of the Revenue Sharing Act, specifically as it concerned the absence of "federal strings" attached to the receipt of revenue sharing funds; and (3) Congress' failure to overturn an earlier court decision that held the provisions of NEPA not to be applicable to the Revenue Sharing Act.

Your memorandum relies solely on the first aspect of the *Goolsby* decision, in which the court concluded that there was an insurmountable conflict between the policies of the two Acts that would have posed substantial problems if the URA had been applied to states receiving revenue sharing funds. The court reached

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[14] One might contend that HUD's interpretation of the effect of the Reconciliation Act is entitled to great deference. Although we of course agree with this general principle, the Supreme Court has held that the degree of deference owed to an agency interpretation depends on several factors, including "its consistency with earlier and later pronouncements. . . ." *Skidmore* v. *Swift & Co.,* 323 U.S 134, 140 (1944). When an agency changes a long-held interpretation of a statute or regulation, courts need not defer to the agency's revised interpretation *Standard Oil Co.* v. *DOE,* 596 F.2d 1029 (Temp Emer. Ct App. 1978). In this instance, your proposed interpretation of the CDBG program is not consistent with previous HUD interpretations that apparently have been accepted by Congress and the courts Thus, the interpretation now tendered by HUD would not, we believe, be accorded the same level of deference by the courts as its previous interpretation.

this conclusion by determining that revenue sharing payments were automatically made upon the receipt of certain minimal assurances from the states. The court contrasted this scheme with its finding that the URA contemplated "discretionary federal approval and specific requests to fund specific projects."[15] Thus, the court concluded that it was "at a loss to understand how these two Acts can work in consort if one Act provides for automatic distribution and the other Act contemplates prior federal approval for specifically proposed projects." 590 F.2d at 1371–72.

This type of conflict does not, however, exist with respect to the URA and the amended CDBG program. First, the amended CDBG program does not on its face have the same no-strings approach as revenue sharing. As we previously noted, there is some federal discretion in the approval of grants and in the review of grantees' performance. Moreover, in contrast to the Revenue Sharing Act, the HCDA requires federal funds to be utilized for one of the specifically enumerated purposes set forth in the Act.

Second, the URA's requirement that the head of a federal agency shall not approve a grant unless he receives satisfactory assurances that the URA will be followed is not inconsistent with this CDBG mechanism. Ever since the adoption of the HCDA in 1974, HUD has been able to implement the URA by requiring satisfactory assurances in grant applications. Nothing in the changes made by the Reconciliation Act makes it any more difficult to apply the URA to CDBG grants. HUD can still require the same assurances and can monitor compliance with the URA through its performance review. If *Goolsby*'s suggestion that "the URA envisions federal control over a funded project while revenue sharing does not" (590 F.2d at 1372) is read to require federal approval of individual projects, then our conclusion is that this statement goes too far and does not accurately characterize the URA.[16] As long as a program permits the federal government to require the proper assurances and determine whether a grantee has complied with the URA's requirements, then that program is consistent with the structure of the URA.

Finally, although *Goolsby* does contain broad language concerning the scope of the URA, the *Goolsby* court's real concern seems to be suggested by its reference to the "vast administrative problems in determining when a project is funded with revenue sharing money." 590 F.2d at 1372. Since there was so little federal direction with respect to how revenue sharing funds would be spent, there would indeed have been serious problems in implementing the URA in the context of the revenue sharing program. The same problem does not exist, however, with respect to the amended CDBG program. HUD has been able to trace the use of federal funds without any significant problems, and the Reconciliation Act amendments will not impede this ability in any material way.[17]

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[15] This finding was based on the statutory language that "[t]he head of a Federal agency shall not approve any grant . . . unless he receives satisfactory assurances from such State agency that [the URA will be followed]." 590 F.2d at 1371

[16] Under this reading, the URA would not have been applicable to the original HCDA

[17] Courts have not permitted states to avoid responsibilities imposed by cross-cutting statutes by the expedient of diverting block grant funds to other projects and replacing them with state funds. *See Ely* v. *Velde*, 497 F.2d 252 (4th Cir 1974) (application of NEPA and the National Historic Preservation Act to Law Enforcement Assistance Administration (LEAA) block grants).

The other two elements relied upon by the *Goolsby* court strongly suggest that the URA should continue to apply to the amended CDBG program. The second factor considered in *Goolsby* was the legislative history of the Revenue Sharing Act, which indicated that Congress had considered and rejected imposing federal strings upon revenue sharing funds other than the requirements specifically set forth in the Revenue Sharing Act. 590 F.2d at 1372–75. In the case of the amended CDBG program, however, there are no such indications in the legislative history. To the contrary, the legislative history suggests, as previously indicated, that Congress intended the URA to apply to the CDBG program.

The final factor upon which *Goolsby* relied was Congress' failure to overturn an earlier court of appeals decision which held that NEPA did not apply to the Revenue Sharing Act. *See Carolina Action* v. *Simon*, 522 F.2d 295 (4th Cir. 1975). In the present case, however, the opposite factual setting exists. HUD specifically by regulation applied the URA to the CDBG program, and Congress failed to overturn that requirement. Congress had previously recognized and discussed HUD's policies with respect to application of the URA, but it chose not to change those policies. Thus, under the *rationale* of *Goolsby*, Congress' failure to change HUD's explicit interpretation is evidence that Congress intended the URA to continue to apply to the amended CDBG program.

Moreover, in relying upon Congress' failure to overturn the prior court decision on the applicability of NEPA to revenue sharing, the *Goolsby* court concluded that, even though the URA is more specific and could apply in a situation where NEPA did not, it would be "incongruous to distinguish between the two acts." 590 F.2d at 1377. Therefore, the court ruled that the fact that NEPA did not apply to revenue sharing was evidence that the URA did not apply as well. In the case of the amended CDBG program, precisely the contrary is true. Congress has implicitly recognized that NEPA *does* apply to the HCDA and, in fact, has adopted a special provision to permit local grantees to carry out the federal government's responsibilities under NEPA.[18] Thus, under the principle of *Goolsby*, the applicability of NEPA to the CDBG program suggests that the URA should also apply.

In sum, the facts relating to the Revenue Sharing Act are sufficiently different from the amended CDBG program to distinguish *Goolsby* from the present issue. In fact, the principles established by *Goolsby* suggest a different result in this case, that the URA should continue to apply to the amended CDBG program.

The present facts seem closer to those considered by the court in *Ely* v. *Velde*, 451 F.2d 1130 (4th Cir. 1971); 497 F.2d 252 (4th Cir. 1974).[19] In that case, the

[18] Section 104(h)(1) of the HCDA states that "in lieu of the environmental protection procedures *otherwise applicable*," HUD may require a local grantee to assume the Secretary's responsibilities under NEPA. (Emphasis added) This language and the legislative history of the HCDA suggest that Congress assumed that NEPA would apply to the CDBG program. *See* H.R. Rep. No 1114, 93d Cong., 2d Sess. 50 (1974); 120 Cong. Rec. 28148 (1974) (Statement of Senator Jackson) Subsequent cases and scholarly commentary have also assumed that NEPA would apply to the HCDA in the absence of HUD regulations implementing § 104(h). *Ulster County Community Action Committee, Inc.* v. *Koenig*, 402 F. Supp 986, 991 (S.D.N.Y. 1975); Notis-McConarty, *Federal Accountability· Delegation of Responsibility by HUD under NEPA*, 5 Env. Aff. 121 (1976)

[19] The Fourth Circuit held, on its first hearing of *Ely* v. *Velde*, that NEPA and the National Historic Preservation Act applied to LEAA block grants. Subsequently, plaintiffs sued again after the state attempted to avoid the court's first order by shifting the federal funds to a different project. On the second hearing, the court reaffirmed its earlier decision and ruled that the state could not avoid that decision merely by shifting the federal funds to a different project.

court determined that both NEPA and the National Historic Preservation Act (NHPA) applied to block grants distributed by the Law Enforcement Assistance Administration (LEAA). The court noted that "[a] block grant is not the same as unencumbered revenue sharing, for the grant comes with strings attached." 497 F.2d at 256. Since the block grant was not for general purposes, but for the specific purposes described in the statute, the court held that the state was not entitled to use the money without observing the requirements of NEPA and NHPA.

The amended CDBG program is closer to the LEAA block grant of the *Ely* case than it is to the revenue sharing provisions at issue in *Goolsby*. Although the amended program simplifies the application process and permits states more discretion in determining the type of community development projects on which CDBG funds will be expended, the grants do not come without federal strings. HUD still must review certain aspects of the application prior to the approval of a grant, and HUD's performance review is designed to determine whether the program has been carried out in a manner consistent with the provisions of the HCDA. *Ely* thus confirms that the URA should continue to apply to the amended CDBG program.

VI. Conclusion

In summary, we have concluded that there is little question that the URA was intended to apply to the original block grant program established by the Housing and Community Development Act of 1974. Congress was undoubtedly aware that HUD by regulation determined that the URA applied to the block grant program and implicitly approved of this result. The Reconciliation Act amendments to the CDBG program do not make any explicit reference to the application of the URA. Although they simplify the application process and diminish the amount of federal involvement at the initial application stage, the amendments are not inconsistent with continued application of the URA. In the absence of a more explicit statement that Congress intended to change the established practice of applying the URA to the CDBG program, we conclude that the URA remains applicable to community development block grants.

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Procedures for Investigating Allegations Concerning Senior Administration Officials

A proposal whereby personnel from one agency's Office of Inspector General would conduct an investigation of allegations of non-criminal misconduct by employees of another agency, or by the head of another agency, and report to the President's Council on Integrity and Efficiency, is of questionable legality.

The President has inherent authority to supervise and direct the performance of his appointees in office, and to investigate allegations of possible misconduct related to that performance.

Under the Inspector General Act, an Inspector General and his staff are authorized to conduct investigations into allegations of misconduct only when those allegations involve fraud and abuse in the programs and operations of the particular agency in which the office is located.

An agency head has authority to investigate allegations of misconduct against any officer or employee of his agency, including the agency's Inspector General. If under the circumstances he deems it prudent, an agency head may request that investigative personnel be detailed from another agency on a reimbursable basis to conduct such an investigation, though in such a case the investigative authority of any such detailed personnel could not exceed his own.

November 5, 1982

MEMORANDUM OPINION FOR THE SPECIAL COUNSEL TO THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

In accordance with your request, we have reviewed the draft proposal entitled "Procedures for Investigating Allegations Concerning Senior Administration Officials." The draft proposal was prepared for the President's Council on Integrity and Efficiency, and forwarded to you on October 4, 1982, by Joseph Wright, Chairman of the Council. You indicate that some specific questions were raised at the Council's October 12 meeting relating to the source of authority for certain of the proposed procedures, including the authority to pay the costs of an investigation. Concern was also expressed over the potential for conflict among federal law enforcement agencies generated by the proposed procedures. Our review indicates that the proposed procedures, as we understand them, are legally deficient in several respects.

I.

The procedures set forth in the draft proposal apply whenever the Council or one of its members receives an "allegation" concerning an Inspector General, a

staff member in an Office of Inspector General, or the head of a department or agency represented on the Council.[1] Any allegation of criminal conduct received, or evidence of criminal conduct "uncovered" during the course of an investigation, will be referred directly to the Department of Justice, as is required by 28 U.S.C. § 535. Under such circumstances, "the fact finding for the Council will be terminated until Justice has completed its review."

"Non-criminal allegations"[2] against an Inspector General, or a presidentially appointed Deputy Inspector General, are to be "brought to the attention of" the Chairman of the Council. The Chairman, "in consultation with" the head of the agency to whom the Inspector General reports and the Deputy Attorney General,

> shall request an Assistant Inspector General for Investigations (not reporting to the IG in question) to conduct a fact finding for the Chairman of the Council. For the purposes of this fact finding, the AIG (Investigations) will report directly to the Chairman.[3]

The report of the factfinder "shall be provided directly" to the Department of Justice, the Merit Systems Protection Board, the Office of Government Ethics, and the Office of Personnel Management, so that they might determine whether "there is evidence of any violations of laws or regulations for which they are responsible." These agencies are to notify the Chairman of "their findings and the actions which they will take." The Chairman himself is at this point provided with a "summary" of the factfinding. The Chairman, in consultation with the head of the agency to whom the Inspector General reports and the Deputy Attorney General, then reports to the Counsel to the President on the results of the factfinding.

Non-criminal allegations against Office of Inspector General staff, or against heads of departments and agencies represented on the Council, are also dealt with in the draft proposal. In brief, such allegations are to be referred by the Chairman of the Council to the responsible Inspector General for investigation. A copy of the Inspector General's report is to be provided to the head of the department or agency involved, in accordance with §§ 3(a) and 4(a)(5) of the Inspector General

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[1] The Council was established as an interagency committee by Executive Order 12301 of March 26, 1981, 46 Fed. Reg 19211 Its 23 members include the Deputy Attorney General, the Director of the Office of Personnel Management, the Executive Assistant Director of Investigations of the Federal Bureau of Investigation, and all of the statutory Inspectors General except those of the military departments. Under Section 2 of the Executive Order, the Council is charged with developing plans for "coordinated government-wide activities which attack fraud and waste in government programs and operations," including "standards for the management, operation, and conduct of inspector general-type activities," and policies to ensure "the establishment of a corps of well-trained and highly skilled auditors and investigators " Section 2(d) directs the Council to "develop interagency audit and investigation programs and projects to deal efficiently and effectively with those problems concerning fraud and waste which exceed the capability or jurisdiction of an individual agency "

[2] The draft proposal does not give any examples of non-criminal activity which might be the subject of an allegation against an Inspector General. We assume that "non-criminal allegations" which could spark an investigation might be related directly to the Inspector General's performance of his statutory functions, or related more generally to his performance as an officer and employee of the United States.

[3] It is not clear from the draft proposal whether some procedure for screening non-criminal allegations is to be established, or whether (as it would appear from a literal reading of its provisions) each and every allegation brought to the attention of the Chairman or members of the Council must be the subject of factfinding by an Assistant Inspector General for Investigations.

Act of 1978, Pub. L. No. 95–452, 92 Stat. 1101, 5 U.S.C. App. (Supp. IV 1980). In addition, the Inspector General is required to "brief" the Chairman of the Council of any "significant findings" resulting from his investigations.[4] In the case of allegations against an agency head, the Inspector General is required to provide a copy of his report to the Department of Justice, the Merit Systems Protection Board, the Office of Government Ethics, and the Office of Personnel Management. These agencies in turn must determine whether there is evidence in the report of any violation of laws or regulations over which they have responsibility, and notify the Inspector General and the Chairman of the Council of "their findings and the actions which they will take." A summary of the Inspector General's factfinding is then provided to the Chairman of the Council, who, in consultation with the Deputy Attorney General, reports to the Counsel to the President on the results of the investigation.

The draft proposal also deals with the "release of investigatory files and report findings" pursuant to Freedom of Information Act and Privacy Act requests. Such requests are to be "handled according to established procedures."[5] With respect to Privacy Act requests, the draft proposal directs that "for each system of records created to contain these investigatory files, a regulation should be promulgated claiming the (j)(2) exemption."[6] The draft proposal further provides that all investigatory files and the investigative report are to be maintained by "[t]he IG's office that conducts the investigation."

II.

The President has inherent authority to supervise and direct the performance of his appointees in office, and to investigate allegations of possible misconduct related to that performance. We assume for present purposes that much of this authority could be delegated to the Council or its Chairman. *See* 3 U.S.C. §§ 301, 302. However, Executive Order 12301 does not accomplish such a

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[4] In the case of allegations against Office of the Inspector General staff, the Inspector General is required to "inform" the Chairman of "any significant adverse findings" resulting from his investigation and "the subsequent follow-up action." It is not clear whether in this case the Inspector General is also required to inform the Chairman of findings which are not "adverse."

[5] It is not clear whether the "established procedures" referred to are intended to include procedures to be established by the Council itself.

[6] The draft's reference to the "(j)(2) exemption" is apparently to the provision in the Privacy Act of 1974, Pub. L. 93–579, 88 Stat 1897, 5 U.S.C § 552a, which permits certain agencies to promulgate rules to exempt systems of records from certain of the Act's provisions. *See* 5 U S C. § 552a(j)(2). The (j)(2) exemption is available only to an agency "which performs as its principal function any activity pertaining to the enforcement of criminal laws . . . ." Most Offices of Inspector General, whose principal functions do not involve the enforcement of criminal laws, may avail themselves only of the more limited exemption contained in subsection (k)(2) of the Privacy Act for "investigatory material compiled for law enforcement purposes." *See, e.g.*, 24 C F.R. § 16.15(a)(2) (1981) (investigative files in HUD's Office of Inspector General exempt under § 552a(k)(2)). Note that, like subsection (j)(2), subsection (k)(2) permits an agency to exempt records from certain of the Act's accounting requirements, and from its provisions giving an individual access to information about himself. It does not permit an agency to exempt records from the Act's prohibitions on disclosure of information concerning individuals without their written consent. *See* § 552a(b). Circumstances under which such disclosure is permissible are discussed in note 12, *infra*.

delegation,[7] and the draft proposal does not refer to any other authority relied upon for the investigation of non-criminal allegations against an Inspector General. It is our understanding that in any event the Council has no funds appropriated to it which might be used for this purpose.[8]

Moreover, the Inspector General Act authorizes an Inspector General and his staff to conduct investigations into allegations of misconduct only when those allegations involve fraud and abuse in the programs and operations of the particular agency or department in which the Office is located.[9] Thus, funds appropriated for the activities of an Office of Inspector General in one agency would ordinarily not be available to conduct an investigation into allegations of misconduct by personnel in another agency. An Assistant Inspector General

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[7] None of the Council's functions set forth in § 2 of the Order include any substantive investigative functions *See* note 1, *supra* While § 2(d) might be interpreted to authorize the Council to develop procedures to investigate misconduct by Inspectors General, we cannot construe it also to bestow authority on the Council actually to conduct such investigations Such a delegation of substantive presidential authority to an agency not otherwise authorized to engage in such activities would, in our view, have to be explicit *See* 3 U S C § 302. The Council Chairman's responsibilities under § 3 of the Order are confined to establishing procedures for the Council, reporting to the President and agency heads, and establishing committees of the Council. Section 4(c) describes the Chairman's analogous administrative functions in connection with the Coordinating Conference of the Council. We are unaware of any other presidential delegation or directive, either to the Council or to its Chairman, relating to the investigation of allegations against an Inspector General

[8] Under § 5(a) of Executive Order 12301, funds for the "administrative support" of the Council are provided by the Director of the Office of Management and Budget The head of each agency represented on the Council is responsible for providing its representative with "such administrative support as may be necessary, in accordance with law, to enable the agency representative to carry out his responsibilities." *See* § 5(b). While 31 U S.C. § 691 (1976) permits the expenditure of appropriated funds "for the expenses of committees, boards, or other interagency groups engaged in authorized activities of common interest," this statute does not provide authority for an agency represented on the Council to expend funds on activities which are not already authorized by its existing appropriation Section 691 allows an interagency group to continue in existence for longer than a year without separate appropriation for its activities, as would otherwise be required by 31 U.S C § 696, but does not provide any independent authority for the expenditure of agency funds *See* H.R Rep No. 2023, 78th Cong , 2d Sess. (1944). The absence of authority in one agency's Office of Inspector General to investigate another agency's Inspector General is discussed in the text and note 9 Similarly, while we have not examined the issue in detail, we are unaware of any funds appropriated to the Office of Management and Budget which could be used to conduct the sort of investigations contemplated in the proposed draft.

[9] The duties and responsibilities of an Inspector General under § 4(a) of the Inspector General Act are described in terms of "the establishment within which his Office is established." As more specifically enumerated in paragraphs (1) through (5) of that section, the Inspector General's duties and responsibilities are explicitly confined to the "programs and operations" of his own "establishment." Similarly, the investigative authority given each Inspector General under § 6(a) of the Act is limited to "programs and operations" of his own "establishment " Finally, the Inspector General is authorized under § 7(a) of the Act to investigate only complaints from employees "of the establishment." Section 11(2) of the Act defines an "establishment" as the particular agency or department in which the Office of Inspector General is established by the Act. The legislative history of the Inspector General Act makes plain that the Inspector General's authority and responsibility were intended to be restricted to the investigation of fraud and waste in the particular department in which his Office was established. *See, e.g* , S. Rep. No 1071, 95th Cong , 2d Sess. 7 (1978).

> [T]he legislation gives the [Inspector General] no conflicting policy responsibilities which could divert his attention or divide his time, his sole responsibility is to coordinate auditing and investigating efforts and other policy initiatives designed to promote the economy, efficiency and effectiveness of the programs of the establishment.

See also H R. Rep No 584, 95th Cong , 1st Sess 12–14 (1977); 124 Cong Rec. 32033 (1978) (remarks of Rep Fountain). The Office of Assistant Inspector General for Investigations is described in § 3(d)(2) of the Inspector General Act as having "responsibility for supervising the performance of investigative activities relating to . . programs and operations [of the establishment]." There is no authority under the Inspector General Act, or under any appropriation act of which we are aware, for an Assistant Inspector General for Investigations, or any member of an Inspector General's staff, to conduct investigations which do not "relate to" the "programs and operations" of the agency in which he is employed.

might lawfully be directed by his own agency head to investigate allegations against the Inspector General to whom he reports,[10] or allegations against another Inspector General on a detail basis.[11] However, an Assistant Inspector General has no authority under the Inspector General Act to conduct an investigation which is unrelated to his duties and responsibilities under the Act respecting his own agency.

III.

We are less concerned over the provisions in the draft proposal which require that the factfinder's report in an investigation of non-criminal allegations against an Inspector General be sent to the Department of Justice, the Merit Systems Protection Board, the Office of Government Ethics, and the Office of Personnel Management. These provisions also come into play in connection with an investigation of non-criminal allegations against the head of an agency. As long as the factfinder is properly authorized to perform the investigation in question, and to disclose his report to other federal agencies, there would appear to us no reason in law why the named agencies should not receive a copy of the report.[12]

Moreover, none of the agencies named has exclusive or even primary jurisdiction over violations of the non-criminal laws and regulations for which they are responsible. *Compare* 28 U.S.C. § 535, which mandates the "expeditious[]" referral of all criminal information or allegations to the Department of Justice. Indeed, in some cases jurisdiction over non-criminal allegations attaches only after a matter has first been investigated at the agency level. *See, e.g.*, 5 U.S.C.

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[10] Ordinarily, an agency head has authority, in the exercise of his supervisory responsibilities for the proper functioning of his agency, to investigate allegations of misconduct in office against an employee or officer of his agency, and to take appropriate action in the event those allegations prove well-founded. Funds appropriated for the general administration of the agency would be available for this purpose. The agency head's authority extends to the agency's Inspector General, who under § 3(a) of the Inspector General Act reports to and is "under the general supervision of" the head of his agency. However, § 3(a) also enjoins the agency head not to "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation . . . ." Thus, an agency head might find it awkward to investigate allegations against his Inspector General without violating or appearing to violate this statutory restriction. Depending on the nature of the allegations against the Inspector General (*e.g.*, whether the allegations related directly to the Inspector General's conduct of his statutory duties), the agency head might decide to limit his own personal involvement in the matter, and request the President to direct an investigation of the Inspector General's conduct.

[11] For obvious reasons, an agency head might not wish to rely upon one of the agency's own Inspector General's staff to conduct an investigation of the Inspector General himself. If appropriate investigative personnel were not available in other parts of his agency, the agency head could request that investigative personnel be detailed from another agency on a reimbursable basis, under authority of the Economy Act. *See* 31 U.S.C. § 686. Personnel from another agency's Office of Inspector General would seem to be particularly suited for such a detail. We note, however, that in conducting an investigation in another agency at the request of the head of that agency, personnel detailed from another Inspector General's Office might be limited to the investigative authority of the head of the agency to which they were detailed. Many of the particular powers given an Inspector General and his staff under § 6(a) of the Inspector General Act, such as the power to subpoena documents, may not be available to an agency head conducting his own independent investigation of misconduct by officers of his agency.

[12] The Privacy Act, 5 U.S.C. § 552a, permits disclosure of records containing information about an individual without his consent in a number of specified circumstances, including two in particular which seem potentially applicable in this case. First, § 552a(b)(3) permits disclosure for a "routine use," *i.e.*, a use "for a purpose which is compatible with the purpose for which it was collected." *See also* § 552a(a)(7). A "routine use" must be established by publication in the Federal Register. *See* § 552a(e)(4)(D). Second, § 552a(b)(7) permits disclosure to another federal agency "for a civil or criminal law enforcement activity if the activity is authorized by law." Disclosure under this section is permissible only if the head of the agency desiring the information has made a written request to the head of the agency maintaining the record.

§ 1206(b) (Supp. II 1978) (Special Counsel of the Merit Systems Protection Board must refer complaints of prohibited personnel practices to the appropriate agency head for initial investigation). *See also* 5 U.S.C. § 2302(c) (agency head responsible for enforcement of laws and regulations relating to personnel management).

IV.

The procedures proposed for investigating allegations against Office of Inspector General staff or the head of an agency seem to us for the most part legally unobjectionable. We question, however, whether an Inspector General would have authority under the Inspector General Act to investigate all non-criminal allegations against the head of the agency, including those unrelated to the Inspector General's statutory responsibilities respecting the programs and activities of his establishment. We also question whether either the Council or its Chairman has been properly authorized to receive information from an Inspector General relating to an investigation. *See* notes 7 and 12, *supra*.

V.

We appreciate the Council's interest in devising an effective means of holding an Inspector General and his staff accountable for their conduct under non-criminal laws and regulations generally applicable to officers and employees of the Executive Branch. And we recognize that the Council's procedures are still in the process of development. While we have expressed a number of legal reservations about the procedures as presently drafted, it should be possible to accomplish the Council's objectives through more explicit reliance on the President's inherent authority to oversee the performance of his appointees in office.[13] In addition, depending on the nature of the allegations involved, the Council may find it useful to draw upon an agency head's inherent authority to supervise the conduct of officers and employees of his agency.[14]

We would be interested to learn what further steps the Council decides to take in connection with this matter, and to be of further assistance should you so desire.

RALPH W. TARR
Deputy Assistant Attorney General
Office of Legal Counsel

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[13] While the President could delegate this oversight function in the case of Inspectors General to the Council or its Chairman, *see* 3 U.S.C. §§ 301 and 302, there would remain the question of what funds could be used to pay its costs. *See* note 8, *supra*. If the President were to retain overall responsibility for directing investigations into allegations against an Inspector General, funds appropriated to the general activities of the White House Office could be used for this purpose. If necessary, trained investigative personnel, including Inspector General staff, could be detailed from other agencies on a reimbursable basis. *See* 3 U.S.C. § 107. Alternatively, if the President were to direct the investigation of his appointees by an agency which is otherwise authorized to investigate particular types of misconduct, funds appropriated to that agency could be made available for the investigation.

[14] An agency head's authority to investigate allegations against officers and employees of his agency, and to use funds appropriated for the general administration of the agency for this purpose, is discussed in notes 10 and 11, *supra*. Under such circumstances the investigator should report directly to the agency head, rather than to the Chairman of the Council, as the proposal currently provides in the case of investigations of Inspectors General

Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress

Statute requiring the Administrator of the Federal Aviation Administration (FAA) to transmit concurrently to Congress any budget information and legislative recommendations that are transmitted to the Secretary of Transportation, the Office of Management and Budget (OMB), and the President, would, if interpreted strictly, on its face violate the constitutional principle of separation of powers.

Separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions, which includes the right to supervise and review the work of such officials; this principle, coupled with the constitutional protection afforded the deliberative process within the Executive Branch, creates an area of executive prerogative that may not be invaded by a coordinate branch of government absent a very compelling and specific need

Disclosure to Congress of unreviewed recommendations by subordinates within the Executive Branch would disrupt the normal interchange between agency heads and the President in connection with the decisionmaking process, and interfere with the President's ability to supervise the actions of his subordinate officials while this process is going on, thus adversely affecting the President's ability to carry out his responsibilities.

Because there appears to be no specific or compelling congressional need for the information at issue in this case, the concurrent reporting requirement can and should be construed so as to avoid constitutional infirmity, by allowing the FAA Administrator to provide Congress with budget data and legislative comments only after they have been approved by the Administrator's superiors in the Executive Branch, including, where appropriate, the President and OMB.

November 5, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

This responds to your request for the advice of this Office regarding your implementation of § 506(f) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 677 (1982), which requires the Administrator of the Federal Aviation Administration (Administrator) to transmit certain budget information and legislative recommendations directly to Congress at the same time that they are transmitted to the Secretary of Transportation (Secretary), the President, or the Office of Management and Budget (OMB). Specifically, you have expressed concern that this provision may conflict with the principle of separation of powers under the Constitution. In response to your request, we have reviewed the relevant statutory provisions, case law concerning separation of powers, the Constitution itself and the history of its development,

and prior opinions of this Office on this general subject. On the basis of this review, we have concluded that, if interpreted strictly, the statutory provision would, on its face, violate the separation of powers which is central to the structure of the United States Constitution.

As discussed in Section II of this opinion, several clearly established principles of the separation of powers doctrine apply to the question raised by the concurrent reporting provision. The 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. This supervisory control is reinforced by the constitutional protection afforded to the deliberative process within the Executive Branch. These principles combine to create an area of executive prerogative that may not be invaded by a coordinate branch of government absent a very compelling and specific need.

As detailed in Section III, a requirement that subordinate officials within the Executive Branch submit reports directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch. This interference contrasts with the relatively nonspecific request for information embodied in § 506(f). In balancing Congress' limited apparent need for direct reports against the President's right to control subordinates within the Executive Branch, it seems clear that § 506(f) would be unconstitutional if it were construed to require the Administrator to report to Congress without prior review by his superiors.

In Section IV, we consider how § 506(f) might be interpreted so as to avoid this constitutional problem. In brief, we conclude that in order to harmonize the statute with the requirements of the Constitution, the Administrator should provide to Congress only budget information and legislative comments that have been approved by the Administrator's superiors, including, where appropriate, the President, OMB, and the Secretary.

I. Background

The Airport and Airway Improvement Act of 1982 (AAIA) was enacted as Title V of the Tax Equity and Fiscal Responsibility Act of 1982. Pub. L. No. 97–248, 96 Stat. 324, 677 (1982). The AAIA generally authorizes an extension of, and enacts certain changes to, the Federal Airport Aid Program. In addition, § 506(f) provides:

> (f) TRANSMITTAL OF BUDGET ESTIMATES.—Whenever the Administrator of the Federal Aviation Administration submits or transmits any budget estimate, budget request, supplemental budget estimate, or other budget information, legislative recommendation, or comment on legislation to the Secretary, the President of the United States, or to the Office of Management and

> Budget pertaining to funds authorized in subsection (a) or (b) of this section, it shall concurrently transmit a copy thereof to the Speaker of the House of Representatives, the Committees on Public Works and Transportation and Appropriations of the House of Representatives, the President of the Senate, and the Committees on Commerce, Science, and Transportation and Appropriations of the Senate.

In essence, this provision purports to direct the Administrator to report concurrently to Congress any budget data or legislative comments that are transmitted to the President, the Secretary, or OMB. By the terms of § 506(f), this requirement applies to budget information or legislative comments "pertaining to funds authorized in subsection (a) or (b) of this section . . . ." Subsections (a) and (b) authorize funding for acquiring or establishing and improving air navigation facilities and for establishing demonstration projects in connection with certain research and development activities. In addition, § 504(b) requires the Administrator to prepare and submit to Congress "a national airways system plan" and directs that the preparation be "subject to the requirements of section 506(f). . . ."

Given this statutory language, it is arguable that the Administrator is required to submit the specified reports, information, and comments directly to Congress prior to any review or approval by the President, the Secretary, or OMB. If the statute were read to impose such a requirement, the Administrator would be severed from his superiors in the Executive Branch with respect to these matters and would, in effect, become an independent agency reporting to both Congress and the President. In addition, the internal deliberative process within the Executive Branch would be tapped by an information pipeline running directly to a coordinate branch of government. These possibilities raise serious separation of powers issues, which are discussed below.

III. Applicable Separation of Powers Principles

Article II, § 1 of the United States Constitution begins with the statement that "[t]he executive Power shall be vested in a President of the United States of America." Article II, § 3 requires the President to "take Care that the Laws be faithfully executed . . .," and also requires the President to "recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient. . . ." These constitutional provisions, taken together, impose certain fundamental duties upon the President and grant the power to direct the Executive Branch to carry out those duties.

In order to execute the laws adopted by Congress, the President must have the assistance of subordinate officials who will carry out his policies and implement his instructions with respect to the execution of law. The Supreme Court has, from its earliest decisions, consistently recognized this basic principle. For example, in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 164 (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.

Although it is clear that the Constitution does not contemplate "a complete division of authority between the three branches," *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977), each branch retains certain core prerogatives upon which the other branches may not transgress. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," but it emphasized that there was a "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." 424 U.S. at 120–21. The Court declared that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." 424 U.S. at 123.

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 Tenure of Office Act had been unconstitutional as well.[1] 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:

[1] 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

> 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.

272 U.S. 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 (FTC) from removal by the President at his pleasure. The Court reasoned that the FTC could not "be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." 295 U.S. at 628. *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." 295 U.S. at 627. The Court emphasized that within the Executive Branch, the President retained the right to direct the actions of his subordinates 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.

295 U.S. at 629–30. Thus, by narrowing *Myers* to cover only subordinates of the President within the Executive Branch, 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. 357 U.S. 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.

357 U.S. 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. 357 U.S. at 353.

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.

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 decisionmaking 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 decisionmaking process.

418 U.S. at 705 (footnote omitted). 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 underpinnings." 418 U.S. 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." 418 U.S. at 708 (footnote omitted).

This decision gives further content to the principle that the constitutional separation of powers requires the President to have effective control over the decisionmaking 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.[2]

The D.C. Circuit has explicitly recognized the right of the President to protect himself from unwarranted intrusions by Congress into the domain of protected decisionmaking activity. In *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (*en banc*), the court ruled that the President was not required to produce to Congress certain transcripts of White House conversations. The court decided that the general presumption in favor of the confidentiality of executive deliberations could be overcome "only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations. . . ." 498 F.2d at 730. The court found that the general oversight need of Congress in this instance was not sufficient to meet the court's requirement that the information be "demonstrably critical to the responsible fulfillment of the Committee's functions." 498 F.2d at 731.

The decisions and the long practical history concerning the right of the President to protect his control over the Executive Branch are based on the fundamental principle that the President's relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities. The executive power resides in the President,

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[2] 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 decisionmakers within the Executive Branch. *See United States* v. *American Telephone & Telegraph Co.*, 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 (footnotes omitted)

and he is obligated to "take care that the laws are faithfully executed." In order to fulfill these responsibilities, the President must be able to rely upon the faithful service of subordinate officials. To the extent that Congress or the courts interfere with the President's right to control or receive effective service from his subordinates within the Executive Branch, those other branches limit the ability of the President to perform his constitutional function. Therefore, only the most compelling and specifically supported needs will justify any interference with the President's power within the Executive Branch.

III. Application of Separation of Powers Principles to § 506(f)

In this instance, the potential impact of § 506(f) on the Executive Branch is significant and adverse. On the other hand, the provision does not reflect any particularized congressional need for specific factual information. Under these circumstances, as described more fully below, the constitutionally based need to protect the executive process from a non-compelling intrusion by Congress suggests that the statutory provision should be very narrowly construed so as not to offend separation of powers principles.

A. Interference with the Executive Process

There is no doubt that the Administrator is a purely executive official who serves at the pleasure of the President and is subject to the President's control. The FAA, as a division of the Department of Transportation, is indisputably an executive agency. The Administrator is appointed by the President with the advice and consent of the Senate, and he serves at the pleasure of the President. 49 U.S.C. § 1652(e)(1). The Administrator reports directly to the Secretary of Transportation, who reports in turn to the President. 49 U.S.C. § 1652(e)(3). Since the Administrator is a purely executive official subject to the direct control of the President, under the principles set forth above, the Administrator must be responsible to the Secretary, and ultimately to the President, and the Administrator's superiors have the right to supervise and approve the Administrator's work.

The concurrent reporting provision could be construed to interfere greatly with the President's right to supervise the Administrator's action. The provision could be read to require the Administrator to submit any budget information or legislative comments directly to Congress prior to any approval or even review by the Administrator's superiors, including the Secretary and the President. If the provision were interpreted in that manner, the Administrator would be effectively severed from his superiors in the Executive Branch with respect to these areas of his responsibility. On these vital budget and legislative matters, the Administrator would become, in effect, an independent agency reporting both to Congress and to the President. This concurrent responsibility is entirely inconsistent with the separation of powers principles set forth above and with the

corollary right of the President to control his subordinates within the Executive Branch.

The practical effect of a broad interpretation of § 506(f) would severely impair the President's ability to carry out his constitutionally assigned responsibilities. The President's responsibility to take care that the laws are faithfully executed includes the responsibility imposed by the Budget and Accounting Act to present a unified national budget to Congress. *See* 31 U.S.C. § 11. In order to implement this statutory responsibility, the President has established a budget development and review process through OMB, which is a part of the Executive Office of the President. The President through OMB requires that

> the confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, since these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress. . . . Budgetary material should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head of each agency is responsible for preventing premature disclosures of this budgetary information.

OMB Circular No. A–10 (Nov. 12, 1976) at 2. Thus, the Executive has explicitly determined that disclosure of unreviewed recommendations by subordinates within the Executive Branch would adversely affect the President's ability to carry out his responsibilities.[3]

Moreover, the President has an explicit constitutional obligation to "recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient. . . ." Article II, § 3. The Administrator is responsible for making recommendations to the President concerning such legislative action so that the President may review them and determine which measures "he shall judge necessary and expedient." *Id.* Congress seeks to interdict this process by requiring immediate reporting of such legislative recommendations prior to the President's review or approval. Thus, although the Constitution gives to the President the right to present legislative recommendations on behalf of the Executive Branch, Congress, by this concurrent reporting provision, purports to require a subordinate executive official to present legislative recommendations of his own. Such a provision clearly transgresses upon the President's constitutionally designated role.

Thus, the concurrent reporting provision presents a constitutional problem that transcends the issue of executive privilege.[4] The issue here concerns not just

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[3] Although Congress has enacted concurrent reporting provisions with respect to certain independent agencies, we are unaware that it has ever imposed a concurrent reporting requirement upon a purely executive agency that is under the President's direct supervision and control *See* 7 U S C § 4a(h)(1) (Commodity Futures Trading Commission); 15 U.S.C. § 2076(k)(1) (Consumer Product Safety Commission); 31 U.S.C § 11(j) (Interstate Commerce Commission).

[4] The provision would present a more classic executive privilege problem if it required production of recommendations and deliberative documents after the final budget decisions had already been made and transmitted to Congress by the President. That type of statute would present constitutional problems, but they would be of a different character than the ones presented by § 506(f).

protection of the deliberative process once a final decision has already been made, but rather protection of the President's ability to supervise the actions of his subordinate officials while the decisionmaking process is still going on. Because § 506(f) might be read to require a presidential subordinate to report both to Congress and his superiors within the Executive Branch, it intrudes deeply into the President's constitutional prerogative. Indeed, as thus construed, it would interdict and therefore irreparably damage, if not destroy, the normal exchange of views between agency heads and the President (through OMB) before budget submissions are finally approved. A potential result is that the Administrator might be cut out of the process and made into a figurehead with the budget work assigned to someone not subject to the constraints of § 506(f).

This Office has previously considered, and found constitutionally defective, legislative proposals that impose concurrent reporting requirements upon executive officials. For example, this Office has published an opinion concerning a proposal that an inspector general be required to report information directly to Congress, without review or approval by the head of the particular agency involved. *Inspector General Legislation,* 1 Op. O.L.C. 16 (1977).[5] In that opinion, this Office determined that the "President's power of control extends to the entire executive branch, and includes the right to coordinate and supervise all replies and comments from the executive branch to Congress." *Id.* at 17. The opinion stated that the requirement to provide information directly to Congress without Executive Branch clearance was "inconsistent with [the Inspector General's] status as an officer in the executive branch, reporting to and under the general supervision of the head of the agency." *Id.* In conclusion, the opinion set forth the following principle:

> Reports of problems encountered and suggestions for remedial legislation may be required of the agencies in question, but those reports must come to Congress from the statutory head of the agency, who must reserve the power of supervision over the contents of these reports.

Id. at 18.

B. Congressional Need for § 506(f)

In the face of this significant interference with the President's right to control his subordinates, there does not appear from the legislation or its history a strong comparable Legislative Branch interest. Congress has not expressed a specific need for § 506, either in the statute itself or in the legislative history. One can only infer that Congress adopted the provision in order to obtain more information to assist it in carrying out its review of the budget. There is no indication that Congress could not obtain similar information to aid its deliberations from other sources or by other means that would be less intrusive upon the Executive Branch. Certainly there is no indication that the material "is demonstrably

[5] *See also Proposals Regarding an Independent Attorney General,* 1 O.L.C. 75 (1977)

critical to the responsible fulfillment of the Committee's functions." *See Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d at 731.

Moreover, the concurrent reporting provision is a blanket requirement that applies to all budget information and legislative comments. The provision is sweeping and indiscriminate in its demand for information from the Executive Branch. This type of requirement is inconsistent with the Constitution's "spirit of dynamic compromise" with respect to disputes between coordinate branches of government. *See United States* v. *American Telephone & Telegraph Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). That case involved a Justice Department suit to block a congressional subpoena of third-party materials on the ground that production would pose a threat to national security. In resolving the clash between the Executive and Legislative Branches, the Court insisted on further efforts by the two branches to reach a compromise arrangement and emphasized that

> the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutitonal scheme.

567 F.2d at 130. By enacting a blanket statutory mechanism that would require automatic submission to Congress of preliminary and not fully developed Executive Branch positions, Congress has ignored this common sense construction of constitutional principles. Congress' need is much less significant than would be the case if Congress had made a specific, well-defined request for materials that were necessary for it to fulfill a vital legislative function. Congress may still make such a specific request, and it needs no statute to do so. Congress and its committees frequently obtain information in this manner from the Executive Branch when, in the view of the Executive Branch, the provision of such information will not have an unacceptable impact on the deliberative process.

On balance, if the concurrent reporting provision were construed to require immediate transmission to Congress of the Administrator's budget and legislative recommendations, it would violate the constitutionally prescribed separation of powers. The potential interference with the President's constitutional duty to supervise the actions of his subordinates would be substantial, while there does not appear to be any congressional need of comparable magnitude for the information. Therefore, the provision must be construed in a manner consistent with the separation of powers required under the Constitution.

IV. Implementation of § 506(f)

In implementing § 506(f), the Administrator must act in accordance with the constitutional principles set forth above. Therefore, § 506(f) must be carried out

in a manner that will permit the Secretary and, as necessary, the President or OMB to review the Administrator's reports prior to their submission to Congress.

Broadly worded statutes that could be interpreted in such a way as to create a conflict with the separation of powers have, in the past, been interpreted very narrowly so as not to impinge upon the constitutional prerogatives of the Executive Branch. For example, Congress has enacted a provision that on its face requires any executive agency to submit to the Government Operations Committees of the House or Senate "any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954. This provision, however, has been narrowly interpreted by the Executive Branch to grant to the pertinent committees access to only the type of information that has traditionally been made available to Congress and that is not subject to valid claims of executive privilege. Statement of Attorney General Elliot Richardson, June 1973. Attorney General Rogers adopted a similar approach in response to a provision of the Mutual Security Act of 1954 in order to avoid a construction of the statute that would require production of documents presumptively protected by executive privilege. *See* 41 Op. Att'y Gen. 507, 525 (1960). This practice is, of course, consistent with the familiar rule that courts will adopt an interpretation of a statute that will avoid constitutional questions. *See, e.g., United States* v. *Rumely*, 345 U.S. 41, 45 (1953).

In this instance, we have concluded that § 506(f) can and should be construed to be consistent with the Constitution by interpreting the budget information and legislative comments that the Administrator is required to produce to Congress to include only "final" information and comments. In other words, until budget information, legislative comments, or any other material required to be transmitted to Congress is reviewed and approved by the appropriate senior officials, the material should be regarded as tentative, rather than final, conclusions of the Administrator. The information or comments would not become final until the appropriate review process was complete, at which time the Administrator, pursuant to § 506(f), would transmit the final information or comments to both the Secretary and Congress.

V. Conclusion

In conclusion, we believe that § 506(f) is constitutional only if interpreted to permit the Secretary and the President to review the Administrator's reports prior to the time that they are submitted to Congress. We recommend that the Administrator carry out his responsibilities under § 506 in accordance with this constitutional requirement.

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Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products

[The following memorandum, prepared for the President for transmission to Congress in accordance with the direction in § 3 of the Energy Emergency Preparedness Act of 1982, describes in comprehensive fashion the authorities available to the President under existing statutes to respond to a severe energy supply shortage or interruption. It sets forth the legal basis for certain specific emergency preparedness activities, discusses the scope of each available emergency authority, and analyzes the differing threshold standards for activation of the President's authority under each of the statutes involved.]

November 15, 1982

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GLOSSARY OF ABBREVIATIONS

DPA	Defense Production Act of 1950
EAA	Export Administration Act of 1979
EECA	Emergency Energy Conservation Act of 1979
EEPA	Energy Emergency Preparedness Act of 1982
EPAA	Emergency Petroleum Allocation Act of 1975
EPCA	Energy Policy and Conservation Act
ESA	Energy Security Act
FEMA	Federal Emergency Management Agency
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FPM	Federal Personnel Manual
FTC	Federal Trade Commission
FUA	Powerplant and Industrial Fuel Use Act of 1978
IEA	International Energy Agency
IEEPA	International Emergency Economic Powers Act
IEP	International Energy Program
IPR	Industrial Petroleum Reserve
Mer	Maximum efficient rate of production
MLLA	Mineral Lands Leasing Act
NATO	North Atlantic Treaty Organization
NEA	National Emergencies Act
NESO	National Emergency Sharing Organization
NGA	Natural Gas Act
NGPA	Natural Gas Policy Act
NPRs	Naval Petroleum Reserves
OCS	Outer Continental Shelf
PURPA	Public Utility Regulatory Policies Act of 1978
SPR	Strategic Petroleum Reserve
TEA	Trade Expansion Act of 1962
Ter	Temporary emergency production rate
TWEA	Trading with the Enemy Act
WOCs	Without Compensation Employees

MEMORANDUM OF LAW

Introduction

This memorandum is submitted in response to § 3 of the Energy Emergency Preparedness Act of 1982 (EEPA), Pub. L. No. 97–229, 96 Stat. 248 (1982). That section amends Title II of the Energy Policy and Conservation Act, 42 U.S.C. §§ 6201–6422 (1982), by adding, *inter alia*, a new § 272(a). Section 272(a) directs the Attorney General, in consultation with the Secretary of Energy, to prepare for transmission by the President to Congress a "Memorandum of Law" describing the "nature and extent of the authorities available to the President under existing law to respond to a severe energy supply interruption or other substantial reduction in the amount of petroleum products available in the United States."[1] Section 272(a) provides that the Memorandum of Law shall address the legal bases for certain specific emergency preparedness activities to deal with a petroleum shortage,[2] and to distinguish among the threshold standards for activation of the President's statutory authorities.[3]

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[1] This Memorandum was prepared by the Office of Legal Counsel of the Department of Justice, at the direction of and under the supervision of the Attorney General, in consultation with the Department of Energy Assistance was also provided by the Antitrust Division and Land and Natural Resources Division of the Department of Justice, the Department of Defense, the Department of State, and the Federal Emergency Management Agency

[2] Section 272(a)(3)(A) specifies that the Memorandum include the following subjects:

(i) activities of the United States in support of the international energy program and the December 10, 1981, International Energy Agency agreement entitled 'Decision on Preparation for Future Supply Disruptions' including—

(I) the National Emergency Sharing Organization,

(II) emergency sharing systems; and

(III) the supply right project;

(ii) activities of the United States pursuant to its energy emergency preparedness obligations to the North Atlantic Treaty Organization;

(iii) development and use of the Strategic Petroleum Reserve;

(iv) Government incentives to encourage private petroleum product stocks,

(v) reactivation of the following Executive Manpower Reserves.

(I) the Emergency Electric Power Reserve,

(II) the Emergency Petroleum and Gas Reserve; and

(III) the Emergency Solid Fuels Reserve,

(vi) energy emergency response management in coordination with State and local governments; and

(vii) emergency public information activities, . . .

[3] Section 272(a)(3)(B) provides that the Memorandum should distinguish among—

(i) situations involving limited or general war, international tensions that threaten national security, and other Presidentially declared emergencies,

(ii) events resulting in activation of the international energy program; and

(iii) events or situations less severe than those described in clauses (i) and (ii).

In order to implement fully the intent of the EEPA, we have prepared the following analysis of the primary statutory authorities that would be available to the President in the event of a severe energy supply interruption. In addition to describing the requirements, scope, and limitations of those statutory authorities, we attempt to address each of the legal issues specifically raised by Congress during consideration of the EEPA and the legal bases for the activities enumerated in § 272(a)(3). Consistent with the scope and legislative intent of the EEPA,[4] the analysis focuses on statutory authorities that could be used to respond to a "petroleum emergency"—*i.e.*, standby authorities that could be exercised in the event of a sudden substantial reduction in petroleum products available to the United States.[5] We generally do not address the President's broad authority to take actions to reduce the likelihood that any of these "emergency" authorities will ever have to be exercised, or particular statutory authorities with respect to energy emergencies resulting from a shortfall in energy sources other than petroleum.

It is important to recognize at the outset that any memorandum of law discussing the powers of the President in the context of nonexistent, necessarily incomplete, and hypothetical facts is of limited utility and should not be regarded as decisive or exhaustive of the President's legal authority to take any specific action based on a factual situation that may arise in the future. The exercise of the various broad powers of the President to deal with "emergencies" is so often tied to the particular facts and circumstances confronting the President at that time that a general and hypothetical discussion of his authority should not and cannot be viewed as dispositive of his authority in actual emergencies.[6] *See generally Dames & Moore* v. *Regan*, 453 U.S. 654, 660–62, 669 (1981).

Finally, the purpose of this Memorandum is limited to outlining the nature and scope of the statutory authorities available to the President. The Memorandum does not address whether or how the President should exercise particular authorities. That question is primarily a policy rather than a legal matter, and therefore outside the scope of this Memorandum. In that regard, it should be noted that, as described more fully below, the available statutory authorities generally provide the President with broad discretion to determine if, when, and how they should be exercised, taking into account the facts of any future energy emergency and the President's best judgment as to how to prevent or deal with the emergency situation.

Part I of this Memorandum outlines the scope and applicability of existing statutory authorities available to the President to deal with a petroleum emergency. Part II describes how those statutory authorities may support or limit the

[4] *See* S. Rep. No. 393, 97th Cong., 2d Sess. 4–5 (1982); H.R. Rep. No. 585, 97th Cong., 2d Sess. 1–2 (1982).

[5] We use the term "petroleum" or "petroleum products" in this Memorandum to include those energy sources that are included in the definition of "petroleum products" in § 3(3) of the Energy Policy and Conservation Act, 42 U.S.C. § 6202(3), *i.e.*, "crude oil, residual fuel oil, or any refined petroleum product (including any natural [gas] liquid and any natural gas liquid product)."

[6] For that reason, we cannot attempt here to discuss whatever inherent constitutional powers the President may have, in the absence of specific statutory authority, to deal with a future petroleum emergency. *See generally Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The existence or scope of such inherent powers can only be addressed in the context of a particular emergency situation.

particular energy preparedness activities enumerated in § 272(a)(3)(A). Part III groups the statutory authorities according to the three triggering situations listed in § 272(a)(3)(B), to the extent consistent with the specific provisions of those statutes.

I. Statutory Authorities

A number of statutes currently provide the President with authority that may be available in the event of a substantial domestic or international shortfall in petroleum supplies, ranging from direct authority to allocate and to restrict imports or exports of petroleum products, to authority to undertake or facilitate energy emergency preparedness planning and programs. The scope of the President's authority under these statutes necessarily depends on the particular facts presented by any future petroleum shortage, and therefore it is difficult, if not impossible, to resolve in the abstract all of the legal issues concerning the nature and extent of that authority. In particular, to the extent that the President's authority under certain statutes rests on a discretionary presidential finding, for example, that an emergency situation exists or that actions are necessary and appropriate "in the national interest," to promote the "national defense," or to fulfill international obligations of the United States, it is impossible to determine in the absence of specific facts when exercise of that authority would be consistent with the terms of the statute. This Memorandum therefore can only attempt to outline the terms of the statutes and describe generally the authority and any limitations on that authority contained in those statutes as written.

Among these authorities, the Energy Policy and Conservation Act,[7] the Defense Production Act of 1950,[8] and the Trade Expansion Act of 1962[9] provide the President, in a petroleum emergency meeting the requirements of those statutes, with some specific authority to affect or control the distribution of petroleum products, as well as other authority to mitigate or plan for such an emergency. Additional authority that may be available to the President, depending on the circumstances of any petroleum emergency, is contained in the International Emergency Economic Powers Act,[10] the Emergency Energy Conservation Act of 1979,[11] the Export Administration Act of 1979,[12] and in numerous miscellaneous statutes such as the Public Utility Regulatory Policies Act of 1978,[13] the Powerplant and Industrial Fuel Use Act of 1978,[14] the Federal Power Act,[15] the Natural Gas Act,[16] the National Gas Policy Act,[17] the Mineral Lands

[7] 42 U.S.C. §§ 6201–6422, *as amended by* Pub. L. No. 97–229, 96 Stat 248 (1982).
[8] 50 U S.C. app §§ 2061–2169 (1982).
[9] 19 U.S.C. §§ 1801–1982 (1982).
[10] 50 U.S.C. §§ 1701–1706 (1982)
[11] 42 U.S.C §§ 8501–8541 (1982).
[12] 50 U.S.C. app §§ 2401–2420 (1982).
[13] Pub. L No. 95–617, 92 Stat. 3119 (1978), *codified in* 16 U.S.C §§ 2601–2645 (1982) & 15 U.S.C § 717z (1982).
[14] 42 U.S.C. §§ 8301–8484 (1982)
[15] 16 U.S.C. §§ 791a–825r (1982).
[16] 15 U.S C. §§ 717–717z (1982).
[17] 15 U.S.C. §§ 3301–3432 (1982)

Leasing Act,[18] the Outer Continental Shelf Lands Act,[19] the Clean Air Act,[20] the Interstate Commerce Act,[21] the Disaster Relief Act of 1974,[22] the Magnuson Act,[23] and the Foreign Assistance Act of 1961.[24]

A. Energy Policy and Conservation Act

The Energy Policy and Conservation Act (EPCA), 42 U.S.C. §§ 6201–6422 (1982), provides the President with discretionary authority to respond to an actual or potential shortfall in domestic or international petroleum supplies, including the power to: restrict exports of energy supplies; require accelerated production of crude oil or natural gas from designated fields; establish and use a Strategic Petroleum Reserve; direct the preparation and implementation of energy conservation contingency plans; and take actions necessary to implement certain international obligations of the United States.[25]

With the exception of export restrictions promulgated under § 103,[26] the President's authority under the EPCA is generally contingent on a finding that the actions taken are necessary to meet a "severe energy supply interruption" or to fulfill "obligations of the United States under the international energy program" (IEP).[27] A "severe energy supply interruption" is defined by § 3(8) of the Act, 42 U.S.C. § 6202(8), as a national energy supply shortage which the President determines—

> (A) is, or is likely to be, of significant scope and duration, and of an emergency nature;
>
> (B) may cause major adverse impact on national safety or the national economy; and
>
> (C) results, or is likely to result, from an interruption in the supply of imported petroleum products, or from sabotage or an act of God.

The IEP, established in 1974 by the Agreement on an International Energy Program (Agreement), to which the United States is a signatory, provides for coordinated action among the 21 members (Participating Countries) in order to decrease their vulnerability to supply disruptions and dependence on imported

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[18] 30 U S C. §§ 181–287 (1982).
[19] 43 U.S C. §§ 1331–1356 (1982).
[20] 42 U.S.C §§ 7401–7642 (1982).
[21] 49 U.S.C. §§ 10101 *et seq* (1982).
[22] 42 U.S C. §§ 5121–5202 (1982)
[23] 50 U S C. §§ 191 *et seq* (1982).
[24] Pub. L No 87–195, 75 Stat 424 (1961), *as amended, codified in* scattered sections of 7, 22, and 42 U.S.C.
[25] The EPCA also extended the crude oil and petroleum product pricing authority of the Emergency Petroleum Allocation Act of 1975 (EPAA), 15 U.S C §§ 751–760h (1982), established price controls on previously exempt domestic crude oil; established maximum weighted average first sale prices on all domestic crude oil, and directed the President to develop a rationing contingency plan Those provisions of the EPCA expired with the EPAA on September 30, 1981. In addition, § 104 of the EPCA amended § 101 of the Defense Production Act of 1950, 50 U S C app. § 2071, adding a new subsection (c) that authorizes the President to require the allocation of supplies of materials and equipment in order to maximize domestic energy supplies That provision is discussed *infra*
[26] 42 U.S C. § 6212 *See* discussion *infra*.
[27] *See* 42 U.S C §§ 6214(a)(2)(B), 6214(b)(2), 6214(c), 6261(b), 6271(a), 6272(b)

oil.[28] The Agreement imposes four principal substantive obligations: (1) the maintenance of emergency oil reserves (Chapter I); (2) a program of contingent demand restraint measures (Chapter II); (3) a program of international sharing of oil supplies during a supply emergency (Chapter III); and (4) the establishment of an information system on the international oil market (Chapter V). A critical feature of the IEP is the agreement on a "trigger" level of shortage in petroleum supplies that may activate certain emergency measures to ease disruption caused by the shortage. This emergency system may be activated only in the event of a 7 percent or greater shortfall in oil supplies of one or all of the Participating Countries, as determined in accordance with procedures set out in Chapter IV of the Agreement. Once the emergency system has been activated, all Participating Countries are obligated to share in the shortfall. This may include, depending on the circumstances, the sharing of oil supplies among Participating Countries, based on a calculation of "supply rights" that assumes a certain amount of the shortfall will be absorbed through demand restraint and use of emergency reserves.[29]

1. Section 103. Limitations on Exports

Section 103 of the EPCA, 42 U.S.C. § 6212, grants the President certain authority to limit exports of energy supplies, including petroleum products. Subsection (a), 42 U.S.C. § 6212(a), provides the President with discretionary authority to promulgate a rule restricting exports of coal, petroleum products, natural gas, or petrochemical feedstocks, and related materials and equipment. To facilitate implementation of any rule issued pursuant to subsection (a), the President may require the Secretary of Commerce to implement export restrictions pursuant to procedures established by the Export Administration Act of 1979 (EAA), 50 U.S.C. app. §§ 2401–2420 (1982). *See* 42 U.S.C. § 6212(c). The Secretary of Commerce may implement those restrictions without regard to the direction in the EAA that export controls be limited to those necessary, *inter alia*, "to reduce the serious inflationary impact of foreign demand."[30] Subsection (b), 42 U.S.C. § 6212(b), requires the President to promulgate a rule prohibiting the export of crude oil and natural gas produced in the United States. The President may exempt crude oil or natural gas exports from that prohibition only

[28] Section 3(7) of the EPCA, 42 U.S.C. § 6202(7), defines the IEP as follows

> The term "international energy program" means the Agreement on an International Energy Program, signed by the United States on November 18, 1974, including (A) the annex entitled "Emergency Reserves," (B) any amendment to such Agreement which includes another nation as a party to such Agreement, and (C) any technical or clerical amendment to such Agreement

The effect of this definition is to limit the use of the authority provided by the EPCA to actions taken in support of the Agreement as it was signed by the United States in 1974; the definition precludes use of the EPCA in support of actions taken to implement any future substantive amendments to the Agreement. In addition, § 255 of the EPCA, 42 U.S.C. § 6275, contains a caveat that, "[w]hile the authorities contained in [subchapter II of the EPCA] may, to the extent authorized . . . , be used to carry out obligations incurred by the United States in connection with the International Energy Program, [subchapter II] shall not be construed in any way as advice and consent, ratification, endorsement, or other form of congressional approval of the specific terms of such program."

[29] The scope and operation of the IEP are discussed more fully *infra* at 687–89

[30] *See* 50 U.S.C. app. § 2402(2)(C). The EAA is discussed *infra* at 683–84

if he determines that an exemption would be consistent with the national interest and the purposes of the EPCA. *Id.*

The President's authority to restrict exports of energy supplies and materials under § 103(a) or to waive mandatory restrictions on the export of crude oil and natural gas under § 103(b) is subject to several limitations. First, he must find that the restrictions or exemptions are "appropriate and necessary" to carry out the purposes of the EPCA[31] and consistent with the national interest. 42 U.S.C. § 6212(a), (b)(1), (d). The President's determination of the "national interest" (or the parallel determination by the Secretary of Commerce in implementing export restrictions under this section) must take into account the need to leave uninterrupted or unimpaired: (1) exchanges in similar quantity for convenience or increased efficiency of transportation with persons or the government of a foreign state; (2) temporary exports across parts of an adjacent foreign state; and (3) the historical trading relations of the United States with Canada and Mexico. *Id.* § 6212(d). Second, with respect to restrictions on supplies of materials or equipment other than primary energy sources, the President must determine that the restrictions are necessary either to maintain or for further exploration, production, refining, or transportation of energy supplies, or for the construction or maintenance of energy facilities, within the United States. *Id.* § 6212(a)(2). Third, exemptions from the mandatory export restrictions on crude oil and natural gas required by subsection (b) must be based on a "reasonable classification or basis," such as the purpose for export, class of seller or purchaser, or country of destination. *Id.* § 6212(b)(2).

2. Section 106. Accelerated Production Rates

Section 106(a)(1) of the EPCA, 42 U.S.C. § 6214(a)(1), requires the Secretary of the Interior to determine, by rule, a "maximum efficient rate of production" (Mer) and a "temporary emergency production rate" (Ter) for each field on federal lands that produces or is capable of producing significant volumes of crude oil and/or natural gas.[32] Subsection (b) of § 106, 42 U.S.C. § 6214(b),

[31] The purposes of the EPCA are broadly defined in § 2, 42 U.S.C § 6201, to include the following.

(1) to grant specific standby authority to the President, subject to congressional review, to impose rationing, to reduce demand for energy through the implementation of energy conservation plans, and to fulfill obligations of the United States under the international energy program;

(2) to provide for the creation of a Strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;

(3) to increase the supply of fossil fuels in the United States, through price incentives and production requirements;

(4) to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;

(5) to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;

(6) to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources; and

(7) to provide a means for verification of energy data to assure the reliability of energy data

[32] The Mer is defined as the maximum rate of production that "may be sustained without loss of ultimate recovery of crude oil or natural gas, or both, under sound engineering and economic principles." 42 U.S.C. § 6214(e)(1). The Ter is the maximum rate of production, above the Mer, that "may be maintained for a temporary period of less than 90 days without reservoir damage and without significant loss of ultimate recovery of crude oil or natural gas, or both. . ." *Id.* § 6214(e)(2)

provides that each state may establish a Mer and Ter for any field in the state, other than a field on federal lands, that produces or is capable of producing significant volumes of natural gas or crude oil, and subsection (c), 42 U.S.C. § 6214(c), provides that the Secretary of the Interior may establish a Mer and Ter for unitized fields on federal and non-federal lands for which no Mer or Ter has otherwise been established.

Except with respect to the Naval Petroleum Reserves (NPRs),[33] the President may, at any time, require natural gas or crude oil to be produced from fields on federal lands at the Mer. If the President determines that a severe energy supply interruption exists, he may also authorize production from federal fields at the Ter, or from non-federal or unitized fields on federal and non-federal lands at the Mer or Ter, if such rates have been established by the states or the Secretary of the Interior pursuant to subsections (b) and (c). 42 U.S.C. § 6214(a)(2), (b)(2), (c). This authority could be used to increase domestic crude oil supplies generally by increasing the rate of production from federal fields to the Mer, or, in response to an interruption in petroleum supplies that triggers a presidential finding of a severe energy supply interruption, by increasing production from federal fields to the Ter and from other fields to the Mer or Ter.

3. Sections 151–161. Strategic Petroleum Reserve

Sections 151–161 of the EPCA, 42 U.S.C. §§ 6231–6241, *amended by* Pub. L. No. 97–229, § 4, 96 Stat. 250 (1982), provide for creation of a Strategic Petroleum Reserve (SPR) to be available for the purposes of reducing the impact of future disruptions in supplies of petroleum products and fulfilling obligations of the United States under the IEP,[34] and set forth the method and circumstances for drawdown and distribution of the SPR.

a. Establishment of the SPR

Section 154 of the EPCA directs the establishment of an SPR for storage of up to one billion barrels of petroleum products and preparation of a plan (SPR Plan) outlining proposals for designing, constructing, and filling the storage and related facilities of the Reserve. 42 U.S.C. § 6234(a), (b). The SPR Plan must

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[33] The NPRs, which are established pursuant to 10 U.S C §§ 7420–7438 (1982), are exempt from § 106 of the EPCA. *See* 42 U.S.C § 6214(f). Section 7422(c) of title 10 authorized and directed production of the NPRs at the Mer for a period ending not later than April 5, 1982, and permitted the President to extend such production for additional periods not to exceed three years each Mer production has been extended until April 1985. 17 Weekly Comp. Pres. Doc. 1097 (Oct. 6, 1981). Section 7422(b) of title 10 authorizes the Secretary of Energy to require production of petroleum from the NPRs at the Ter, with the approval of the President, whenever such production is needed for national defense and if such production is authorized by a joint resolution of Congress. 10 U.S C. § 7422(b)(2)

[34] As discussed *infra*, at the discretion of the President, the SPR may be used to fulfill the obligations of the United States under the IEP to participate in an international oil sharing plan in the event of activation of the IEP emergency system. *See infra* at 656

also include a description of the method of drawdown and distribution of the SPR.[35] *Id.* § 6234(e)(12).

In addition, the SPR Plan must provide either for establishment and maintenance on a regional basis of a "Regional Petroleum Reserve" containing sufficient volumes of residual fuel oil or any refined petroleum product to "provide substantial protection against an interruption or reduction in imports of such oil or product," or for storage in the SPR of "substitute" volumes of crude oil and petroleum products sufficient to meet regional needs. 42 U.S.C. § 6237. Section 154(d) of the EPCA, 42 U.S.C. § 6234(d), further directs that the Plan "shall be designed to assure, to the maximum extent practicable, . . . that each noncontiguous area of the United States which does not have overland access to domestic oil production has its component of the [SPR] within its respective territory."

As part of the SPR, the Secretary of Energy[36] may create an Industrial Petroleum Reserve (IPR). 42 U.S.C. § 6236. An IPR would consist of private inventories of petroleum products required to be maintained in excess of normal requirements. The Secretary of Energy has the discretionary authority to establish such a reserve by requiring importers and refiners of petroleum products to acquire, store, and maintain supplies of petroleum products up to 3 percent of the amount they imported or refined in the previous calendar year. In establishing and maintaining an IPR, the Secretary is required to take steps to avoid inequitable economic impacts on refiners and importers, and to maintain an economically sound and competitive petroleum industry. *Id.*

b. Filling the SPR

To implement the SPR, the Secretary of Energy is authorized to acquire petroleum products by purchase, exchange, or other means; the Secretary may also store or exchange crude oil produced from federal lands, including NPR oil and oil that the United States is entitled to receive as royalties. 42 U.S.C. § 6240. Amendments to the EPCA added in 1982 by the EEPA require the President, to the extent funds are appropriated by Congress, to increase the volume of petroleum products in the SPR at a "minimum fill rate" of 300,000 barrels per

[35] The SPR Plan and any amendments thereto must be transmitted to Congress pursuant to the procedures provided in 42 U S C § 6421 for approval of "major energy actions" *See* 42 U S.C. § 6239. We believe that procedures such as these, which contemplate either a one-House veto or a two-House approval mechanism, violate the presentation requirement and, insofar as a one-House veto is involved, the bicameralism requirements of Art. I, § 7, cls. 2 & 3 of the Constitution. These clauses require that all congressional actions having the force and effect of law must be adopted by both Houses of Congress and presented to the President for his approval or veto. In addition, legislative veto provisions such as involved here, which purport to allow Congress to play a direct and significant role in the execution of the law, are inconsistent with the principle of separation of powers. *See Consumers Union of U.S., Inc* v *Federal Trade Comm'n*, 691 F.2d 575 (D.C. Cir 1982) *(per curiam) (en banc); Consumer Energy Council of America* v. *Federal Energy Regulatory Comm'n*, 673 F.2d 425 (D C. Cir 1982), pending before the Supreme Court as Nos. 81–2008, 81–2020, 81–2151, 81–2171, 82–177, and 82–209; *Immigration and Naturalization Service* v *Chadha*, 634 F.2d 408 (9th Cir. 1980), pending before the Supreme Court as Nos. 80–1832, 81–2170, and 81–2171

[36] Responsibility for developing and implementing the SPR was originally given to the Administrator of the Federal Energy Administration Pursuant to the Department of Energy Organization Act, 42 U.S.C. §§ 1701–7375 (1982), the Secretary of Energy is responsible for all functions relating to the SPR. *See* 42 U.S C § 7151

day, or 220,000 barrels per day if the President finds that the higher rate would not be in the national interest, until the SPR reaches at least 500,000,000 barrels. Pub. L. No. 97–229, § 4(a), 96 Stat. 250 (1982).[37] In order to facilitate achievement of this fill rate, the EEPA authorizes the leasing or other use of "interim storage facilities." *Id.* § 4(b).

c. Drawdown and Distribution of the SPR

Section 161, 42 U.S.C. § 6241, governs the drawdown and distribution of petroleum products in the SPR. Drawdown and distribution must be accomplished in accordance with an effective Distribution Plan.[38] The Distribution Plan can only be implemented upon a finding by the President that distribution of the Reserve is required either by (1) a severe energy supply interruption or (2) obligations of the United States under the IEP. *Id.*

The President's authority to withdraw oil in the SPR includes the authority to impose allocation and price controls on that oil. Under § 161(e), 42 U.S.C. § 6241(e), the Secretary of Energy is specifically authorized to provide by rule "for the allocation of any petroleum product withdrawn from the [SPR] in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such rules. Such price levels and allocation procedures shall be consistent with the attainment, to the maximum extent practicable, of the objectives specified in [the EPAA]." The Department of Energy has adopted regulations that would govern the allocation and pricing of SPR crude oil, in the event that such oil were allocated rather than sold through price competition, after a breakdown of the reserve had been triggered by one of the enumerated circumstances. *See* 10 C.F.R. Pt. 220 (1984).

4. Sections 201–202. Energy Conservation Contingency Plans

Under § 201 of the EPCA, 42 U.S.C. § 6261, the President is required to develop one or more "energy conservation contingency plans," which are defined by § 202, 42 U.S.C. § 6262, as plans "which impose reasonable restrictions on the public or private use of energy that are necessary to reduce energy consumption."[39] The President is required to submit any energy conservation contingency plan or amendments thereto to Congress accompanied by a statement explaining the need for, rationale of, and operation of the plan. The plan

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[37] If funds are available to achieve a fill rate higher than the required "minimum fill rate," the EEPA provides that the fill rate be the "highest practicable fill rate achievable." Pub. L. No. 97–229, § 4(a)(1)(D), 96 Stat. 251 (1982). After the SPR reaches 500,000,000 barrels, the President's obligation is to "seek to undertake and continue" a fill rate of 300,000 barrels per day until the SPR reaches 750,000,000 barrels. *Id.* § 4(a)(2).

[38] The currently effective SPR Distribution Plan was submitted to Congress on October 31, 1979. The EEPA requires the Secretary of Energy to transmit a new drawdown plan to Congress by December 1, 1982, as an amendment to the existing SPR Plan. The EEPA specifies that this amendment shall take effect on the date of transmittal to Congress and shall not be subject to provisions in § 159(e) of the EPCA, 42 U.S.C. § 6239(e), relating to congressional review of SPR Plan amendments. Pub. L. No. 97–229, § 4(c), 96 Stat. 252 (1982).

[39] As enacted, §§ 201 and 203 also required the President to develop a "rationing contingency plan" as part of regulations promulgated under § 4(a) of the EPAA, 15 U.S.C. § 753(a). *See* 42 U.S.C. §§ 6261, 6263. This authority expired on September 30, 1981. *See id.* § 6263(f) (1976).

must take into account its potential economic impacts, including its effects on vital industrial sectors of the economy, employment, the economic vitality of states and regional areas, the availability and price of consumer goods and services, the gross national product, and any possible anticompetitive effects. *Id.* § 6261(b), (c), (e). Section 201(b)(2) further requires that the contingency plan be approved by a resolution by each House of Congress.[40] *Id.* § 6261(b)(2). In order to implement an effective emergency contingency plan, the President must find that implementation is required by a severe energy supply interruption or by the need to fulfill the obligations of the United States under the IEP. *Id.* § 6261(b)(3).

The President's authority to prescribe particular demand restraint or energy conservation measures pursuant to § 201 is limited by § 202(a)(2), 42 U.S.C. § 6262(a)(2), which prohibits any energy conservation contingency plan from imposing any rationing, tax, tariff, or user fee, from providing for any credit or deduction in computing any tax, and from containing any provision respecting the price of petroleum products. A plan may provide for exemption of individual states or political subdivisions if the President determines a comparable program is in effect in such state or subdivision or that "special circumstances" exist. *See id.* § 6262(b).

5. Sections 251, 252, 254. Authorities in Support of the Allocation and Information Provisions of the IEP

Sections 251, 252, and 254 of the EPCA, 42 U.S.C. §§ 6271, 6272, 6274, *as amended by* Pub. L. No. 97–229, § 2, 96 Stat. 248 (1982), provide authority for the President and cooperating U.S. oil companies to take action to implement obligations of the United States under the allocation and information provisions contained in Chapters III, IV, and V of the IEP.

As described more fully in Part II below, under the allocation provisions of the IEP, when a reduction in oil supplies reaches the "trigger" level, the United States may have an obligation to allocate oil to another Participating Country, or may have the right to receive allocations of oil from another Participating Country, depending on calculation of the United States' "supply rights." Chapter III of the IEP Agreement provides that "when the sum of normal domestic production and actual net imports available during an emergency exceeds its supply right [the country] shall have an allocation obligation which requires it to supply, directly or indirectly, the quantity of oil equal to that excess to other Participating Countries." Chapter III obligates the United States and the IEP countries to take "necessary measures" to ensure that such allocation will be carried out. As provided in Chapter IV of the Agreement, there are two types of emergencies that "trigger" or activate a nation's allocation obligations under the IEP Agreement: (1) a selective trigger, which occurs when one or more Par-

[40] For the reasons set forth *supra* at n 35, we believe that this two-House approval provision is within the class of so-called legislative veto mechanisms that violate the requirements of Art I, § 7 of the Constitution and the principle of separation of powers.

ticipating Countries suffer a 7 percent or greater shortfall of available supplies measured against final oil consumption during a specified base period; and (2) a general trigger, which occurs when the Participating Countries as a whole suffer a 7 percent or greater shortfall.[41]

The IEP Agreement also provides for the furnishing of information to the International Energy Agency (IEA)[42] during normal and emergency situations. Pursuant to Chapter V, Participating Countries are required to supply to the IEA certain information concerning the international oil market and activities of oil companies, and the possible development of oil shortages, and are responsible for assuring that oil companies subject to their jurisdiction provide them with the required information.[43]

a. Section 251. International Allocation

Section 251 of the EPCA, 42 U.S.C. § 6271, provides the exclusive statutory authority for the President to require U.S. oil companies to allocate petroleum products to Participating Countries, if such allocation is necessary for the purpose of implementing obligations of the United States under the IEP.[44] That section authorizes the President to promulgate rules requiring that producers, transporters, refiners, distributors, or storers of petroleum products "take such action as [the President] determines to be necessary for implementation of the obligations of the United States under Chapters III and IV of the [IEP] insofar as such obligations relate to the international allocation of petroleum products." The President's authority under that section specifically includes the authority to regulate the allocation and price of petroleum products owned or controlled by oil companies subject to the jurisdiction of the United States.[45] No rule promulgated under § 251 may be made effective unless (1) it has been transmitted to Congress, accompanied by a finding that implementation of the rule is required in order to fulfill the obligations of the United States under the IEP; (2) an "international energy supply emergency" has been declared by the President;[46] and (3) the IEP emergency system has been activated in accordance with the pro-

[41] *See infra* at 688–87.

[42] The IEA is the international body set up by the IEP Agreement The supreme decisionmaking body of the IEA is the Governing Board, which includes a representative of each member government. A permanent staff is provided by the establishment of a Secretariat. Much of the work of the IEA is done by several "standing groups," consisting of senior personnel from the Participating Countries.

[43] The IEP information system is discussed *infra* at 688.

[44] Subsection (c)(2) of § 251, 42 U.S.C § 6271(c)(2), makes clear that the authority is exclusive:

> No officer or agency of the United States shall have any authority, other than authority under this section, to require that petroleum products be allocated to other countries for the purpose of implementation of the obligations of the United States under the [IEP]

[45] Section 251(a), 42 U S.C. § 6271(a), provides that "[a]llocation under such rule should be in such amounts and at such prices as are specified in (or determined in a manner prescribed by) such rule."

[46] An "international energy supply emergency" is defined by § 252(l)(1), 42 U.S.C. § 6272(l)(1), as:

> any period (A) beginning on any date which the President determines allocation of petroleum products to nations participating in the international energy program is required by chapters III and IV of such program, and (B) ending on a date on which he determines that such allocation is no longer required. Such a period may not exceed 90 days, but the President may establish one or more additional 90-day periods by making anew the determination under subparagraph (A) of the preceding sentence.

cedures and standards of Chapter IV.[47] No rule may remain in effect longer than twelve months after its transmittal to Congress. *Id.* § 6271(b).

Under § 251, the President has clear authority to require oil companies subject to the jurisdiction of the United States to divert their oil supplies to other Participating Countries, and to determine prices at which such supplies should be sold, if a "trigger" situation has been declared in accordance with Chapter IV of the Agreement and if the President determines that such allocation is necessary to meet the United States' allocation obligations. A related question is whether § 251 provides the President with authority to allocate oil supplies among cooperating oil companies if those oil companies are disadvantaged by diversion of their projected supplies to other countries, when such diversion is necessary to enable the United States to meet its obligations under Chapters III and IV of the IEP Agreement. Although the IEP Agreement does not require that the United States have authority to control the allocation or price of oil domestically in order to ensure that those oil companies that assist the United States in meeting its obligations under the Agreement do not suffer competitively, the Agreement could arguably be interpreted to support the development of such a "fair share" domestic allocation program. Articles 6(1), 9(3), and 9(4) of the Agreement, for example, appear to contemplate that Participating Countries may implement such programs in order to fulfill their international allocation obligations.

> Art. 6(1). Each participating country shall take the necessary measures in order that allocation of oil will be carried out pursuant to [Chapter III] and Chapter IV.
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> * * * * *
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> Art. 9(3). Insofar as possible, normal channels of supply will be maintained as well as the normal supply proportions between crude oil and products and among different categories of crude oil and products.
>
> Art. 9(4). When allocation takes place, an objective of the Program shall be that available crude oil and products shall, insofar as possible, be shared within the refining and distributing industries as well as between refining and distributing companies in accordance with historical supply patterns.

Section 251 specifically authorizes the President to direct oil companies "to take such action as he determines to be necessary" to meet the international allocation obligations of the United States under the IEP. 42 U.S.C. § 6271(a). Consistent with this language and the arguable breadth of the IEP Agreement, the President could find that a limited domestic "fair sharing" allocation program

[47] The second and third requirements were recently added by the EEPA to clarify Congress' intent that § 251 not provide authority for the President to implement allocation or price control requirements prior to activation of the IEP emergency system in accordance with Chapter IV of the Agreement. Pub. L. No 97–229, § 2, 96 Stat. 248 (1982); *see* 128 Cong Rec. S 6065 (daily ed. May 26, 1982) (remarks of Sen. McClure) This requirement would, for example, preclude use of § 251 to direct oil companies to allocate oil in "subcrisis" situations. A fuller discussion of this limitation is provided in Part II *infra*.

would be necessary in order for the United States to meet its IEP allocation obligations through the voluntary cooperation of U.S. oil companies, because such cooperation could well depend on assurances to the participating companies that they would not suffer competitive losses. A presidential determination that such a system is "necessary" to meet those obligations would be accorded substantial deference by the courts. *See generally, e.g., Chicago & Southern Airlines* v. *Western S.S. Corp.*, 333 U.S. 103 (1948); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); 42 Op. Att'y Gen. 363, 370 (1968). Similarly, the President's determination with regard to the nature of the United States' international allocation obligations under the IEP and the measures to be used to meet those obligations would be accorded substantial deference. *See generally, e.g., Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 561 (1976). It is clear, however, that neither the IEP nor § 251 *requires* the President to develop or implement a domestic "fair sharing" allocation plan.

It is less clear that § 251 could be used to establish comprehensive nationwide allocation and price controls, for example, such as those provided under the EPAA, on the basis that such controls are "necessary" for implementation of the United States' international allocation obligations under the IEP. An allocation and pricing regulation of the breadth available under the EPAA would not, at least in the absence of particular facts, appear to be linked with sufficient directness to fulfillment of the United States' international allocation obligations to justify a presidential finding of necessity. However, any exercise of presidential discretion under § 251 will depend on the particular facts presented. *See generally Federal Energy Administration* v. *Algonquin SNG, Inc., supra,* 426 U.S. at 571.

b. Section 252. Antitrust Defense

Section 252 of the EPCA, 42 U.S.C. § 6272, authorizes persons engaged in the business of producing, transporting, refining, distributing, or storing petroleum products to develop voluntary agreements and plans of action to facilitate or implement the United States' allocation and information obligations under the IEP, and establishes procedures for development of such agreements and plans and for approval and monitoring by federal officials.[48] That section provides a limited antitrust defense with respect to actions taken by participating companies in developing or implementing agreements that meet the requirements of the section. The antitrust defense is available only if the actions are taken in the

[48] Section 252 calls upon the Secretary of Energy to prescribe rules governing, and provides detailed procedural requirements with respect to, meetings held to develop or carry out a voluntary agreement or plan of action. 42 U.S.C. § 6272(b), (c). *See* 10 C.F.R. Pt. 209 (1984). The Attorney General and the Federal Trade Commission (FTC) are to participate in the development and execution of voluntary agreements and plans of action and the Attorney General must approve any voluntary agreement or plan of action prior to its implementation. 42 U.S.C. § 6272(d). The Attorney General and the FTC are also to monitor the development and execution of voluntary agreements and plans of action in order to "promote competition and to prevent anticompetitive practices and effects." *Id.* § 6272(e). A "Voluntary Agreement and Plan of Action to Implement the International Energy Program," administered by the Secretary of Energy, was approved in 1976. *See* 41 Fed. Reg. 13998 (Apr. 1, 1976). Twenty U.S. oil companies are now participating in that Agreement. On May 8, 1981, the Department of Energy published a revised draft Plan of Action in the Federal Register. 46 Fed. Reg. 26026 (May 8, 1981).

course of developing or carrying out a voluntary agreement or plan of action, are in compliance with the requirements of the section and any rules promulgated thereunder, and are not taken for the purpose of injuring competition. Section 252(f)(2), 42 U.S.C. § 6272(f)(2), provides that actions taken to implement a voluntary agreement or plan of action must be "specified in, or within the reasonable contemplation of, an approved plan of action" in order to qualify for the antitrust defense. A separate breach of contract defense is also provided if the alleged breach "was caused predominantly by action taken during an international energy supply emergency or to carry out a voluntary agreement or plan of action authorized and approved in accordance with [§ 252]." *Id.* § 6272(k).

The authority in § 252 to develop and implement voluntary agreements or plans of action and the parallel antitrust and breach-of-contract defenses may be relied upon only in support of the United States' allocation and information obligations under Chapters III, IV, and V of the IEP Agreement. Any doubt whether § 252 would authorize actions taken by oil companies that are not provided for by the allocation and information provisions of Chapters III, IV, or V of the IEP was dispelled by the EEPA, which amended § 252 to provide that:

> The authority granted by this section shall apply only to the development or carrying out of voluntary agreements and plans of action to implement chapters III, IV, and V of the international energy program.

Pub. L. No. 97–229, § 2(b), 96 Stat. 248 (1982). *See* discussion *infra* at 694–95.

The legislative history of § 252 makes clear that the antitrust defense was not intended to authorize voluntary agreements among the oil companies for the domestic allocation or pricing of oil supplies, even if the purpose of such allocation were to ease disruptions caused by international allocations necessary to meet the United States' IEP obligations. The report issued by the Senate Committee on the Judiciary states that, at the request of the Ford Administration and of Chairman Hart of the Subcommittee on Antitrust and Monopoly, the requirements of § 121 (the predecessor to § 252) were tailored and limited to specific actions with respect to the international allocation of petroleum and the information system of the IEP. The Report indicates that the defense was intentionally not extended to domestic activities of companies participating in voluntary agreements or plans under § 252. *See* S. Rep. No. 26, 94th Cong., 1st Sess. 43 (1975).

c. Section 254. Exchange of Information with the International Energy Agency

Section 254, 42 U.S.C. § 6274, contains procedures for the transmittal of information to the IEA by the United States government. That section provides that the Secretary of State may transmit to the IEA information and data related to the energy industry that is required to be submitted under the terms of the IEP Agreement. 42 U.S.C. § 6274(a). To the extent feasible, trade secrets and

commercial or financial information must be aggregated to avoid identification of sources before being reported to the IEA by the United States government. *Id.* However, such information may be transmitted directly by the government without aggregation during an international energy supply emergency,[49] or if the President certifies that the IEA has adopted and is implementing security measures to protect against disclosure of the information to any person or foreign nation. *Id.* The President may withhold transmittal of any data or information if he determines that transmittal would prejudice competition, violate the antitrust laws, or be inconsistent with national security. *Id.* § 6274(b). If the confidentiality of information to be transmitted to the IEA is otherwise protected by statute, the Secretary of Energy, prior to giving the information to the State Department, must obtain concurrence in its release from the head of the department or agency authorized to collect or obtain the information. *Id.* § 6274(c).

B. Defense Production Act of 1950

The Defense Production Act of 1950 (DPA), 50 U.S.C. app. §§ 2061–2169, provides the President with additional discretionary authority that may be available in the event of a substantial shortfall in petroleum supplies. The DPA is not an "emergency" statute, in the sense that the authority provided in the statute may be used only if certain specified "emergency" conditions occur.[50] Rather, the President may use that authority to meet a variety of national defense and national defense preparedness needs, whether or not an "emergency" situation exists. As discussed above, however, our focus in this Memorandum is on statutory authorities that may be available to the President in the event of a future "petroleum emergency." Consequently, our discussion of the scope of the DPA is generally limited to how that statute could be used by the President to respond to such an emergency. Nothing in this discussion is intended to suggest that, subject of course to the requirements of each relevant provision,[51] the DPA may not be used in other contexts or in non-emergency situations.

The purpose of the DPA is to provide for the promotion of the national defense by assuring that adequate productive capacity and supply exist to meet national defense needs. With one exception,[52] exercise of authority provided by the DPA must be linked to the needs of the national defense or of national defense preparedness programs.[53] The President has broad discretion to determine what those needs are and how the DPA authorities may be used, consistent with the

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[49] This exception is limited, however, to information or data relating to the international allocation of petroleum products. 42 U.S.C. § 6274(a)(2)(B)(i).

[50] One exception is § 710(e), 50 U.S.C. app. § 2160(e), which, as we discuss *infra*, authorizes employment of members of the Executive Reserve only "during periods of emergency." *See infra* at 672–73.

[51] *See id.*

[52] *See* discussion of § 101(c), 50 U.S.C. app. § 2071(c), *infra* at 668–70.

[53] The term "national defense" is defined by the Act to include "programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling, space and directly related activity." 50 U.S.C. app. § 2152(d).

specific requirements of each provision of the statute.[54] *See generally* H.R. Rep. No. 2759, 81st Cong., 2d Sess. 4 (1950); S. Rep. No. 470, 82d Cong., 1st Sess. 12 (1951). In particular, in his determination of what the national defense requires, it is clear that the President may consider, *inter alia*, the potential impact of severe shortages in petroleum supplies available to the United States. In the Energy Security Act (ESA), Pub. L. No. 96–294, § 102, 94 Stat. 617 (1980), Congress specifically designated energy as a "strategic and critical material" within the meaning of the DPA's Declaration of Policy,[55] and added language to that Declaration to emphasize that preparedness programs, as well as actions to expand productive capacity and supply in order to assure the availability of energy supplies, are linked to the national defense:

> In view of the present international situation and in order to provide for the national defense and national security, our mobilization effort continues to require some diversion of certain materials and facilities from civilian use to military and related purposes. It also requires the development of preparedness programs and the expansion of productive capacity and supply beyond the levels needed to meet the civilian demand, in order to reduce the time required for full mobilization in the event of an attack on the United States *or to respond to actions occurring outside of the United States which could result in the termination or reduction of the availability of strategic and critical materials, including energy, and which would adversely affect the national defense preparedness of the United States. In order to insure the national defense preparedness which is essential to national security, it is also necessary and appropriate to assure domestic energy supplies for national defense needs.*

50 U.S.C. app. § 2062 (amendment emphasized). The Conference Report explained:

> The "Declaration of Policy" is amended to make it clear that it is necessary and appropriate, indeed essential, "to assure domestic energy supplies for national defense needs."

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[54] As described below, the particular basis for exercise of authority under each of the relevant provisions of the DPA differs somewhat, although, with the exception of § 101(c), 50 U.S.C. app. § 2071(c) (*see* n.52), that exercise must be related to the national defense or national defense preparedness programs. Thus, the President has authority under § 101(a), 50 U.S.C. app. § 2071(a), to order the priority performance of contracts or allocate materials "to promote the national defense," under § 708, 50 U.S.C. app. § 2158(c)(1), the President may authorize voluntary agreements among private individuals and companies "upon finding that conditions exist which may pose a direct threat to the national defense or its preparedness programs;" the President may employ persons from the private sector without compensation under § 710(b), 50 U.S.C. app. § 2160(b), "in order to carry out the provisions of [the DPA];" and he may establish and train an Executive Reserve pursuant to § 710(e), 50 U.S.C. app. § 2160(e), for employment "in executive positions in Government during periods of emergency."

[55] *See* 50 U.S.C. app. § 2076.

H.R. Rep. No. 1104, 96th Cong., 2d Sess. 187 (1980).[56]

Three provisions of the DPA provide the President with authority to respond to a substantial petroleum shortage: § 101, 50 U.S.C. app. § 2071, which authorizes the President to require the priority performance of contracts or orders and to direct allocation of materials, including petroleum products, in certain circumstances; § 708, 50 U.S.C. app. § 2158, which authorizes the President to approve certain voluntary agreements relating to preparedness for national emergencies and thereby to trigger an antitrust defense for persons or companies participating in such agreements; and § 710, 50 U.S.C. app. § 2160, which authorizes the President to employ "persons of outstanding experience and ability" to serve without compensation in advisory positions for purposes of assisting in carrying out the DPA and to establish an Executive Reserve to train private and governmental personnel for employment in executive positions in the government during periods of emergency.

1. Section 101(a). Priority Performance of Contracts and Allocation of Materials

Section 101(a) of the DPA, 50 U.S.C. app. § 2071(a), authorizes the President to require performance on a priority basis of contracts or orders that he deems "necessary or appropriate to promote the national defense," and to allocate materials and facilities "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate to promote the national defense."[57] The authority provided to the President under this section has been characterized by Congress as "broad and flexible." H.R. Rep. No. 2759, 81st Cong., 2d Sess. 4 (1950). Indeed, the House Report on the original version of the DPA noted that § 101(a) would authorize a wide range of actions to meet the national defense needs of the United States:

> [The powers granted under § 101(a)] would include the power to issue orders stopping or reducing the production of any item; orders to prohibit the use of a material for a particular purpose or for anything except a particular purpose; and orders to prohibit the accumulation of excessive inventories. [Section 101(a)] would authorize the President to require filling certain orders in prefer-

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[56] Congress intended that this amendment to the DPA make explicit the link between domestic energy supplies and the national defense, but it did not intend to grant any new allocation or pricing authority or new authority to engage in the production of energy (except as authorized by the ESA with respect to synthetic fuel production) *See* 50 U.S C. app. § 2076

[57] The full text of § 101(a) reads as follows.

> The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

50 U S C. app. § 2071(a).

ence to other orders, or requiring the acceptance and performance of particular orders.

Id.; see also H.R. Rep. No. 639, 82d Cong., 1st Sess. 21–22 (1951). The report of the Senate committee on amendments added to the DPA in 1952 cautions, however, that the section should be used "only where necessary or appropriate to promote the national defense. [It] should not be used to accomplish purposes, however meritorious, which bear no relation to national defense." S. Rep. No. 1599, 82d Cong., 2d Sess. 7 (1952).

In a petroleum emergency, § 101(a) could give the President authority, *inter alia*, to require acceptance of and priority performance under contracts relating to the production, delivery, or refining of petroleum products or to allocate supplies of petroleum products, depending on the circumstances of the emergency.[58] Section 101(a) might also be used to facilitate petroleum transportation during an emergency, for example, by requiring pipelines, marine terminals, and other facilities to perform oil transport contracts necessary or appropriate to promote the national defense.

The President's authority would be subject to certain limitations or would have to rest on certain findings required by the DPA. First, the requisite "national defense" nexus must exist. Use of the authority provided by § 101(a) specifically to respond to a petroleum emergency would have to be based on a presidential determination that the emergency threatens or adversely affects the national defense, as that term is defined in the Act.[59] However, as noted above, Congress has specifically recognized that national defense concerns may be implicated by a shortfall in energy supplies, particularly a shortfall resulting from actions occurring outside the United States. *See supra* at 663. Especially in light of this clear congressional intent, a presidential determination that a substantial reduction in petroleum supplies affects the national defense and security of the United States would be given considerable deference by the courts. *See generally Federal Energy Administration* v. *Algonquin SNG, Inc.*, *supra*, 426 U.S. at 561.

Second, the President's authority is limited by § 101(b), 50 U.S.C. app. § 2071(b), which directs that the powers granted in § 101(a) can be used to

[58] It is clear that Congress contemplated use of § 101(a), as well as other DPA provisions, to control the performance of petroleum-related contracts and to allocate petroleum products, if the President were to find such action necessary and appropriate to promote the national defense The 1950 House Report noted that increased demand for certain metals for the military and other programs or for stockpiling "will inevitably cut down on the supply available to industry generally, with consequent dislocations The same situation is present, to a greater or lesser extent, in the case of many other materials, such as many chemicals, *petroleum*, and in the case of many kinds of equipment" H R. Rep. No. 2759, 81st Cong . 2d Sess 7 (1950) (emphasis added). Moreover, the definition of "materials" subject to the President's allocation authority ("raw materials, articles, commodities, products, supplies, components, technical information, and processes") is clearly broad enough to include petroleum products, especially in light of that legislative history. *See* 50 U S.C app § 2152(b), H R Rep No 2759, *supra*, at 7 That interpretation is confirmed by the language and legislative history of the provision of the ESA that clarified that "energy" is a "strategic and critical material" within the meaning of the DPA's Declaration of Policy. *See supra* at 21

[59] As we noted above, the President's authority under § 101(a) to direct priority performance of contracts or to allocate materials, including petroleum, is not necessarily dependent on the existence of a petroleum emergency That authority could be used, for example, to require performance of petroleum supply, production, or transportation contracts or to allocate petroleum supplies on a timely basis, if necessary to meet the needs of a particular defense program, even if no "emergency" situation exists.

control the general distribution of material in civilian markets only if the President finds that the material is a "scarce and critical material essential to the national defense" and that defense needs cannot be met without causing dislocations in that market that will create "appreciable hardship." This section, which was added to the DPA in 1953, was intended to address situations in which defense needs cause a hardship in civilian markets by making large demands on a limited resource or limited production capacity. The House report discussing the 1953 amendment described the need and scope of this restriction:

> In the proposed extension of the priorities and allocation authority the committee has taken cognizance of the conditions which exist today and has proposed that the powers not be used to control the general distribution of any material in the civilian market except in special cases where otherwise, because of demands for national defense of a scarce and critical material, there would be a significant dislocation in the civilian market resulting in appreciable hardship. Nickel at present provides an excellent illustration of the need for authority to provide for equitable distribution of available civilian supplies. It is estimated that during 1953 the military, AEC, and stockpile will take more than one-half of the total supply. These requirements are so heavy as to make it necessary to apportion, as equitably as possible, the residual supply among civilian uses.

H.R. Rep. No. 516, 83d Cong., 1st Sess. 5 (1953).[60]

Thus, § 101(a) provides broader authority for the President to allocate scarce materials among defense agencies, contractors, or suppliers than to allocate supplies of materials among refiners or importers, wholesalers, retailers, and end-users in the civilian market. If there were a direct defense requirement for the material, the material could be allocated to defense agencies or programs or to their contractors upon a finding that such allocation is "necessary or appropriate" to meet those defense needs. A direct defense need could occur, for example, if the material were required by defense preparedness programs of the Department of Defense, the atomic energy programs of the Department of Energy, certain programs of the National Aeronautics and Space Administration, or by a contractor of those agencies. Use of § 101(a) would be justified, *inter alia*, if demand for the material exceeded available supply, if suppliers of a defense-related material were unwilling or unable to supply that material to the govern-

[60] Another provision of the DPA, § 701(c), 50 U.S.C. app. § 2151(c), further limits the President's authority to control the distribution of material in the civilian market. Section 701(c) provides:

> Whenever the President invokes the powers given him in this Act to allocate any material in the civilian market, he shall do so in such a manner as to make available, so far as practicable, for business and various segments thereof in the normal channel of distribution of such material, a fair share of the available civilian supply based, so far as practicable, on the share received by such business under normal conditions during a representative period preceding any future allocation of materials: *Provided*, That the President shall, in the allocation of materials in the civilian market, give due consideration to the needs of new concerns and newly acquired operations, undue hardships of individual businesses, and the needs of smaller concerns in an industry.

ment or to defense contractors, or if such a material were otherwise unavailable in a timely fashion through ordinary commercial channels. To take one example, if, as a result of a national petroleum shortage, defense agencies or contractors could not obtain sufficient petroleum products in time to meet the needs of defense preparedness programs, § 101(a) could be used to require suppliers to provide adequate petroleum supplies without regard to their existing contractual commitments. The DPA would relieve the seller of any liability for breach of contract resulting from compliance with such an order. 50 U.S.C. app. § 2157.

On the other hand, the President's authority could not be used to control general distribution in the civilian market unless he were to make the further findings required by § 101(b). Thus, in order to implement a general domestic allocation of petroleum products under § 101(a) in response to a shortage of petroleum supplies, the President would have to find that defense needs for petroleum will reduce supplies of petroleum available to the civilian markets to the point of causing "significant dislocation" and "appreciable hardship." *See* 50 U.S.C. app. § 2071(b).

Third, it is not entirely clear whether the allocation authority contained in § 101(a) gives the President authority to impose price controls. The language of that section, which allows the President to allocate materials and facilities "upon such conditions, and to such extent as he shall deem necessary or appropriate," appears broad enough to authorize price controls.[61] As a practical matter, the President could find that the allocation of materials, particularly from unwilling suppliers, could not be accomplished without some form of price controls. As we have noted before, that is the sort of presidential determination to which the courts will ordinarily defer. *See supra* at 660. We note, however, that there is legislative history that suggests Congress did not intend the authority contained in § 101(a) to include authority to impose mandatory price controls. As enacted in 1950, the DPA empowered the President to impose general wage and price controls. *See* Act of 1950, ch. 932, Title IV, 64 Stat. 803. However, those provisions were allowed to expire in 1953. In renewing other provisions of the DPA at that time, Congress specifically stated that the wage and price control provisions were no longer necessary. *See* H.R. Rep. No. 516, 83d Cong., 1st Sess. 2–3, 10–13 (1953). Therefore, in the absence of specific authorization, it is possible that a court may conclude that the DPA does not empower the President to impose mandatory price controls on materials, including petroleum, allocated under § 101(a).[62] *Cf. American Federation of Labor* v. *Kahn*, 618 F.2d 784, 794–96 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979). Absent a specific factual setting, it would be inappropriate to speculate further as to how this issue might be resolved in the courts.

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[61] That language is included only in clause (2) of § 101(a), with respect to allocation of materials and facilities; it does not appear in the language of clause (1) authorizing the President to require acceptance of and priority performance under contracts and orders *Compare* 50 U S C app. § 2071(a)(1) *with id* § 2071(a)(2).

[62] This legislative history would not necessarily preclude some limited regulation respecting price, for example, a requirement of non-discriminatory pricing

Fourth, the President cannot use the allocation authority in § 101(a) to require rationing of gasoline among end-users. 50 U.S.C. app. § 2075.[63]

2. Section 101(c). Maximizing Domestic Energy Supplies

Section 101(c) of the DPA, 50 U.S.C. app. § 2071(c), provides that the President may require the allocation of, or the priority performance under, contracts or orders relating to "supplies of materials and equipment in order to maximize domestic energy supplies," if he makes certain findings with respect to the need for the materials for either the exploration, production, refining, transportation, or conservation of energy supplies, or for the construction and maintenance of energy facilities.[64] The President's authority under § 101(c) may be exercised "[n]otwithstanding any other provision of this Act," and therefore is not subject to the "national defense" requirement of § 101(a) or the constraints imposed by § 101(b), 50 U.S.C. app. § 2071(a), (b). This section thus provides some authority for the President to allocate materials in the civilian market, or to require priority performance of contracts, that is not dependent on a national defense nexus or the findings required by § 101(b).

The legislative history of § 101(c) indicates that Congress' specific concern was with bottlenecks in the production and transportation of energy caused by shortages in critical equipment needed for the production and transportation of energy. Section 101(c) was added to the DPA in 1975 by § 104 of the EPCA. The Report of the Senate Committee on Interior and Insular Affairs on the Senate version of the bill discussed the purpose of that provision as follows:

> Section 105 [of the Senate bill] authorizes the President to allocate supplies of materials and equipment associated with the production of energy supplies to the extent necessary to maintain and increase the production and transport of fuels. . . . This provision was included in the title in an attempt to remedy critical shortages and misallocations of pipe, pumps, drilling rigs and roofbolts, which are currently plaguing energy producers.
>
> The committee received the following testimony at a hearing on February 27, 1974, from the Deputy Director at FEO:
>
> > Mr. Sawhill. Well, I think that we have impediments to our domestic production. We have impediments because of the lack of tubular steel that we talked about before. We have impediments because of the lack of drilling rigs in this

[63] This restriction was added by § 103 of the ESA, *codified at* 50 U.S.C. app. § 2075, and provides "[n]othing in [the DPA] shall be construed to authorize the President to institute, without the approval of the Congress, a program for the rationing of gasoline among classes of end-users." Because the "approval" of Congress would, of necessity, take the form of plenary legislation, such authority would be derived from that legislation and not from § 101(a).

[64] The President must find (1) that such supplies are "scarce, critical, and essential to maintain or further (i) exploration, production, refining, transportation, or (ii) the conservation of energy supplies, or (iii) for the construction and maintenance of energy facilities;" and (2) that "maintenance or furtherance of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified in paragraph (1) of this subsection." 50 U.S.C. app. § 2071(c)(3).

> country. In other words, no matter what the price is, there are only so many wells we can drill, because there are only so many rigs available and so much tubular steel available.

S. Rep. No. 26, 94th Cong., 1st Sess. 34 (1975). This legislative history clearly contemplates that § 101(c) could be used, in the event of a petroleum emergency, to maximize available energy supplies through reducing bottlenecks in the production and transportation of energy, for example, to facilitate delivery of equipment necessary for increased energy production.[65]

It is somewhat less clear whether Congress intended that § 101(c) be used to allocate supplies of energy sources, such as petroleum products. Section 101(c) uses the term "materials and equipment." As we have noted, the definition of "materials" contained in the DPA, 50 U.S.C. app. § 2152(b), includes petroleum products. *See supra* n.58. However, the language of the Senate Report quoted above seems to indicate that the Senate intended the section to encompass only supplies of hardware such as parts and equipment, as distinguished from energy sources such as crude oil, petroleum, coal, natural gas, or petrochemical feedstocks. The authority has been used to date only for that purpose—*i.e.*, to provide assistance to energy production or transportation projects in obtaining scarce equipment and supplies. *See, e.g.*, 10 C.F.R. Pt. 216.

There is legislative history, however, that supports the contrary conclusion that § 101(c) was intended to give the President some authority to allocate energy supplies, including petroleum products, if the requisite findings are made. Senator Randolph, one of the conference bill's floor managers, stated in his remarks introducing the bill on the floor of the Senate:

> Mr. President, the Energy Policy and Conservation Act deals with several matters affecting domestic energy supply availability in general. Some provisions of S. 622 address leasing practices on the Outer Continental Shelf and other Federal lands, *as well as the availability of energy supplies and equipment for the production of domestic energy supplies*. For example, authority is provided to assure that roof bolts are available for use in the underground production of coal—a significant restraint on coal production during the oil embargo in the winter of 1973.

121 Cong. Rec. 41022 (Dec. 16, 1975) (emphasis added). Moreover, neither the language of the section nor the legislative history suggests that "materials" as used in § 101(c) should be defined more narrowly than "materials" as used in § 101(a) which, as noted above, include energy sources such as crude oil and petroleum products. In fact, Congress' intent in placing this authority in the DPA rather than in the EPCA was to prevent the creation of two overlapping and

[65] Because the authority under § 101(c) to require performance of contracts is limited to contracts or orders "relating to supplies of materials and equipment," 50 U.S.C. app § 2071(c), it is questionable whether § 101(c) provides authority to require performance of service contracts. Thus, there is some doubt, for example, whether § 101(c) would support a requirement that a pipeline, marine terminal, or other facility provide transportation services

possibly inconsistent statutory schemes. Senator Proxmire, the sponsor of the amendment to place the authority in § 101 of the DPA, explained its effect as follows:

> [The amendment] is offered to avoid a duplicate allocation mechanism, which could very well conflict with the priorities and allocations program provided for defense programs under [the DPA]. . . .
>
> The effect, then, of the amendment which I have proposed is essentially to take our existing and working allocation system and to broaden it to include domestic energy supplies, while at the same time to provide the authority to reconcile different claims on a basis that will best serve the total national interest. . . .

121 Cong. Rec. 9162 (Apr. 7, 1975) (remarks of Sen. Proxmire).

Thus, although the issue is not free from doubt because of the somewhat conflicting legislative history, § 101(c) could possibly also be used by the President to allocate an energy source such as petroleum products. As a practical matter, however, the usefulness of that authority may be significantly limited by the requirement of § 101(c) that the allocation be necessary to "maximize domestic energy supplies."[66] The legislative history of the section suggests strongly that Congress' intent was to enable the President to take action to increase supplies of energy, not to distribute existing energy supplies. *See supra* at 668–69. While it is conceivable that in limited situations the allocation of petroleum products might serve to increase energy production,[67] it is unlikely that in the event of a severe petroleum shortage § 101(c) could be relied upon to institute a general allocation of scarce supplies of petroleum among oil companies, regions, or end-users.

3. Section 708. Voluntary Agreements

Section 708 of the DPA, 50 U.S.C. app. § 2158, provides a limited antitrust defense for persons who carry out voluntary agreements "to help provide for the defense of the United States through the development of preparedness programs and the expansion of productive capacity and supply beyond levels needed to meet essential civilian demand in the United States." The section empowers the President to authorize the making of such voluntary agreements when he finds that "conditions exist which may pose a direct threat to the national defense or its

[66] The authority to allocate materials under § 101(c) is also dependent on a finding that the materials are "scarce and critical." *See* 50 U.S.C. app. § 2071(c)(3). Absent a finding of scarcity, § 101(c) would not be available to allocate energy sources In a petroleum interruption, it is likely that this finding could be made, but the availability of the authority would obviously depend on the facts of any particular situation.

[67] There may be some circumstances that would justify a presidential finding that allocation of petroleum products is necessary to "maximize energy supplies." For example, the allocation of petroleum supplies to utilities could be necessary to maximize production of electricity. Arguably, the allocation of petroleum products for use in energy exploration, production, or transportation, such as building or maintaining oil rigs and refineries, might serve to increase total energy production in times of a petroleum shortfall. Allocation to end-users who adopt stringent conservation measures could also arguably provide for the most efficient use of available supplies and therefore increase total supplies.

preparedness programs." 50 U.S.C. app. § 2158(c)(1).[68] Persons or companies participating in approved voluntary agreements may claim an antitrust defense with respect to any act or omission taken in good faith in the course of developing or carrying out such an agreement. *Id.* § 2158(j). No voluntary agreement may be approved unless the Attorney General finds that its purpose "may not reasonably be achieved through a voluntary agreement having less anticompetitive effects or without any voluntary agreement." *Id.* § 2158(f)(1).[69]

The purpose of voluntary agreements authorized by § 708 is specifically "to help provide for the defense of the United States through the development of preparedness programs and the expansion of productive capacity and supply beyond levels needed to meet essential civilian demand in the United States." 50 U.S.C. app. § 2158(c). Because of the scope of the President's authority under the DPA to determine the reach of the term "national defense" and the explicit congressional recognition of the importance of energy preparedness to the national defense (*see supra* at 663), § 708 could be used to authorize a broad range of voluntary agreements among oil companies or with others to plan for or deal with a substantial petroleum shortage that may impair the national defense or national defense preparedness,[70] and would make available an antitrust defense for actions taken to formulate or implement such agreements.

With respect to energy-related activities, however, the § 708(j) antitrust defense is available only for domestic activities taken to develop or carry out a voluntary agreement. Section 708A(o), 50 U.S.C. app. § 2158a(o), makes the antitrust defense unavailable for voluntary agreements to carry out the IEP[71] or to

[68] The original DPA § 708, enacted in 1950 and patterned after the 1942 Small Business Mobilization Act, gave the President broad authority to convey antitrust immunity:

> (b) No act or omission to act pursuant to this Act, . . . if requested by the President pursuant to a voluntary agreement or program approved . . [by him] and found by the President to be in the public interest as contributing to the national defense shall be within the prohibitions of the antitrust laws. . . .

There were few procedural restrictions on the exercise of this authority. Section 708 was substantially revised in 1975 in conjunction with legislative enactment of § 252 of the EPCA, 42 U.S.C. § 2172. The 1975 DPA amendments reduced the antitrust immunity to a defense, adopted the "good faith" requirement, and imposed procedural safeguards comparable to those contained in § 252 of the EPCA. *See* Pub. L. No. 94–152, § 3, 89 Stat. 810 (1975).

[69] The DPA requires the Attorney General, after consultation with the FTC, to approve rules for the development of voluntary agreements and any voluntary agreement itself. 50 U.S.C. app. § 2158(e), (f). An agreement may be developed only at meetings in which the Attorney General and an FTC representative participate, and the Attorney General and the FTC are required to monitor the implementation of any voluntary agreement. *Id.* § 2158(e)(3), (g). The Attorney General is granted the authority to terminate an agreement at any time. *Id.* § 2158(h). The Attorney General and the FTC are given access to all relevant information, and have rulemaking authority to carry out their responsibilities. *Id.* § 2158(h), (i). Finally, both the Attorney General and the FTC are required to conduct surveys of the competitive effects of voluntary agreements, and the Attorney General must submit reports to Congress on the administration of any operative agreements. *Id.* § 2158(k).

[70] The authority contained in § 708 has been used in the past to authorize cooperation and exchange of information relating to the impact of petroleum shortages on the national defense. A "Voluntary Agreement Related to the Supply of Petroleum to Friendly Foreign Nations" was approved by the Attorney General and entered into on June 26, 1951. It was superseded by the "Voluntary Agreement on Foreign Petroleum Supply" approved June 1, 1953. This Agreement, formed under the sponsorship of the Department of the Interior, remained in effect until 1976. The Agreement was activated in response to international events, including the nationalization of the Suez Canal, the 1967 Six Days War, and the 1973 Yom Kippur War.

[71] As discussed above, § 252 of the EPCA, 42 U.S.C. § 6272, provides the only statutory antitrust defense for industry activities pursuant to authorized voluntary agreements or plans of action in support of the IEP. *See supra* at 660–61. Section 708A(o) was added to the DPA at the time the EPCA was enacted, apparently with the intent of limiting duplication in the scope of § 252 of the EPCA and the existing antitrust defense in the DPA. *See* 121 Cong

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voluntary agreements which "in whole or in part" are in furtherance of a "treaty or executive agreement to which the United States is a party or to implement a program of international cooperation between the United States and one or more foreign countries." This precludes use of § 708 to implement any voluntary "fair sharing" program to meet IEP obligations,[72] or to fulfill international obligations such as NATO oil supply commitments and the United States–Israel oil supply agreement.

In order to qualify for the defense, the conduct in question must have been undertaken in good faith, and the persons claiming the defense must have acted in accordance with the statute, applicable regulations, and the applicable voluntary agreement. 50 U.S.C. app. § 2158(j). The procedures imposed on meetings to develop and carry out voluntary agreements under § 708 of the DPA are quite similar to those imposed by § 252 of the EPCA, 42 U.S.C. § 6272. Public notice must be given, and the public must be afforded an opportunity to participate (unless the meeting concerns classified matters, matters specifically exempted by statute from disclosure, or matters related to trade secrets and proprietary data); the meeting must be attended by a federal employee (and chaired by the President's delegate if the meeting is to develop a voluntary agreement) and must be monitored by representatives of the Attorney General and the FTC; if the meeting is to develop a voluntary agreement, records and verbatim transcripts must be kept. The President's delegate or the Attorney General (after consultation with the FTC) may terminate or modify an agreement. *Id.* § 2158(e). Unlike § 252, however, § 708 does not contain any specific provision for adoption of plans of action.

Section 708(d), 50 U.S.C. app. § 2158(d), provides for establishment of advisory committees to aid the President or his delegated officers in carrying out the purposes of the section. Such committees would be subject to the provisions of the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1–15 (1982) and provisions of the Federal Energy Administration Act of 1974, 15 U.S.C. § 776. Section 708(d) further provides that "in all cases such advisory committees . . . shall include representatives of the public, and the meetings of such committees shall be open to the public." 50 U.S.C. app. § 2158(d)(1).

4. Section 710. Employment of Persons from the Private Sector

Pursuant to § 710 of the DPA, 50 U.S.C. app. § 2160, the President may, subject to certain restrictions, authorize the training and employment of persons from the private sector in order to facilitate planning for and responding to energy emergencies. Two methods of facilitating such training and employment are authorized by this section. Subsection (b) permits the President to employ "persons of outstanding experience and ability" to serve without compensation

Rec. 36619 (Nov 14, 1975) (remarks of Reps. Dingell and Ashley). The amendment also had the effect, however, of narrowing the scope of the existing DPA provision and of the original House bill, which had provided antitrust protection for international voluntary agreements beyond the IEP.

[72] *See supra* at 659–60

in advisory positions for purposes of assisting in carrying out the purposes and provisions of the DPA. *Id.* § 2160(b). Subsection (e) authorizes the establishment and training of a "nucleus executive reserve" (Executive Reserve) for employment during "periods of emergency." *Id.* § 2160(e). Use of these authorities to obtain advice and assistance from the private sector in planning for or responding to an emergency caused by a petroleum shortage raises two legal issues: (1) the circumstances under which these authorities can be used; and (2) the applicability of conflict-of-interest and antitrust laws and regulations.

a. Circumstances Governing Use of Employees

Persons serving without compensation (WOCs), under § 710(b), 50 U.S.C. app. § 2160(b) may be used as necessary and appropriate to carry out the provisions of the DPA. Their service is not limited to times of emergency, and WOCs can therefore be employed for a variety of preparedness tasks, such as assisting in planning, providing counsel and assistance in conducting exercises or seminars, or assisting state and local officials to develop emergency preparedness plans and programs. WOCs may be employed, however, only if the employing department or agency head certifies that he or she has been "unable to obtain a person with the qualifications necessary for the position on a full-time, salaried basis," and that the appointment is necessary and appropriate to carry out provisions of the DPA. 50 U.S.C. app. § 2160(b)(1), (5). WOCs may be appointed only to advisory or consultative positions, except that they may be appointed to decisionmaking (but not policymaking) positions if they are found to possess outstanding experience and ability not obtainable on a full-time, salaried basis. *Id.* § 2160(b)(2).

Under subsection (e), 50 U.S.C. app. § 2160(e), persons from either the private sector or from within the federal government may be appointed to an Executive Reserve.[73] During "periods of emergency" those individuals may be employed by the government either as regular federal employees or as WOCs. *See* S. Rep. No. 696, 84th Cong., 1st Sess. 9 (1955). Employment of a Reservist as a WOC would, of course, be subject to the limitations imposed by subsection (b). However, employment of a Reservist as a regular full- or part-time federal employee would not be subject to the limitations contained in subsection (b) with respect to use of the individual in decisionmaking or policymaking positions or with respect to compensation,[74] and would not require the employing federal

[73] By executive order, the President has established a "National Defense Executive Reserve," which is composed of "persons selected from various segments of the civilian economy and from government for training for employment in executive positions in the Federal Government in the event of the occurrence of an emergency that requires such employment." Exec. Order No. 11,179, 3 C.F.R. 246 (1964–65), *as amended by* Exec. Order No. 12,148, 3 C.F.R. 412 (1979). In addition, the President has delegated authority to employ WOCs to heads of departments or agencies that exercise DPA functions. Exec. Order No. 10,647, 3 C.F.R. 282 (1954–58), *as amended by* Exec. Order No. 11,355, 3 C.F.R. 653 (1966–70), *and* Exec. Order No. 12,107, 3 C.F.R. 264 (1978).

[74] The only provision respecting compensation of Reservists is that members who are not full-time government employees may be allowed transportation and per diem payments for the purpose of participating in the Executive Reserve training program. In the absence of any further restriction, it appears that Reservists could be employed as full-time, part-time, temporary, or unsalaried government employees in times of emergency. The legislative history of subsection (e) supports this conclusion. *See* S. Rep. No. 696, 84th Cong., 1st Sess. 9 (1955).

agency to find that no full-time federal employee is available and qualified to perform functions to be performed by the Reservist.

The major limitation on the President's authority to use the Executive Reserve is that Reservists can be employed by the government only "during periods of emergency." *See* 50 U.S.C. app. § 2160(e).[75] The DPA does not define what constitutes an "emergency" for purposes of activation of the Reserve.[76] Section 710(e), however, must be read in light of the purpose of the DPA to protect and promote the national defense, as expressed in the Declaration of Policy. Subsection (e), authorizing the Executive Reserve, was added to the DPA in 1955. At the same time, the Declaration of Policy was amended to include a specific congressional finding that the Nation's mobilization program requires the development of preparedness programs and the expansion of productive capacity and supply "in order to reduce the time required for full mobilization in the event of an attack on the United States." *See* S. Rep. No. 696, 84th Cong., 1st Sess. 9 (1955). The Senate Report draws a direct link between authorization of the Executive Reserve and the Declaration of Policy:

> This provision [now section 710(e)] supports the added emphasis placed on preparedness for a period of full mobilization in the Declaration of Policy.

Id. at 8. The legislative history of subsection (e) thus makes clear that establishment and training of the Reserve and employment of Reservists is specifically intended to further the national defense preparedness aims of the DPA.[77]

Therefore, activation of the Reserve would depend on the existence of an emergency that, in the language of the Declaration of Policy, "would adversely affect the national defense preparedness of the United States." 50 U.S.C. app. § 2062.[78] Likewise, although § 710 does not limit *in haec verba* the functions

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[75] This limitation does not preclude participation by Reservists in orientation and training, it does, however, preclude participation in the type of pre-emergency preparedness tasks that may be performed by WOCs

[76] No other provision of DPA specifically limits the President's authority to "periods of emergency."

[77] When Congress intended to eliminate the requirement of a "national defense" nexus, as in § 101(c), 50 U.S.C. app. § 2071(c), it did so in express terms *See supra* at 668. The absence of any such limitation in § 710(e) is further evidence that Congress did not intend that the Executive Reserve be used for purposes unrelated to the national defense. *See generally United States* v. *Rutherford*, 442 U.S. 544, 552 (1979), *KSK Jewelry Co.* v. *Chicago Sheraton Corp.*, 283 F.2d 8, 11 (7th Cir. 1960).

[78] Section 710(e) does not, however, expressly require the President to declare a national emergency in order to activate the Reserve. *See* 50 U.S.C. app. § 2160(e). Therefore, we believe use of the Reserve is not subject to the provisions of the National Emergencies Act (NEA), 50 U.S.C. §§ 1601–1651 (1982). The legislative history of the NEA makes clear that use of authorities under the DPA, such as the Executive Reserve, is not subject to that Act In testimony before the House Subcommittee on Administrative Law and Governmental Relations, Assistant Attorney General Scalia of the Office of Legal Counsel noted that:

> [L]aws like the Defense Production Act of 1950, which do not require a Presidential declaration of emergency for their use, are not affected by this title [*i.e.*, Title I]—even though they may be referred to in a lay sense as "emergency" statutes.

Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 91 (1975). That comment is repeated in both the House and Senate reports. *See* H.R. Rep. No 238, 94th Cong., 1st Sess. 5 (1975), S. Rep. No. 1168, 94th Cong., 2d Sess. 4 (1976). Although this language refers only to Title I of the NEA, which terminated existing emergencies, there is nothing in the legislative history to suggest that the DPA is subject to the procedural requirements imposed by Title II of the NEA with respect to the future use of emergency authorities Rather, the Senate Report states that "[t]he provisions of Title II . . . are designed to insure congressional oversight of Presidential actions *pursuant to declarations of a national emergency authorized by an act of Congress*. . . . The legislation is directed solely to Presidential *declarations of emergency*" S. Rep No 1168, *supra* at 4 (emphasis added).

that can be performed by Executive Reservists in the event of activation, the inclusion of authority for the Executive Reserve in the DPA and the legislative history of that section make clear that those functions are limited to achievement of the national defense preparedness and response purposes of the DPA.

As discussed above, however, the DPA's Declaration of Policy expressly contemplates that disruptions in energy supplies may affect the national defense interests of the United States. *See supra* at 663. Therefore, the President has broad discretion, in the event of a disruption in petroleum supplies, to determine that an energy emergency exists that could threaten national security or national defense preparedness and that would therefore justify activation and use of the Executive Reserve to assist in meeting the emergency.

b. Conflict-of-Interest and Antitrust Restrictions

A second question is whether individuals who serve as WOCs or Executive Reservists would be subject to conflict-of-interest restrictions imposed by federal laws and regulations or to liability under the antitrust laws. We believe that WOCs and Executive Reservists would be subject to conflict-of-interest and antitrust restraints, but the nature of these restraints could differ depending on the circumstances of their government employment and the nature of their ties to private employers.

1) Conflict-of-Interest Restrictions: Applicability of federal conflict-of-interest restrictions to WOCs and Executive Reservists would depend on whether those individuals would be considered to be federal officers or employees within the meaning of applicable statutes and regulations. The Federal Personnel Manual (FPM), App. C., sets forth the principles for determining whether persons serving the federal government on a temporary or intermittent basis are subject to the conflict-of-interest laws. Briefly, the FPM distinguishes between (1) persons "whose advice is obtained by an agency . . . because of [their] individual qualifications and who serve . . . in an independent capacity" and (2) persons who are asked "to present the views of . . . nongovernmental organization[s] or group[s] which [they] represent, or for which [they are] in a position to speak." FPM, App. C at C–6. The former category of independent experts are deemed to be subject to the conflict-of-interest laws because their service to the government is expected to be impartial and free from outside influence or control. The latter category of private representatives, on the other hand, are not subject to the conflict-of-interest laws because it is expected that such persons would be influenced by the private groups that they have been chosen to represent.[79]

We believe that the language and legislative history of § 710 are clear that the purpose of employment of WOCs and Executive Reservists is to obtain independ-

[79] We have found that these FPM criteria are ordinarily the most useful standards to apply in determining whether particular persons are federal employees for purposes of the conflict-of-interest laws. There are, however, other factors that may be relevant to such a determination For example, if a person performs a government function, receives a government salary, or is supervised directly by government employees, it is likely that he or she will be deemed a federal employee for other personnel purposes. *See* 5 U S C § 2105(a) (1982), and *Lodge 1858, AFGE* v. *NASA*, 424 F Supp. 186 (D.D.C. 1976)

ent assistance and advice from uniquely qualified individuals,[80] and that therefore those individuals would be considered to be federal employees subject to conflict-of-interest restrictions, when they are actually employed to provide such assistance and advice.[81] The scope of the conflict-of-interest restrictions applicable to a particular individual would depend, *inter alia*, on whether the individual is a "special government employee"[82] and whether he or she receives compensation for his or her services.

Since WOCs or Reservists could be employed by any of several federal agencies, consistent with the scope of the DPA, it is impossible to summarize here all of the applicable conflict-of-interest statutes and agency conduct standards. We note, however, that 18 U.S.C. §§ 208 and 209 would be of particular concern to an individual who comes from private employment to serve the federal government on a temporary or intermittent basis as a WOC or Executive Reservist. Section 208 imposes criminal penalties on any government employee, including a special government employee, who participates personally and substantially for the government in a matter in which he, his spouse or minor child, or a partner or an organization by which he is employed, has an arrangement for future employment, or is negotiating concerning employment, or has a financial interest. Under appropriate circumstances, government agencies may grant waivers of this prohibition. *See* 18 U.S.C. § 208(b). Section 209 imposes criminal penalties on any regular government employee who receives any salary, or contribution to or supplementation of a salary, from a private source as compensation for services as a government employee. *Id.* § 209.[83] Special government employees and employees serving without compensation are not prohibited by § 209 from accepting a salary from an outside source for performance of their government duties. *Id.* Apart from § 209, the standards of conduct of the employing agency may limit the receipt of gifts or certain things of value by individuals subject to the standards, if the source of the compensation has a business relationship with the agency. Those limitations may differ depending on whether the individual is a regular or special government employee.[84]

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[80] In fact, § 710 originally provided for an exemption from the federal conflict-of-interest laws for WOCs and Reservists, which demonstrates that Congress certainly contemplated that such individuals would be considered to be federal employees for purposes of the conflict-of-interest laws. When the federal conflict-of-interest laws were recodified in 1962, the recodification act made that exemption inapplicable Pub. L No 87–849, § 2, 76 Stat 1126 (1962)

[81] We do not believe that Executive Reservists would generally be considered officers or employees of the federal government during orientation or training for mobilization assignments, because they would not normally act or advise on any matters pending before a federal department or agency during such periods. If, however, the responsibilities of a Reservist during training or orientation included assistance or advice to a federal department or agency, the conflict-of-interest restrictions would probably apply, depending on the facts of the particular situation.

[82] A "special government employee" is a federal employee or officer who serves for no more than 130 days during any period of 365 days, on a full-time or intermittent basis. *See generally* 18 U S C § 202(a). Under federal personnel rules, an agency may not appoint an individual to serve as a special government employee unless "at the time of his original appointment" the agency's "best estimate" is that during the following 365-day period the services of the appointee will be needed for 130 days or less. *See* FPM, App C

[83] Section 209 also imposes criminal penalties on any organization or individual that makes any such contribution or supplementation 18 U S.C. § 209(a)

[84] For example, regulations of the Department of Energy prohibit regular employees from accepting fees, compensation, gifts, payment of expenses, or any other thing of monetary value if the circumstances "may result in, or create the appearance of, a conflict of interest" 10 C.F.R. § 1010 204(a) *See also* § 1010 604 (special

Continued

Other provisions of the federal criminal code impose restrictions on the ability of government employees to assist private parties in matters involving the government,[85] and on former government employees representing others in matters that they worked on or were responsible for, while in the government.[86] Additional restrictions may be imposed by statutes that are specific to the employing agency. The Department of Energy Organization Act, for example, imposes requirements or restrictions on certain Department employees with respect to divestiture and disclosure of financial interests, reporting of pre- and post-government employment, and appearances before the Department after employment. *See* 42 U.S.C. §§ 7211–7216.

2) Antitrust Exposure: Individuals who serve as WOCs or Executive Reservists and their private employers would also be subject to the antitrust laws. It is likely that any individual called to government service as a WOC or as a regular federal employee would retain some ties with his or her former private employer, and would probably return to private employment upon completion of government service. In light of these dual public and private roles, actions taken by the individual while employed by the government might raise questions of antitrust liability for the individual and the employer.[87] Actions that may raise some question under the antitrust laws could include, for example:

> (1) advice to government policymakers with respect to governmental actions to be taken in markets in which the individual's company is involved;
>
> (2) decisions that affect particular energy markets;
>
> (3) agreements as to what actions are to be taken by their private firms, particularly if those individuals implement such actions in their private capacities; or
>
> (4) exchange between private industry executives of confidential industry information, gained pursuant to training activities or governmental responsibilities.

In general, antitrust liability attaches only to private conduct that has anticompetitive conseqences. *See Parker* v. *Brown,* 317 U.S. 341 (1943); *Sea-Land*

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government employees). Regulations issued by the Office of Personnel Management require that agency standards of conduct contain a provision that prohibits regular employees from soliciting or accepting any compensation or other thing of value, subject to certain exceptions, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with his agency;
(2) Conducts operations or activities that are regulated by his agency, or
(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

5 C.F.R § 735.202.

[85] *See, e g ,* 18 U.S.C. §§ 203, 205

[86] *See, e.g ,* 18 U.S.C § 207

[87] In general, antitrust exposure would probably be greatest when individuals are actually employed by the government in policymaking or decisionmaking positions, because they would then be in a position to make or affect governmental decisions that may have an impact on a particular industry or employer. However, it is possible, though less likely, that antitrust liability could attach for particular actions taken in the course of training and orientation, for example, for an exchange with other industry personnel of confidential information gained during the training program.

Service, Inc. v. *The Alaska Railroad*, 659 F.2d 243 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982). Thus, actions taken by a governmental official within the scope of his authority do not ordinarily give rise to antitrust concerns. On the other hand, actions of WOCs or Reservists that cause competitive harm could result in antitrust liability if such individuals are acting outside the scope of their governmental activity.[88]

C. Trade Expansion Act of 1962

The Trade Expansion Act of 1962 (TEA), 19 U.S.C. §§ 1801–1991, provides the President with certain authority with respect to imports of crude oil and petroleum products, which may be available in the event of a severe shortage of petroleum supplies. Section 232(b), 19 U.S.C. § 1862(b), provides that, upon an investigation and finding that a commodity is entering the country "in such quantities or under such circumstances as to threaten to impair the national security," the President "shall take such action, and for such time, as he deems necessary to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not threaten to impair the national security."

Presidents have often exercised this authority to respond to emergencies of different types and their actions have usually been sustained by the courts. In recent decades, Presidents have invoked national security successfully to establish quotas on volumes of imports, including oil,[89] to establish license-fee systems,[90] to limit imports from certain countries,[91] and to allocate oil imports exempt from import fees to certain refineries.[92]

The President's powers under § 232(b) have received a broad interpretation. The authority of the President to take "such action as he deems necessary" was broadly construed by the Supreme Court in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976), which upheld the President's power to impose license fees. Throughout its decision, the Court cited with approval those portions of the legislative history that support the widest reasonable interpretation of the President's authority, such as the statement that it included the power "to take whatever action he deems necessary to adopt imports [including the use of] tariffs, quotas, import taxes or other methods of import restrictions." 426 U.S. at 564; *see also id.* at 558, 561–69.

In *Algonquin*, however, the Supreme Court also expressed the caveat that its opinion applied only to measures with an "initial and direct" effect on petroleum imports and not necessarily to presidential action with a "remote" effect on

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[88] *Cf. Harlow* v *Fitzgerald*, 102 S. Ct 2727 (1982); *Butz* v. *Economou*, 438 U S 478 (1978); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F 2d 672 (5th Cir.), *cert denied*, 393 U.S. 1000 (1968)

[89] Proclamation 3279, 24 Fed. Reg. 1781 (Mar. 12, 1959) This proclamation was issued pursuant to a predecessor statute

[90] Proclamation 4210, 9 Weekly Comp. Pres. Docs. 406 (Apr 18, 1973).

[91] President Carter utilized this authority to prohibit imports from Iran. Proclamation 4702, 44 Fed. Reg. 65581 (Nov. 14, 1979).

[92] *See, e g., FEA* v. *Algonquin SNG, Inc.*, 426 U.S 548, 570–71 (1976); *Pancoastal Petroleum Ltd.* v. *Udall*, 348 F 2d 805, 807 (D.C. Cir 1965).

imports. 426 U.S. at 571.[93] This caution suggests that a court might limit the President's broad flexibility under the TEA to regulate imports of crude oil or petroleum products to measures whose primary purpose and impact is confined to imported, rather than domestic, supplies of those products. It is possible, therefore, that an attempt to control directly the price of, or to allocate, petroleum products refined in the United States would be ruled invalid by the courts, at least if the impact of such controls on oil imports would be remote and indirect and if the impact on domestic supplies would be direct. In the absence of a particular factual situation, however, we cannot predict whether the courts would strike down such allocation or pricing regulation.

Exercise of authority under § 232(b) must be based on a finding that the imports "threaten to impair the national security." The statute provides some guidance with respect to that finding by listing a number of illustrative factors that may be taken into account, as follows:

> (1) domestic production needed for projected national defense requirements;
>
> (2) capacity of domestic industries to meet defense requirements;
>
> (3) existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense;
>
> (4) requirements of growth of such industries and such supplies and services; and
>
> (5) the quantities, availabilities, character and use of imported articles as those affect such industries and the capacity of the United States to meet national security requirements.

19 U.S.C. § 1862(c).[94]

The legislative history of § 232(b) firmly establishes that increasing the domestic production of oil is a legitimate national security aim. *See, e.g.*, 104 Cong. Rec. 10542–43 (June 9, 1958) (remarks of Rep. Mills). Recent practice, tacitly approved by the Supreme Court in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, *supra*, suggests that reducing the consumption of oil may similarly be a legitimate national security aim. Thus, it seems likely that a court would sustain a presidential finding that imports of crude oil and petroleum products "threaten to impair the national security," *see* 19 U.S.C. § 1862(b), and thereby uphold the use of § 232(b).

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[93] This *dictum* later was relied upon by a federal district court to strike down the Gasoline Conservation Fee imposed by President Carter on the ground that the fee was beyond the scope of the authority conferred by § 232(b) *Independent Gasoline Marketers Council* v *Duncan*, 492 F Supp 614, 616–18 (D.D C 1980). The court ruled that the measure was principally a conservation measure and only indirectly a restriction on imports, and thus not authorized by the TEA. The district court's decision has little, if any, precedential effect, because the appeal was dismissed as moot and the opinion vacated after the fee was repealed by Congress.

[94] The text and the legislative history of this provision state that these considerations are illustrative but not exclusive. *See* S Rep. No. 1838, 85th Cong., 2d Sess 11–12 (1958)

D. International Emergency Economic Powers Act

The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706 (1982), provides the President, in the event of a national emergency, with plenary control over property that is subject to U.S. jurisdiction and in which any foreign country or national thereof has an "interest." *See generally Dames & Moore* v. *Regan*, 453 U.S. 654, 675 (1981). If a petroleum shortage is sufficiently severe to invoke a presidentially declared national emergency, the IEEPA could be used to control supplies of petroleum products in which foreign countries or foreign nationals have an "interest."

The key provision of the IEEPA is § 203, 50 U.S.C. § 1702(a)(1), which states that the President may:

> (A) investigate, regulate, or prohibit—
>
> (i) any transactions in foreign exchange,
>
> (ii) transfer of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
>
> (iii) the importing or exporting of currency or securities; and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States.[95]

The reach of § 203 is limited by § 202, 50 U.S.C. § 1701, which provides that the President may use these authorities only to deal with an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." Section 202 also requires that the President declare a new national emergency for each new threat before he may exercise the emergency powers. *Id.*

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[95] This provision was taken almost verbatim from § 5(b) of the Trading with the Enemy Act (TWEA), 50 U.S.C. app. § 1–44 (1982), which gave the President certain authorities "[d]uring time of war or during any other period of national emergency declared by the President." The IEEPA removed from the TWEA the President's authorities "during any other period of national emergency" and placed those authorities in § 203(a)(1) of the IEEPA, 50 U.S.C. § 1702(a)(1). The TWEA currently provides the President with authority "during time of war" that is identical in most respects to that available under the IEEPA, but also permits the President to exercise some additional powers not encompassed in the IEEPA, such as seizing and vesting of enemy property and control over wholly domestic economic transactions. *See* 50 U.S.C. app. § 5(b)(1); H.R. Rep. No. 459, 95th Cong., 1st Sess. 15 & n.23 (1977).

Section 204(a) of the IEEPA, 50 U.S.C. § 1703(a), provides that the President "in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter, and shall consult regularly with the Congress so long as such authorities are exercised." Section 204(b), 50 U.S.C. § 1703(b), requires that "[w]henever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying" the circumstances necessitating the exercise of his authority; the reasons that the circumstances constitute an unusual and extraordinary threat; the authorities to be exercised and the actions to be taken; the reasons that such actions are necessary; a list of foreign countries with respect to which such actions are to be taken; and the reasons for such decisions.[96]

The scope of the authority available under the IEEPA to respond to an energy emergency, assuming the requisite findings have been made, depends on the breadth the courts are willing to accord to the term "interest" as used in § 203, 50 U.S.C. § 1702, in the context of a future petroleum shortage. The IEEPA does not define the term "interest," but the legislative history of the statute notes that the authorities available to the President "should be sufficiently broad and flexible to enable the President to respond as appropriate and necessary to unforeseen contingencies." H.R. Rep. No. 459, 95th Cong., 1st Sess. 10 (1977). In addition, in cases decided under the TWEA (*see supra* at n.95) the courts have interpreted the same language in § 5(b)(1) of that statute, 50 U.S.C. app. § 5(b)(1), broadly.[97] The primary substantive limitation on the President's emergency authority is that § 203 of the IEEPA may not be used to regulate wholly domestic transactions. The House Report states that:

> the scope of the authorities should be clearly limited to the regulation of international economic transactions. Therefore the bill does not include authorities more appropriately lodged in other legislation, such as authority to regulate purely domestic transactions or to respond to purely domestic circumstances. . . .

H.R. Rep. No. 459, *supra* at 10–11; *see also* S. Rep. No. 466, 95th Cong., 1st Sess. 5 (1977).[98]

In light of this legislative history, we believe that the President would have broad discretion under the IEEPA to determine whether a foreign nation or national has an "interest" in property subject to U.S. jurisdiction, and, if so, whether any of the authority granted in § 203 should be exercised over that

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[96] There is no provision in the IEEPA for a legislative veto of the President's actions. However, the declaration of an emergency under the IEEPA would be subject to the NEA (*see supra* n 78), which provides, *inter alia*, that Congress has the authority to terminate by concurrent resolution any national emergencies declared after September 14, 1976. *See* 50 U.S C § 1622(c) For the reasons set forth in n 35 *supra*, we believe this legislative veto provision of the NEA is unconstitutional.

[97] *See, e g., Heaton* v *United States*, 353 F.2d 288, 291–92 (9th Cir. 1965), *cert. denied*, 384 U S. 990 (1966); *United States* v *Broverman*, 180 F. Supp. 631, 636 (S D N.Y 1959).

[98] The House Report specifically notes that the IEEPA would not grant the President the same authority to regulate purely domestic transactions as would be available in time of war under the TWEA, for example, regulation of the hoarding of gold by U.S. citizens or the extension of consumer credit by U S businesses. *See* H.R Rep No. 459, 95th Cong , 1st Sess. 15 & n.23 (1977).

property, provided the President does not attempt to regulate transactions that are purely domestic in nature.

For example, the term "interest" would include, but not be limited to, contract rights of foreign countries or their nationals to acquire or control the disposition of property, such as contingent rights or royalty interests in petroleum products owned or controlled by a company subject to U.S. jurisdiction. In the event of an emergency meeting the requirements of § 202, 50 U.S.C. § 1701, the President would therefore have authority to regulate the use, transportation, and disposition of those petroleum products. The authority contained in § 203 of the IEEPA could also be used to regulate imports of petroleum products acquired from foreign nations or nationals. For example, in time of a national emergency, the IEEPA would give the President authority to require American companies and foreign entities they control[99] to ship petroleum products they acquire abroad to other nations.

On the other hand, the authority would probably not extend to property within the United States that is wholly owned by a U.S. company or individual, because the effect of regulation of such property would most probably be considered to be "wholly domestic." For example, the authority granted the President in times of a national emergency under the IEEPA probably would not extend to authorization of domestic pricing or allocation regulation.

E. Emergency Energy Conservation Act of 1979

Title II of the Emergency Energy Conservation Act of 1979 (EECA), 42 U.S.C. §§ 8501–8541 (1982), provides the President with discretionary authority to impose energy demand restraint measures in certain emergency circumstances as defined in that Act or to meet IEP obligations. Section 211(a) of the EECA, 42 U.S.C. § 8511(a), authorizes the President to establish energy conservation targets for any energy source on a nationwide and state-by-state basis if the President determines that a "severe energy supply interruption" exists or is imminent,[100] or that such action is required in order to fulfill obligations of the United States under the IEP.[101] If such targets are set, the states are required to develop and submit to the Department of Energy plans to provide

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[99] American corporations are clearly subject to the jurisdiction of the United States. *See Restatement (Second) of Foreign Relations Law of the United States*, §§ 27, 30 (1965). Foreign entities they control may also be, although they may be subject to the competing jurisdiction of the foreign country. In addition, § 203(a)(1)(B) permits the President to "regulate [or] direct and compel . . . [the] exercising [of] any right, power, or privilege with respect to . . . any [foreign] property . . ." 50 U.S.C. § 1702(a)(1)(B). This authorizes the President to require a U.S. company to exercise its control over foreign entities in the way the President directs, at least when the direction furthers the purposes of other regulations imposed under the IEEPA.

[100] The definition of the term "severe energy supply interruption" for the purposes of the EECA differs from the definition for purposes of the EPCA (*see supra* 651). Section 202(1) of the EECA provides that a "severe energy supply interruption" includes a national supply shortage of motor fuel *or of any other energy source* caused by an "interruption" in energy, including, but not limited to, imported petroleum products, or by sabotage or an act of God. *See* 42 U.S.C. § 8502(1) (emphasis added). Section 3(8) of the EPCA limits the term to energy shortages resulting from an interruption in the supply of imported petroleum products, or from sabotage or an act of God. 42 U.S.C. § 6202(8).

[101] Section 202(2) of the EECA, 42 U.S.C. § 8502(2), incorporates by reference the definition of the term "international energy program" established by § 3(7) of the EPCA, 42 U.S.C. § 6202(7).

"for emergency reduction in the public and private use of each energy source" for which any emergency conservation target is in effect. *Id.* § 8512(a), (b). The President may find inadequate compliance with a target in a state and substitute a federal plan in that state. *Id.* § 8513(b).[102]

If national targets are established for energy sources under the discretionary authority of § 211(a), the President is required to make effective an emergency energy conservation plan for uses by the federal government. 42 U.S.C. § 8511(c).[103]

F. Export Administration Act of 1979

Under the Export Administration Act of 1979 (EAA), 50 U.S.C. app. §§ 2401–2420 (1982), the President may impose controls on exports, including petroleum products and materials and technology necessary to produce petroleum products, in order, *inter alia*, to further the foreign policy interests of the United States, to protect the economy from a drain of scarce resources, or to obtain leverage against countries that aid terrorists. Section 7(a), 50 U.S.C. app. § 2406(a), authorizes the President to prohibit or curtail the export of any goods subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States, in order to carry out the policies of the Act. Those policies are broad enough to allow the President to restrict the export of petroleum products in response to a substantial shortage. In relevant part, the Statement of Policy contained in the Act provides:

> (2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—
>
> * * * * *
>
> (B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and
>
> (C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of

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[102] The Secretary of Energy must approve a state plan unless he finds—

(A) that, taken as a whole, the plan is not likely to achieve the emergency conservation target established for that State . for each energy source involved,

(B) that, taken as a whole, the plan is likely to impose an unreasonably disproportionate share of the burden of restrictions of energy use on any specific class of industry, business, or commercial enterprise, or any individual segment thereof,

(C) that the requirements of this subchapter regarding the plan have not been met, or

(D) that a measure . is—

(i) inconsistent with any otherwise applicable Federal law (including any rule or regulation under such law),

(ii) an undue burden on interstate commerce, or

(iii) a tax, tariff, or user fee not authorized by State law.

42 U.S.C. § 8512(c)(1).

[103] The Department of Energy has established procedures for the development, submission, and approval of state plans and the standby federal plan 10 C.F.R. Pt. 477

> scarce materials and to reduce the serious inflationary impact of foreign demand.
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> * * * * *
>
> (8) It is the policy of the United States to use export controls to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective, the President shall make every reasonable effort to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before resorting to the imposition of export controls.

Id. § 2402(2)(B) & (C), (8). The statute does not, however, contain any authority for the President to impose allocation or price controls with respect to domestically produced or refined crude oil and petroleum.

Section 7 of the EAA also places certain limitations on the export of domestically produced crude oil transported by pipeline over rights-of-way granted by the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652, and on the export of refined petroleum products. *See* 50 U.S.C. app. § 2406(d), (e). In addition, petroleum products produced from the NPRs (*see supra* at n.33), oil and gas produced from the Outer Continental Shelf, and crude oil transported by pipeline over rights-of-way granted under § 28(u) of the Mineral Lands Leasing Act (MLLA), 30 U.S.C. § 185(u), are made subject, by separate statutes, to the requirements and provisions of the EAA.[104] Section 7(d)(3) of the EAA, 50 U.S.C. app. § 2406(d)(3), specifies that the export restrictions imposed by the Act or by other provisions of law do not apply to exports of oil pursuant to any bilateral international oil supply agreement entered into by the United States before June 25, 1979, or to any country pursuant to the IEP's oil sharing system. Under § 103(c) of the EPCA, 42 U.S.C. § 6212(c), the Export Administration Act may be used to implement restrictions on the export of energy sources, materials or equipment imposed under that section. *See* discussion *supra* at 652.

G. Other Statutory Authorities

1. Fuel Switching Authorities

In the event of a petroleum emergency, the President may be able to use authority under several statutes to require fuel switching in order to mitigate the

[104] Petroleum products from the NPRs, oil and gas from the Outer Continental Shelf (OCS), and crude oil transported over MLLA rights-of-way, are subject to all of the limitations and licensing requirements of the EAA, except for products that are either exchanged in similar quantities for convenience or increased efficiency of transportation with persons or the government of an adjacent foreign state, or that are temporarily exported for convenience or increased efficiency of transportation across parts of an adjacent foreign state. 10 U.S C. § 7430(3); 43 U.S.C § 1354(a); 30 U.S C § 185(u). The Outer Continental Shelf Lands Act also specifically provides that OCS oil or gas "exchanged or exported pursuant to an existing international agreement" is exempt from the export restrictions of the EAA 43 U.S.C. § 1354(d). Before any crude oil from the NPRs or any product refined therefrom or crude oil subject to MLLA restrictions may be exported, the President must find, in addition to the requirements imposed by the EAA, that such exports will not diminish the total quality or quantity of petroleum available to the United States and that such exports are in the national interest and are in accord with the EAA 10 U.S C. § 7430(e), 30 U S C § 185(u)

effects of the shortage and reduce dislocations in energy supplies. Fuel switching encompasses two types of emergency authority: (1) authority to prohibit the burning of petroleum or other fuels; and (2) authority to assure access to supplies of alternate fuels by allocation or mandatory interconnections, and possibly to augment available supplies through increased production or curtailed exports.

The President is given the authority to prohibit the burning of particular fuels by power plants and major fuel-burning installations by two statutes. Section 607 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 15 U.S.C. § 717z (1982), authorizes the President to prohibit the burning of natural gas by any electric power plant or major fuel-burning installation. Exercise of this authority depends on a finding by the President of the existence or imminence of a severe natural gas emergency that will endanger the supply of natural gas for high-priority uses. Section 404(b) of the Powerplant and Industrial Fuel Use Act (FUA), 42 U.S.C. §§ 8301–8484 (1982), empowers the President to prohibit the use of petroleum or natural gas as a primary energy source by any electric power plant or major fuel-burning installation. Exercise of this authority requires a finding of a severe energy supply interruption, as that term is defined in the EPCA (*see supra* at 6). *See* 42 U.S.C. § 8374(b).

In addition to prohibiting the use of a particular fuel during an emergency, the President would have the authority under various statutes to assist the recipients of prohibition orders in obtaining alternate fuel supplies. During severe energy supply interruptions as defined in the EPCA, the President could allocate and require the transportation of coal for the use of any electric power plant or major fuel-burning installation, pursuant to § 404(a) of the FUA, 42 U.S.C. § 8374(a). Section 202(c) of the Federal Power Act (FPA), 16 U.S.C. §§ 791a–828c (1982), would allow the Department of Energy to order the temporary interconnection of facilities, and such generation, delivery, interchange, transmission, or power wheeling of electric energy as in its judgment would best meet the emergency. *See* 16 U.S.C. § 824a(c). In addition, under § 210 of the FPA, 16 U.S.C. § 824i, the Federal Energy Regulatory Commission (FERC) would have the authority to order the physical connection of a cogeneration facility, small power production facility, or transmission facilities of any electric utility with the facilities of any other electric utility, federal power marketing agency, geothermal power producer, qualifying small power producer, or cogenerator. Section 211 of the FPA, 16 U.S.C. § 824j, would authorize the FERC to order electric utilities to provide wheeling transmission services, including any necessary enlargement of transmission capacity, for any other electric utility, geothermal power producer, or federal power marketing agency.

Certain deliveries of natural gas could also be facilitated under the Natural Gas Act (NGA), 15 U.S.C. §§ 717–717z (1982). Section 7 of the NGA, 15 U.S.C. § 717f, authorizes the FERC to order a natural gas company to extend or establish transportation facilities to sell natural gas to local distributors. Pursuant to § 303 of the Natural Gas Policy Act (NGPA), 15 U.S.C. § 3363 (1982), the President may allocate supplies of natural gas during an emergency as defined by § 301 of the NGPA in order to assist in meeting natural gas requirements for high-priority users of natural gas; the definition of an emergency is the same as set forth under

the PURPA, and excludes energy supply emergencies not involving a significant natural gas shortage. *See* 15 U.S.C. §§ 3361, 3363. Section 302 of the NGPA, 15 U.S.C. § 3362, provides that the President's authority to direct interstate pipelines or local distribution companies served by interstate pipelines to contract for the purchase of emergency supplies of gas is limited to an emergency as defined by § 301. Thus, the President's authority under the NGPA to require allocation of natural gas supplies directly to affected users is limited to natural gas emergencies. In the event of a petroleum shortage, that authority therefore would probably not be available, for example, to allocate supplies to users with a dual natural gas and petroleum capability, unless there were also a significant natural gas shortage.[105]

Finally, in addition to incremental production of crude oil or natural gas pursuant to § 106 of the EPCA, 42 U.S.C. § 6214 (*see supra* at 653–54), or export controls on supplies of energy imposed under § 7 of the EAA, 50 U.S.C. § 2406, or § 103 of the EPCA, 42 U.S.C. § 6212 (*see supra* at 683–84, 652–53), domestic energy supplies might also be increased by terminating any export authorizations granted under § 3 of the NGA, 15 U.S.C. § 717b, or § 202(e) of the FPA, 16 U.S.C. § 824a(e).

2. Miscellaneous Statutes

A number of other statutes provide the President with selective authority to affect the use or distribution of petroleum products or to take other measures to respond to a petroleum emergency, authority that may be available to respond to a petroleum shortage if the specific triggering requirements of each statute are met. Pursuant to § 36 of the MLLA, 30 U.S.C. § 192, the United States may demand that any royalty accruing to it under an oil or gas lease be paid in oil or gas. The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (1982), gives the United States the right of first refusal to purchase OCS oil at market prices during "time of war or when the President shall so prescribe." 43 U.S.C. § 1341(b). Other measures available to the President might include facilitating transportation of petroleum products in times of emergency;[106] modifying air pollution control requirements in times of an emergency to allow efficient use of available energy sources;[107] or providing technical assistance, funds and personnel to states

[105] The allocation authority in § 101(a) of the DPA, 50 U.S.C app § 2071(a), could possibly be used in a petroleum emergency to allocate natural gas to defense agencies and contractors for defense needs However, that authority could not be used to allocate natural gas supplies in the civilian market, in the event of a petroleum emergency, unless natural gas were also in short supply and necessary for the needs of national defense, as required by § 101(b), 50 U.S.C app. § 2071(b) *See supra* at 665–66.

[106] Under the Interstate Commerce Act, *as amended*, 49 U S.C. §§ 10101–11901 (1982), the Interstate Commerce Commission could authorize the entry of new motor carriers or water carriers into temporary service if they were needed to ensure movement of essential petroleum products, or could issue priority orders during an emergency situation for rail movement of commodities, including petroleum products. 49 U.S.C. §§ 10928, 11123. The Magnuson Act, 50 U S.C §§ 191–198 (1982), authorizes the Secretary of Transportation to make rules and regulations governing the movement of any vessel within the territorial waters of the United States if the President declares a national emergency to exist by reason of actual or threatened war, insurrection or invasion, or disturbance or threatened disturbance in the international relations of the United States. 50 U.S C. § 191.

[107] Section 110(f) of the Clean Air Act, 42 U S C. § 7410(f), permits the temporary modification of a state's air pollution control program upon a presidential finding of a severe national or regional energy emergency.

or to foreign countries in order to minimize the effects of a petroleum shortage.[108]

II. Legal Bases for Specified Energy Preparedness Activities

Consistent with § 3 of the EEPA, this Part addresses how the statutory authorities outlined in Part I support the enumerated energy emergency preparedness activities of the United States. *See supra* n.2. Since no petroleum emergency is likely to be isolated in cause, effect, or remedy, any or all of the authorities described above may, in the appropriate circumstances, provide some basis for the President to respond in some fashion, directly or indirectly, to a particular crisis. In most petroleum emergencies it is likely that several different statutory authorities would be available to the President. The scope of this discussion is therefore necessarily limited to identifying the primary statutory authorities that provide a basis for the enumerated preparedness activities. Failure to mention other less directly applicable authorities should not be interpreted to suggest that the President could not use such authorities to respond to a particular state of facts, if the requirements of those statutes were met.

A. Authority to Implement the IEP

The IEP Agreement, adopted in response to the 1973–74 oil embargo, provides a cooperative system designed to reduce the vulnerability of Participating Countries to future supply disruptions and to dependence on imported oil. The IEP was formally adopted by 16 countries in 1974.[109] It was provisionally entered into as an executive agreement by the President. 27 U.S.T. 1685, T.I.A.S. No. 8278 (Nov. 18, 1974). The United States, on January 9, 1976, gave its notification that, having complied with constitutional procedures by obtaining the necessary legislation, it consented to be bound by the Agreement.[110]

1. Obligations Imposed by the IEP Agreement

The IEP Agreement imposes four principal substantive obligations on Participating Countries as follows:

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[108] Under the Disaster Relief Act of 1974, 42 U S.C. §§ 5121–5202 (1982), upon finding that an emergency or major disaster exists, the President could direct any federal agency to utilize its available resources and personnel in support of state and local disaster assistance efforts 42 U.S.C. §§ 5145, 5146. The Foreign Assistance Act of 1961 empowers the President to allow federal agencies to furnish services and commodities on an advance-of-funds or reimbursement basis to friendly countries and international organizations, and to waive certain regulations governing the making, performance, amendment, or modification of contracts and the expenditure of funds by the federal government, if he determines such action to be in furtherance of the purpose of the Act to "support" or "promote economic or political stability" through provision of foreign assistance. 22 U.S.C. §§ 2346, 2357, 2393.

[109] *See Digest of U S Practice in Int'l Law* 560 (1974). Those countries were Austria, Belgium, Canada, Denmark, Ireland, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States, and West Germany Greece, Iceland, New Zealand, Norway, and Portugal have since consented to be bound by the Agreement.

[110] *See Digest of U.S Practice in Int'l Law* 650 (1975). The enabling legislation was contained in Title II of the EPCA, 42 U S C. §§ 6271–6275, enacted in 1975, Pub. L. No. 94–163, Title II, 89 Stat 871 (1975).

a. Emergency Reserves (Chapter I)

Each Participating Country must maintain emergency reserves equal to 90 days of net oil imports. This commitment may be satisfied by existing oil stocks, including stocks in tankers and pipelines, fuel switching capacity, or standby oil production, to the extent decided by the Governing Board, based on certain determinations and studies required by the Annex to the IEP Agreement.

b. Demand Restraint (Chapter II)

Each Participating Country must develop or have ready a contingent program of demand restraint measures that will enable it to reduce oil consumption, in the event of activation of the IEP's emergency system (*see infra* at 689).

c. Oil Sharing (Chapter III)

Each Participating Country is required to take necessary measures to carry out the international allocation of oil among Participating Countries if required by activation of the emergency system (*see infra* at 689). A complex formula provides for calculation of "supply rights" and "allocation rights and obligations" of Participating Countries. This calculation takes into account historic levels of consumption and actual domestic production and net imports available during an emergency, and assumes that each Participating Country will absorb some of the shortfall through the use of demand restraint measures and emergency reserves. *See infra* at ns. 112 & 113.

d. Information Exchange (Chapter V)

Participating Countries are required to provide or make available to the IEA certain information necessary for monitoring the international supply of petroleum and ensuring the efficient operation of the emergency system. The information system established by the IEP Agreement consists of two sections: (1) a general section, requiring the communication of non-proprietary information on the international oil market and activities of oil companies; and (2) a special section requiring submission of proprietary information necessary to implement emergency measures.[111] Each Participating Country is required to take appropriate measures to ensure that oil companies operating within its jurisdiction make such information available as is necessary to fulfill the information obligations of that member.

[111] A critical feature of the special information system is submission by oil companies of certain proprietary information in Questionnaire A and by member governments in Questionnaire B. If there is reason to believe that a serious oil supply disruption may be developing that could reach the 7 percent trigger (*see infra* at 689), the Secretariat, following contact with the member governments, may request submission of those questionnaires by participating oil companies and by member governments. Each member government makes its own decision as to whether or how to allow oil companies to respond. In the United States, this would be accomplished by issuance of an antitrust clearance by the Secretary of Energy, with the concurrence of the Attorney General, pursuant to the regulations and the Voluntary Agreement implementing § 252

2. Activation of the IEP Emergency System

The core of the IEP is Chapter IV, which outlines the circumstances that trigger the IEP emergency system. The emergency system may be triggered when one or more Participating Countries sustains or is likely to sustain an oil supply shortfall of more than 7 percent, measured against final oil consumption during a specified base period. The IEP provides for both a "selective" and a "general" trigger. A selective trigger may be declared if one or more Participating Countries suffers a 7 percent or greater shortfall.[112] In the event of a selective trigger, countries may meet their allocation obligations by any measure of their choosing, including demand restraint measures or the use of emergency reserves. A general trigger may be declared only if the Participating Countries as a whole suffer at least a 7 percent reduction in oil supplies. Declaration of a general trigger activates the supply rights and allocation rights and obligations of Participating Countries as calculated according to Chapter III, and does not allow the same flexibility to choose emergency measures that is permitted under a selective trigger.[113]

Article 22 of Chapter IV of the IEP Agreement also provides that the Governing Board may decide, by unanimous vote, to "activate any appropriate emergency measure not provided for in this Agreement, if the situation so requires."[114]

3. Statutory Authority to Implement the IEP Agreement

To the extent that statutory authority is required for or relevant to implementation of the obligations of the United States under the IEP, that authority is provided primarily by the EPCA and Title II of the EECA.[115] We address here the scope of that authority with respect to the various obligations created by the IEP Agreement.

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[112] A selective trigger may be initiated by a request from an affected country or countries to the Secretariat of the IEA. If the Secretariat makes a positive finding that a 7 percent shortfall exists or is imminent, activation occurs and emergency measures are implemented within 15 days, unless within 6 days after the Secretariat's finding the Governing Board, by a weighted majority vote, decides not to activate the system or to require only partial activation. If within 72 hours of the initial request the Secretariat does not make a positive finding, the country may request the Governing Board to consider the situation. The Governing Board must meet within 48 hours, and within an additional 48 hours must make its finding whether the requisite shortfall exists If it does so find, it must decide whether to activate emergency measures If a selective trigger is declared, the country requesting that action must absorb the first 7 percent of the shortfall Once that country has absorbed that amount of the shortfall, it has an allocation right equal to the amount of the shortfall above 7 percent. The other Participating Countries share the obligation to satisfy this allocation right on the basis of their consumption during a specified base period.

[113] The procedure for activation of the general trigger is the same as for a selective trigger. *See supra* n 112 In the event of an overall 7 percent or greater shortfall, each Participating Country has a supply right equal to its base period final consumption, after deducting required demand restraint and emergency reserve drawdown amounts. If a country's supply right exceeds the sum of its available domestic production and net imports during an emergency, it has an allocation right that entitles it to additional net imports from the other Participating Countries equal to that excess If a country's available domestic production and net imports during an emergency exceed its supply right, it has an allocation obligation that requires it to supply other Participating Countries, directly or indirectly, with a quantity of oil equal to that excess

[114] The scope of Article 22 is subject to some debate *See infra* n 133.

[115] Other statutes may also provide authority with respect to petroleum products and emergency preparedness activities that could be used by the President in connection with IEP activities if the particular requirements of those statutes are met. Those authorities are discussed below in connection with the authority for participation in "subcrisis" IEP activities. *See infra* at 692–97

a. Emergency Reserves

Under Chapter I of the IEP Agreement, a Participating Country's emergency reserve obligation may be met, *inter alia,* by private stocks of petroleum products. We have been informed by the Department of Energy that the level of private stocks maintained by U.S. companies has been and is expected to be sufficient to meet that obligation. We note that certain provisions of the EPCA and other statutes give the President discretionary authority that could be used to establish or draw down petroleum product reserves; if the President were to determine that such actions would be appropriate under the IEP Agreement and met the conditions otherwise specified in those statutes. For example, the President has discretionary authority to implement an IPR (*see supra* at 655), and to use reserves in the SPR in fulfillment of "obligations of the United States under the international energy program" (*see supra* at 655–56). The IEP Agreement also provides that a Participating Country's emergency reserve obligation may be met by fuel switching authorities or standby oil production, to the extent decided by the Governing Board.[116] Other relevant statutory authorities may therefore include the fuel switching authority granted under various federal statutes,[117] and the authority under § 106 of the EPCA, 42 U.S.C. § 6214, and 10 U.S.C. § 7422(b), to accelerate production of crude oil and natural gas on federal and state lands or petroleum products from the NPRs.[118]

We wish to emphasize, however, that the President's authority under those statutes is discretionary, and that any action taken would have to be in accordance with the specific terms of those statutes. No statute requires the President to take particular actions, or to use particular reserves, in order to implement the emergency reserve obligation of the United States under Chapter I of the IEP Agreement.

b. Demand Restraint Measures

Statutory authority for establishment of a contingent demand restraint program as required by Chapter II of the IEP Agreement is available under §§ 201 and 202 of the EPCA, 42 U.S.C. §§ 6261 & 6262, providing for establishment and implementation of federal energy conservation contingency plans,[119] and Title II of the EECA, 42 U.S.C. §§ 8501–8541 (1982), directing the development of state energy conservation contingency plans.[120] These plans may be implemented upon a discretionary presidential finding that they are necessary "to fulfill obligations of the United States under the international energy program."[121] Demand restraint could also be accomplished or facilitated by restricting supplies

[116] We have been informed by the Department of Energy that the Governing Board has not yet taken action to determine the extent to which the emergency reserve commitment may be satisfied by oil stocks, fuel switching capacity, and standby production

[117] *See supra* at 685–87

[118] *See supra* at 653–54 & n.33.

[119] *See supra* at 656–57.

[120] *See supra* at 682–83.

[121] *See supra* at 682.

of petroleum products through the TEA,[122] or by relying on market forces to dampen demand. In addition, the IEP Agreement allows a Participating Country to substitute reserves held in excess of its emergency reserve commitment for demand restraint measures.

c. Oil Sharing

Section 252 of the EPCA, 42 U.S.C. § 6272, allows domestic oil companies to participate in meeting the allocation obligations of the United States under the IEP by establishing a framework for cooperation and by providing an antitrust defense for actions taken in accordance with those plans.[123] If necessary, such voluntary actions may be supplemented by mandatory regulation under § 251, which provides the President with authority to take actions necessary to fulfill obligations of the United States under the allocation provisions of the IEP, as set forth in Chapters III and IV of the Agreement. As discussed above, the President's authority under § 251 encompasses the authority to require companies subject to the jurisdiction of the United States to divert oil supplies to other Participating Countries in satisfaction of the United States' allocation obligations, and to establish a domestic "fair sharing" program of allocation among oil suppliers as necessary to ensure successful implementation of the IEP emergency system.[124] The authority provided in §§ 251 and 252 with respect to fulfillment of allocation obligations of the United States is available only if the emergency system has been activated in accordance with the requirements of Chapter IV of the Agreement.[125]

d. Information Exchange

Sections 254 and 252 of the EPCA, 42 U.S.C. §§ 6274 & 6272, establish procedures by which the United States may meet its obligations to provide information to the IEA. Section 254 authorizes the Secretary of State to provide to the IEA information and data related to the energy industry that is required to be submitted under the IEP.[126] The provisions of § 252 governing cooperation among and the antitrust defense for domestic oil companies (*see supra* at 660–62), as implemented by the applicable regulations, Voluntary Agreement, and Plan of Action, govern the supplying by oil companies of information required under Chapter V of the IEP Agreement and the availability of the antitrust defense for such activities. As implemented, the antitrust defense

[122] As with the President's authority with respect to emergency reserves (*see supra* at 690), implementation of such plans is a discretionary decision.

[123] *See supra* at 660–62.

[124] *See supra* at 659–60.

[125] *See infra* at 693–94

[126] This information may include data supplied by oil companies to the Department of Energy for transmission to the IEA, or data collected by the Department of Energy pursuant to other statutory authority, such as the Energy Supply and Environmental Coordination Act, 15 U S.C § 796, and the Federal Energy Administration Act, 15 U.S C. § 772. Such information may be transmitted by the Department of Energy to the Department of State, for transmission to the IEA upon certification by the Secretary of State that the information is required to be submitted under the IEP *See* 42 U S C. § 6274(a), (d).

generally covers participating U.S. company advice and consultations in IEA meetings and system tests. If confidential, proprietary data is to be furnished or exchanged prior to activation of the IEP emergency system, § 5(b)(2) of the current Voluntary Agreement requires the prior approval of the Secretary of Energy, after consultation with the Secretary of State, and the concurrence of the Attorney General, after consultation with the FTC.[127] When the emergency system has been activated, § 5(b)(3) of the Voluntary Agreement confers antitrust protection, without the need for further clearance, with respect to the provision or exchange of "such types of confidential or proprietary information as are reasonably required to implement" the Voluntary Agreement and approved plans of action.[128]

4. December 10, 1981, Decision of the Governing Board with Respect to Subcrisis Activities

On December 10, 1981, the Governing Board of the IEA adopted by unanimous vote a "Decision on Preparation for Future Supply Disruptions" outlining a basis for consultation among Participating Countries in the event of a so-called "subcrisis" situation—*i.e.*, a disruption in oil supplies short of the 7 percent trigger required to activate the emergency system. The preamble to the Decision reflects that it is based on the following considerations:

> —disruptions in oil supply which did not reach the 7 percent level required to trigger the emergency allocation system have recently caused and could again cause damage to Member country economies through sharp oil price increases;
> —IEA countries should be better prepared to contribute to preventing a disruption in oil supply from again resulting in sharply higher prices and severe economic damage;
> —allowing market forces to operate and strengthening them where possible will improve the balance between supply and demand and the distribution of oil in short supply;
> —supplementary action by governments may be necessary in those areas where market forces do not sufficiently counteract the adverse impact of supply disruptions;
> —when such action is determined to be necessary, it should be light-handed and flexible in responding to the specific situation

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[127] Section 5(b)(2) of the current Voluntary Agreement (*see* 41 Fed. Reg 14000 (Apr 1, 1976)) requires the prior approval of the Secretary of Energy, with the concurrence of the Attorney General, for any transmittal or exchange of confidential or proprietary information or data by oil companies to the IEA or to each other Company-specific (*i.e.*, disaggregated data) must be aggregated by the Department of Energy or the IEA prior to disclosure to others, unless the Secretary of Energy, after consultation with the Secretary of State and with the concurrence of the Attorney General, "has determined that such exchange or disclosure is necessary to develop, prepare, or test emergency allocation measures."

[128] The companies are required to notify the Department of Energy, the Attorney General, and the FTC of the types of information and data provided The Secretary of Energy, after consultation with the Secretary of State, the Attorney General, and the FTC, may prescribe terms and conditions for the continued exchange or provision of information or data in an emergency situation *See* 41 Fed Reg. 14000 (Apr. 1, 1976)

> at hand and at the same time be taken promptly and effectively; . . . .

The December 10, 1981, Decision provides for monitoring by the IEA of oil markets in order to assess the nature and probable impact of future supply disruptions;[129] requires the Participating Countries to consult with each other and with the Secretariat in the event of a "subcrisis" supply disruption in order to refine the Secretariat's assessment of the supply, demand, and stock situation; and provides that in the event of a "subcrisis" supply disruption the Governing Board will meet to decide what action, if any, is necessary to meet the situation. The Decision lists several illustrative measures that could be considered by the Board in that event, such as discouragement of abnormal spot market purchases or other undesirable purchases, lowered consumption, short-term fuel switching, high levels of indigenous production, changes in stocks and stock policies, and informal efforts to minimize and contain the effects of supply imbalances. The Decision specifically recognizes that "detailed methods of implementation [of any such measures] will be decided by governments in accordance with national law and the IEP, and could vary from country to country while aimed at achieving the overall result desired on an integrated basis." It specifies further that consultation with oil companies concerning any measures that might later be agreed to would be undertaken by the governments having jurisdiction over those companies.

The United States voted in favor of the December 10, 1981, Decision and made the following statement explaining its interpretation of the effect of the Decision:

> The United States . . . welcomes this Decision. At the same time we must state for the record our understanding of it. The United States remains committed to reliance on free market forces as the most effective response to supply disruptions. We are pleased to note the inclusion of this thought in the preamble of the Decision as a guiding principle for IEA discussions of market disruptions. The Decision establishes a basis for future IEA consultations in the event of subtrigger supply disruptions. However, it does not commit IEA countries in advance as to the specific actions which they might take in such circumstances. Moreover, we note the fact that any actions taken in response to future disruptions must be consistent with national law and the Agreement on an International Energy Program, and may vary from country to country.

As this statement recognizes, the December 10, 1981, Decision of the Governing Board does not impose any mandatory obligations on the United States or on any other Participating Country to take particular actions in a "subcrisis"

[129] Specifically, the Decision states that the Executive Director of the IEA may, after consultations with Participating Countries, activate submission of Questionnaires A and B "consistent with procedures established for the emergency allocation system" in the event of a supply disruption.

situation. Rather, it provides only a requirement for future IEP consultations in the event of a "subcrisis" supply disruption.[130] The text of the Decision makes clear that it does not commit IEP countries in advance to particular actions they might take in responding to such situations. Therefore, the Decision itself has no independent legal significance, and presents no legal issue with respect to the President's authority to take steps to implement the Decision.

The December 10, 1981, Decision contemplates, however, that the Governing Board may decide on specific actions in the future, in the event of a particular "subcrisis" supply disruption. It is difficult to speculate as to what authority the President (or participating oil companies) would have to implement any future decision of the Governing Board in a "subcrisis" supply disruption, as that analysis would necessarily depend on the details of the action taken by the Governing Board. The December 10, 1981, Decision suggests that primary reliance would be placed on the operation of market forces to improve the supply/demand imbalance and to equalize the distribution of oil in short supply, and on informal, non-mandatory efforts by Participating Countries to strengthen those market forces. These efforts could include, for example, increased informal consultation among Participating Countries and between Participating Countries and oil companies subject to their jurisdiction, and public appeals by member governments for voluntary measures such as demand restraint, use of alternate fuels, increased indigenous production, and use of private reserve stocks. Implementation of informal measures such as these by the President would not require particular emergency statutory authority.[131]

Questions about the scope of the President's statutory authority and the authority of individuals and oil companies to cooperate voluntarily would arise if, in a "subcrisis" supply disruption, the Governing Board were to adopt mandatory measures requiring specific types of "supplementary action" by Participating Countries. *See* Preamble to December 10, 1981, Decision.[132] Presidential authority to implement a "subcrisis" decision of the Governing Board that imposes mandatory obligations may be available, depending on the circumstances, under certain of the statutory authorities described in Part I above.

However, a significant limitation on the President's authority to take action for the purpose of implementing allocation of oil supplies required by a "subcrisis" decision of the Governing Board, and on the ability of oil companies to cooperate voluntarily in such allocation, is imposed by §§ 251 and 252 of the EPCA, 42

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[130] The Decision does contain provisions concerning the monitoring of oil markets by the Secretariat and activation of the Questionnaire A and B systems. These provisions, however, are specifically limited to the procedures established by the IEP Agreement, and therefore do not expand the existing obligations of Participating Countries under that Agreement.

[131] As we discuss *infra*, however, no statutory antitrust defense would be available for private individuals and companies with respect to voluntary actions taken in response to such efforts.

[132] Any such actions, if they purport to impose new or additional obligations on Participating Countries, would have to be taken by unanimous vote of the Governing Board. *See* Art. 61.1(b) (decisions which impose new obligations on Participating Countries that are not already specified in the Agreement must be by unanimous vote).

U.S.C. §§ 6271 & 6272.[133] Under existing statutes, the President has no authority to direct allocation of petroleum products for the purpose of fulfilling allocation obligations imposed by the IEP, and oil companies have no antitrust defense with respect to voluntary actions to meet those allocation obligations, except as provided in §§ 251 and 252 of the EPCA. *See* 42 U.S.C. § 6271(c)(2);[134] *id.* § 6272(a).[135] As was made clear by the amendments to §§ 251 and 252 added in 1982 by the EEPA,[136] those sections do not apply to "subcrisis" activities, even if directed by the Governing Board pursuant to Article 22.[137] We believe Senator McClure's statements in debate on the amendatory provisions of the EEPA are dispositive on that point:

> The argument has been made that article 22 confers authority on the IEA Governing Board to trigger an allocation system during a subcrisis situation, and that the section 252 antitrust defense would then be applicable to U.S. oil company participation in the allocation program. This argument is incorrect, section 252 would not apply in that situation.
>
> By amending sections 251 and 252 as I have proposed, we would hopefully avoid misinterpretations of those provisions by future administrations here in the United States, by other IEA countries, or by the IEA itself. We would thus insure that the authority conferred by sections 251 and 252 will apply only to crisis situations—those involving at least a 7-percent shortfall—in accordance with the intent of the Congress.

128 Cong. Rec. S 6065 (daily ed. May 26, 1982) (remarks of Sen. McClure). Thus, § 251 would provide no authority for the President to direct any allocation

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[133] This analysis assumes that the Governing Board could require some limited sharing of oil stocks or supplies in a "subcrisis" situation We note, however, that a question exists whether the Governing Board could require any mandatory oil sharing in any supply disruption short of the 7 percent "trigger." The emergency measures provided for in the IEP Agreement, including mandatory demand restraint measures under Chapter II and allocation of oil under Chapter III, can be activated only "in accordance with [Chapter IV]" *See* Chap IV, Art 12 Article 22 of Chapter IV provides that the Governing Board may unanimously, at any time, "activate any appropriate emergency measures not provided for in the Agreement, if the situation so requires." It is debatable whether this general language in Article 22 allows the Governing Board to circumvent the carefully circumscribed and negotiated provisions of Chapters II, III, and IV, which link demand restraint obligations and allocation rights and obligations directly to the existence of a 7 percent shortfall in oil supplies of one or more Participating Countries. It is arguable that the reference in Article 22 to "appropriate emergency measures *not provided for in the Agreement*" (emphasis added) means that Article 22 contemplates emergency measures *other than* mandatory demand restraint and allocation requirements, which are already provided for in the Agreement

[134] "No officer or agency of the United States shall have any authority, other than authority under this section [*i.e.*, § 251], to require that petroleum products be allocated to other countries for the purpose of implementation of the obligations of the United States under the international energy program."

[135] "Effective 90 days after December 22, 1975, the requirements of this section [*i.e.*, § 252] shall be the sole procedures applicable to—

(1) the development or carrying out of voluntary agreements and plans of action to implement the allocation and information provisions of the international energy program, and

(2) the availability of immunity from the antitrust laws with respect to the development or carrying out of such voluntary agreements and plans of action."

[136] *See supra* at 660

[137] The United States, as a member of the Governing Board, would be able to veto any proposed decision that would require such allocation.

of oil for the purpose of implementing a Governing Board decision in a "subcrisis,"[138] and § 252 would provide no authority or antitrust defense for oil companies to participate in such an allocation.[139]

To the extent that any mandatory "subcrisis" measures adopted by the Governing Board would require the President to take particular implementing actions other than the allocation of oil, the President's authority would derive from existing statutory authorities other than §§ 251 and 252 of the EPCA. Such authorities may include, for example, other provisions of the EPCA and Title II of the EECA that may be used to fulfill the United States' "obligations under the [IEP]"—*i.e.*, §§ 151–161, 201–202, and 254 of the EPCA, 42 U.S.C. §§ 6231–6241, 6261–6262, 6274, and Title II of the EECA, 42 U.S.C. §§ 8501–8541.[140]

Additional authority might be available under other statutory authorities described in Part I above, if domestic circumstances were to provide an adequate basis for use of those authorities. For example, an international disruption in the supply of petroleum products may result in an interruption in the supply of imported petroleum products in the United States of sufficient length and severity to trigger a "severe energy supply interruption." This would make available to the President, for example, the authority in § 106 of the EPCA, 42 U.S.C. § 6214, to require accelerated rates of production of crude oil on fields located on designated federal and state lands,[141] and the authority in § 404(b) of the FUA, 42 U.S.C. § 8374(b), to prohibit the use of natural gas or petroleum in power plants and other major fuel-burning installations.[142]

Likewise, in the event of an international shortage in petroleum products that did not reach the "trigger" level, the President could determine that the shortage would affect the national defense preparedness of the United States and therefore use the authorities in the DPA relating to priority performance of contracts, allocation of materials and facilities, and activation of the Executive Reserve, in accordance with the specific requirements of those provisions.[143] In addition, a presidential declaration of an emergency under the IEEPA, if the circumstances

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[138] In addition, the waiver provision in § 7(d)(3) of the EAA, 50 U.S.C app § 2406(d)(3), would not be available unless the IEP emergency system had been activated *See supra* at 683–84.

[139] Section 252 also limits the availability of an antitrust defense with respect to the furnishing and exchange of information by oil companies pursuant to the provisions of Chapters IV and V of the Agreement.

[140] Arguably, a unanimous decision by the Governing Board requiring specific actions by Participating Countries would impose "obligations" on the United States "under the [IEP]" within the language of those provisions. Article 66 of the IEP Agreement provides that the Participating Countries "*shall take* the necessary measures . to implement the Agreement and *decisions taken by the Governing Board*" (emphasis added). In the absence of persuasive legislative history to the contrary or specific limiting language, such as exists with respect to §§ 251 and 252, the authority in §§ 151–161, 201–202, and 254 of the EPCA, and Title II of the EECA might be interpreted to extend to all "obligations" of the United States under the IEP, including mandatory measures required by a unanimous decision of the Governing Board. Whether decisions taken in this manner constitute IEP "obligations" within the meaning of those provisions, however, may be subject to some debate Because of the unanimity required by Article 61 1(b), no such "obligations" could be imposed on the United States without its consent Moreover, this conclusion could not apply to substantive amendments to the IEP Agreement after 1974, which are excluded from the definition of the IEP for purposes of the EPCA. *See supra* at n 28.

[141] *See supra* at 653–54

[142] *See supra* at 685

[143] *See supra* at 662–680. The President could use the authority in § 101(c) of the DPA, 50 U S C app. § 2071(c), to allocate materials and supplies in order to maximize energy production, without making the finding of a national defense nexus required by other sections of the Act

of an international supply disruption met the threshold requirements established by that Act, would trigger presidential authority to control disposition of property in which a foreign country or national has an interest.[144]

However, the President could not use statutory allocation authority, for example, under the IEEPA, to require the international allocation of petroleum products among Participating Countries solely to implement a "subcrisis" decision of the Governing Board that requires Participating Countries to participate in an oil sharing plan.[145] In addition, no antitrust defense would be available under § 708 of the DPA for any voluntary international allocation made by oil companies to support implementation of such a "subcrisis" decision. *See* 50 U.S.C. app. § 2158(a)(o); 42 U.S.C. § 6272(a), discussed *supra* at 70–72.

5. National Emergency Sharing Organization

The term National Emergency Sharing Organization (NESO) refers to the agency or entity within each IEP Participating Country that is responsible for general liaison with the IEA on matters of international oil allocation during an emergency and for national oil emergency matters. Authority for the President to establish a NESO or to provide that the functions of a NESO be performed by an existing agency or department within the government stems from 3 U.S.C. § 301 and congressional implementation of provisions of the IEP Agreement in the EPCA and the EECA. By executive order the President has designated the Department of Energy to function as the NESO for the United States. *See* Exec. Order No. 11,912, 3 C.F.R. 114 (1976), *as amended by* Exec. Order No. 12,038, 3 C.F.R. 136 (1978), *and* Exec. Order No. 12,148, 3 C.F.R. 427 (1979).

6. Emergency Sharing System

The "emergency sharing system" is a term that has been used to refer to those obligations as set forth in the IEP Agreement that may be triggered in the event of a 7 percent or greater shortfall in petroleum supplies of one or more Participating Countries. Authority for implementation by the United States of those obligations is discussed *supra* at 690.

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[144] *See supra* at 680–84.

[145] This conclusion assumes that the sole purpose for the President's decision to order such allocation would be to implement a "subcrisis" decision by the Governing Board imposing mandatory oil sharing requirements, and that the allocation would therefore be "for the purpose of implementation of the obligations of the United States under the [IEP]," within the meaning of § 251(c)(2), 42 U.S.C. § 6271(c)(2), quoted *supra* at n. 134. By the express terms of that section, the only statutory authority available to the President in those circumstances would be § 251, which, as noted above, provides no allocation authority in "subcrisis" situations. *See supra* at 694. However, factors taken into consideration by the IEP Governing Board in responding to a "subcrisis" situation may, of course, also be taken into account by the President in his determination whether or how to exercise statutory authorities other than § 251, such as the IEEPA, together with additional considerations, including the impact of the oil shortage on the security, foreign policy, and economy of the United States. *See, e.g.*, 50 U.S.C. § 1701. We therefore do not suggest that, if the Governing Board were to impose oil sharing obligations on Participating Countries in a "subcrisis" situation, the President could not, independent of that decision, exercise authority under the IEEPA to require the allocation of petroleum products, consistent with the specific terms of the IEEPA.

7. Supply Rights Project

The supply rights project is a study being undertaken by the Department of Energy to determine what options, such as import quotas or tariffs, may be implemented to reduce or eliminate the likelihood that the United States will incur an allocation obligation if the emergency system is triggered. The project is being conducted pursuant to functions delegated to the Department of Energy under the Department of Energy Organization Act, 42 U.S.C. §§ 7101–7375, and 3 U.S.C. § 301. *See* Exec. Order No. 11,912, *supra*.

B. Authority to Fulfill NATO Obligations

Pursuant to its obligations under the North Atlantic Treaty, 63 Stat. 2241, the United States may in some circumstances be obligated to participate in distribution of available oil supplies among members of the North Atlantic Treaty Organization (NATO) to satisfy the defense needs of NATO during a petroleum shortage. Two organizations within NATO have responsibility with respect to petroleum emergencies: (1) the Petroleum Planning Committee, which has the task of developing plans for the distribution of available oil supplies among NATO members if there are supply shortages during times of crisis or war; and (2) the NATO Wartime Oil Organization, which is NATO's emergency petroleum organization.

The primary statutory authorities that would allow the President to fulfill responsibilities to NATO countries include the DPA,[146] the IEEPA,[147] the TWEA,[148] and the Foreign Assistance Act of 1961.[149] Some limitation on the President's flexibility is imposed by export restrictions imposed by the EAA and other statutes, which limit the availability of waivers of restrictions on the export of crude oil pursuant to the North Atlantic Treaty.[150] No statutory antitrust or breach-of-contract defense is available for voluntary participation by U.S. oil companies in NATO oil planning or sharing activities.[151]

C. Authority with Respect to Development and Use of the SPR

The legal authorities with respect to establishment, filling, and drawdown of the SPR are discussed *supra* at 654–656.

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[146] *See supra* at 662–78.

[147] *See supra* at 680–84.

[148] *See supra* at n 95.

[149] *See supra* at n 108

[150] The EAA provides for waiver of export controls on crude oil required by the Act or by other acts only for exports "pursuant to a bilateral international oil supply agreement entered into by the United States with such nation before June 25, 1979, or to any country pursuant to the International Emergency Oil Sharing Plan of the International Energy Agency," which would not include exports to fulfill NATO responsibilities 50 U.S.C. app. § 2406(d)(3). *See supra* at 685.

[151] *See supra* at 660–62, 672. Protection generally would be available, however, for actions by oil companies required by government orders under those Acts. *See, e g.*, 50 U.S.C. app. § 2157 (no person shall be held liable for an act "resulting directly or indirectly from compliance" with orders issued pursuant to the DPA), 50 U.S.C. § 1702(a)(3) ("[n]o person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, [the IEEPA], or any regulation, instruction, or direction issued under [the IEEPA]"), 50 U.S C. app. § 5(b)(2) (TWEA)

D. Authority for Government Incentives to Encourage Private Petroleum Product Stocks

No statutory authority currently exists that would authorize specific government incentives, such as federal subsidies, loan guarantees, tax credits, or the establishment of quasi-governmental corporations to purchase and hold stocks, to encourage build-up in private petroleum product stocks. Incentives for the build-up of such stocks may, of course, be provided as a matter of policy within statutory constraints, for example, by removing market disincentives for increases in private stocks. Voluntary agreements under the DPA could possibly be used, consistent with the requirements of that Act, to facilitate the building of private stocks if necessary to promote the national defense or national defense preparedness. Participants would receive a limited antitrust defense for their participation. *See supra* at 670–72.

E. Authority for Reactivation of the Executive Reserve

The legal authorities with respect to establishment and activation of the Executive Reserve are discussed *supra* at 672–78.

F. Authority for Coordination with State and Local Governments

In response to initiatives at the federal, state, and local levels, most of the states have taken action to facilitate planning for or responding to energy emergencies. Cooperation between state and local governments and federal agencies in planning for energy emergencies is specifically authorized by §§ 201 and 202 of the EPCA, 42 U.S.C. §§ 6261 & 6262, and by Title II of the EECA, 42 U.S.C. §§ 8501–8541.

State energy emergency response statutes, regulations, and plans differ considerably in their scope and applicability. Powers available under state emergency statutes range from broad grants of authority to state governors under general state disaster acts[152] to specific provisions enumerating actions that may be taken in response to an energy emergency, such as establishment of allocation, rationing, distribution, and conservation plans,[153] and setting up of state agencies to implement those option plans. State energy emergency contingency plans developed by several states provide for a range of actions in the event of an energy emergency, including public information and education programs; incentives to increase local production of energy; allocation, rationing, and distribution programs; transportation conservation measures; electricity restraints; and restrictions on retail operations or gasoline purchases. The definition of an energy

[152] *See, e g* , Alaska Stat. §§ 26.23 010–26 23.230 (1981); Ill. Ann. Stat Ch 127 §§ 1101–1127 (1981); Va. Code §§ 44–146.13–44–146 28 (1981).

[153] *See, e.g.*, Cal. Public Resources Code §§ 25700–25705 (West 1977); Kan. Stat. Ann §§ 74–6801–09 (1980); Md. Natural Resources Code Ann. § 11–102 (Supp. 1981); Tenn. Code Ann. §§ 58–2–101–58–2–132 (1980).

emergency sufficient to trigger implementation of such authorities also differs from state to state.[154]

The major legal issue we address here with respect to the establishment or implementation of state energy emergency responses is whether or under what circumstances a state law, regulation, or plan may be subject to challenge on the ground that it is preempted by federal law or is an undue burden on interstate commerce. This issue is particularly difficult to analyze in the abstract. There are no mechanical tests to determine if particular state legislation or regulation is impermissible. Resolution of that issue depends on a case-by-case comparison of the applicable federal and state provisions and programs, and an analysis of the effect of the competing state and federal regulation in a specific fact situation. Given the diversity of both federal and state authorities related to energy emergency preparedness, it is impossible here to do more than outline the general principles that should govern that analysis.

1. Preemption of State Laws and Regulations

Pursuant to the Supremacy Clause of the Constitution (Art. VI, cl. 2),[155] state laws or regulations may be invalid if they operate in the same field or regulate the same subjects as federal laws or regulations. The determination whether particular state laws or actions taken pursuant to those laws are preempted depends on the purpose and nature of federal regulation in that field and the interaction of state regulation with federal regulation. The underlying task is to determine whether Congress intended, in a particular instance, to preempt state regulation of the same subject matter. *See Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963).

Occasionally, Congress explicitly defines the extent to which a particular statute preempts state law. *See generally Jones* v. *Rath Packing Co.*, 430 U.S. 519, 530–31 (1977). Section 6(b) of the EPAA, for example, provided that a regulation or order issued under the Act "shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any state or local government if such provision is in conflict with such regulation or any such order." 15 U.S.C. § 755(b) (1976) (expired Sept. 30, 1981). Another example may be found in § 526 of the EPCA, which provides that:

> No State law or State program in effect on [the date of enactment of this Act], or which may become effective thereafter, shall be superseded by any provision of subchapter I or II of this chapter or any rule, regulation, or order thereunder, except insofar as such State law or State program is in conflict with such provision, rule, regulation, or order.

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[154] *Compare* Hawaii Rev. Stat Chap. 125C (1976) *with* Wash Rev. Code § 43.21G (1972); Mont. Code Ann §§ 90–4–301–319 (1979), *and* Tenn. Code Ann. §§ 58–2–101–58–2–132 (1980).

[155] "The Constitution, and the laws of the United States . . .; and all Treaties . shall be the Supreme Law of the Land."

42 U.S.C. § 6396.[156]

In most cases, however, preemption must be inferred. The general rule is that stated in *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963):

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.

373 U.S. at 142 (citation omitted). This test was reaffirmed in two of the Court's 1981 decisions. *See Commonwealth Edison* v. *Montana*, 453 U.S. 609, 634 (1981); *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). Preemption may be found if Congress has occupied an entire field of interstate commerce, leaving no room for state legislation;[157] if the state legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress;"[158] or if state legislation is inconsistent with specific provisions of a federal statute or regulation.[159]

The clearest examples of state energy emergency laws or regulations that may be subject to challenge under the preemption doctrine would be laws or regulations that actually conflict with federal statutes or directives. For example, a state allocation regulation that requires an oil supplier to take actions inconsistent with effective federal allocation regulations implemented under the EPCA or the DPA would fall under the Supremacy Clause. A determination whether particular provisions of state emergency energy laws, regulations, or plans conflict with federal requirements can be made only by comparing these competing requirements. That comparison cannot be made in the abstract. The "relationship between state and federal laws" must be considered "as they are interpreted and applied, not merely as they are written." *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 526 (citations omitted). Since the scope and effect of both federal and state regulation in the event of an emergency will depend largely on the circumstances of that emergency and the choices made by the appropriate state and federal officials in response to that emergency, a determination whether particular state laws or regulations conflict with federal directives in all likelihood cannot be made unless and until an emergency exists and those authorities are exercised.

The basis for a preemption challenge to state laws or regulations would be more tenuous if the state enactment did not conflict directly with a particular

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[156] Even under statutes such as the EPAA and the EPCA, in which Congress makes its intent express with respect to the scope of preemption, a further determination must be made on a case-by-case basis as to whether particular state regulation is "in conflict with" federal provisions. *See, e.g., Mobil Oil Corp* v. *Dubno*, 492 F. Supp. 1004 (D Conn. 1980), *Atlantic Richfield Co.* v. *Tribbitt*, 399 A.2d 535, 545–46 (Del Ch 1977), *New York State Office of Parks & Recreation* v. *Vantage Petroleum Corp.*, 431 N Y.S.2d 779 (N Y Sup. Ct. 1980), *New England Petroleum Corp.* v. *County of Suffolk*, 383 N Y.S.2d 405 (N.Y. App Div. 1976).

[157] *See, e.g., Campbell* v. *Hussey*, 368 U.S 297 (1961)

[158] *See Hines* v. *Davidowitz*, 312 U S 52, 67–68 (1941)

[159] *See, e g , Jones* v *Rath Packing Co.*, 430 U.S. 519 (1977); *Warren Trading Post Co.* v *Arizona Tax Commission*, 380 U.S 685 (1965).

federal directive, but rather conflicted only with a general federal policy. Recently, in *Commonwealth Edison Co.* v. *Montana, supra,* the Supreme Court conceded the power companies' point that the EPCA and the FUA were intended to encourage the use of coal. It nevertheless rejected their argument that this purpose preempted a severance tax imposed by Montana on coal mined on federal land, saying:

> [w]e do not . . . accept appellants' implicit suggestion that these general statements demonstrate a congressional intent to preempt all state legislation that may have an adverse impact on the use of coal. . . . In cases such as this, it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict.

453 U.S. at 633–34 (citations omitted).[160] Particularly if the state statute is "an exercise of 'historic police power of the States,'" which would include most state energy emergency laws and regulations, the Supreme Court has refused to find preemption "unless that was the 'clear and manifest purpose of Congress.'" *Florida Lime & Avocado Growers, Inc., supra,* 373 U.S. at 146, quoting *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). The congressional mandate must be "unambiguous," *Florida Lime & Avocado Growers, supra,* 373 U.S. at 147, and "compelling." *New York Telephone Co.* v. *New York State Department of Labor,* 440 U.S. 519, 540 (1979).

In the absence of a relatively direct conflict between state and federal directives, we believe the statutory authorities available to the President to deal with an energy emergency probably would not be interpreted to contain an "unambiguous" and "compelling" mandate to preempt state energy emergency provisions. State laws or regulations are most likely to be vulnerable to a preemption challenge under either the EPCA or the DPA.[161] As noted above, the EPCA specifically saves from preemption all state laws and regulations except those that are in conflict with federal directives. Although the DPA does not contain a comparable savings provision, the breadth of the authorities available to the President under the DPA belies any argument that Congress intended to "occupy the field." The standby authorities provided in the DPA could be invoked in practically any area of the economy, and therefore it is highly unlikely that Congress intended that the states could not act at all in this broad area merely because the President was given broad but discretionary powers under the DPA. That conclusion, however, will depend ultimately on the facts of a particular situation.

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[160] However, a particular statutory scheme and legislative history could demonstrate that Congress intended to establish uniform national standards or regulations that would foreclose different or more stringent state requirements In that event, state regulation would fall, even if no direct conflict existed between state and federal requirements *See, e.g., Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 163–64 (1978)

[161] Most of the other statutory authorities, as described in Part I, deal with subjects that are generally outside the scope of a state's authority to regulate, such as exports and imports *See, e g ,* § 232 of the TEA, 19 U.S.C. § 1862 (*supra* at 678–80); § 203 of the IEEPA, 50 U S.C. § 1702 (*supra* at 680–82); § 7(a) of the EAA, 50 U S C. app. § 2406(a) (*supra* at 683–84). It is possible, of course, that a particular situation may present a preemption question under statutory authorities other than the EPCA or the DPA.

2. Burden on Interstate Commerce

A separate question is whether or under what circumstances state laws, regulations, or plans may be subject to challenge under the "negative implication" of the Commerce Clause of the Constitution (Art. I, § 8, cl. 2).[162] Even in the absence of federal regulation, a state law or regulation may be unconstitutional because it creates an undue burden on interstate commerce. *See, e.g., Hughes* v. *Oklahoma,* 441 U.S. 322 (1979). However, not all state actions that regulate aspects of interstate commerce are unconstitutional. Determining the validity of particular state statutes or regulations that may affect interstate commerce requires a careful inquiry:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted).

Although this inquiry necessarily depends on the particular facts presented, as a general matter state laws or regulations that would allow a state to enhance its petroleum supply to the detriment of other states, for example, by an allocation scheme or export restriction, would have to be carefully scrutinized. The Supreme Court has repeatedly struck down, as violative of the Commerce Clause, state statutes that "mandat[e] that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co.* v. *New Hampshire,* 455 U.S. 331 (1982), *citing Hughes* v. *Oklahoma, supra,* 441 U.S. 322 (1979); *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Philadelphia* v. *New Jersey,* 437 U.S. 617, 627 (1978). Most recently, in *Sporhase* v. *Nebraska,* 458 U.S. 941 (1982), the Court held unconstitutional a Nebraska statute conditioning export of groundwater from the state on reciprocal treatment from the receiving state.

In *Sporhase,* however, the Court also suggested that not every restriction imposed by a state on the export of its natural resources is necessarily unconstitutional. The Court noted that:

> [A] State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its

[162] "The Congress shall have the power [t]o regulate commerce . . . among the several states."

> police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.

458 U.S. at 956 (citation omitted). If the Nebraska statute in question had been "narrowly tailored to the conservation and preservation rationale," the Court indicated it might not have found a constitutional objection. *Id.* at 958.[163] Therefore, it may be possible that a state could constitutionally impose some restrictions on the export or allocation of petroleum products to protect the health of its citizens in times of an emergency energy shortage if the restrictions were narrowly tailored to serve legitimate state preservation and conservation purposes. Any such statutes, however, would have to be subject to "the 'strictest scrutiny' reserved for facially discriminatory legislation." *Id.*, quoting *Hughes* v. *Oklahoma, supra*, 441 U.S. at 337.

State laws or regulations that do not discriminate in favor of the state's own producers or consumers would not necessarily present the same facial constitutional objection, but may nonetheless be subject to challenge under the Commerce Clause. For example, if the regulation places unreasonable barriers to the flow of goods across state lines,[164] imposes price controls or other regulation directly on interstate transactions,[165] or poses a threat of multiple, inconsistent burdens because of similar, conflicting regulation by other states, it would be vulnerable to a constitutional challenge.[166] State measures designed to deal with energy emergencies that are strictly local in scope and effect and are clearly linked to preservation of the health and safety of the citizens of the state, would probably withstand constitutional scrutiny. A determination whether particular state laws or regulations would be vulnerable to challenge on the ground that they unconstitutionally burden interstate commerce can be made, however, only on a case-by-case basis.

G. Authority for Public Information Activities

A number of federal statutes charge the Department of Energy with specific responsibility and authority to gather and publish information relevant to energy supplies and energy emergency preparedness activities. *See, e.g.*, 42 U.S.C. § 6361(b) (Secretary of Energy directed to develop a public education program to encourage energy conservation and efficiency); 15 U.S.C. §§ 772, 796 (Secre-

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[163] The scope of this potential exception to the Court's otherwise consistent holdings that a state may not constitutionally restrict its natural resources to its own citizens might conceivably be limited by the Court to restrictions on the export or use of water. In "balancing" the state's interests that might justify otherwise discriminatory legislation, the Court gave some weight to historic claims of state "ownership" of water within its borders. The Court made clear that such claims are based on a "legal fiction," but noted that they may be "more substantial than claims of public ownership of other natural resources." 458 U.S. at 951, 956–57. It is unclear, therefore, whether the narrow exception recognized by the Court would be extended to restrictions on other types of natural resources.

[164] *See, e.g., Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976).

[165] *See, e.g., Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

[166] *See, e.g., Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

tary of Energy authorized to request, acquire and collect energy information);[167] 42 U.S.C. § 7135 (establishment of Energy Information Administration); 42 U.S.C. § 8511(e) (Secretary of Energy directed to publish levels of consumption for targeted energy sources under the EECA). Other public information activities may be undertaken, on a formal or informal basis, in order to carry out functions delegated to the Department of Energy by statute or executive order. *See, e.g.*, 42 U.S.C. § 7101 *et seq.*; Exec. Order No. 12,038, 3 C.F.R. 136 (1978); Exec. Order No. 11,912, *supra*.

III. Triggers for Exercise of Statutory Authorities

Section 272(a)(3)(B) of the EPCA, as added by § 3 of the EEPA, provides that this Memorandum of Law should distinguish among three types of situations that could trigger a presidential exercise of authority to deal with a severe petroleum shortage, *viz:*

(i) situations involving limited or general war, international tensions that threaten national security, and other Presidentially declared emergencies;
(ii) events resulting in activation of the international energy program; and
(iii) events or situations less severe than those described in clauses (i) and (ii).

As described in Part I with respect to each statutory authority, the circumstances that provide a basis for exercise of a particular authority differ from statute to statute, and in some cases, among provisions of the same statute. Many of those circumstances overlap. In any particular emergency situation facts may justify action under a number of those statutes. Consequently, the President's authority cannot be subdivided neatly into the three categories listed, and an attempt to do so with any degree of certainty is inevitably somewhat misleading. Each statute must be considered on its own terms and in light of its legislative history and the facts of a given emergency. However, in order to comply fully with the intent of § 272(a), a rough categorization of the statutory authorities discussed in Part I is provided below. This categorization is not intended in any way to modify or add to the description of those authorities in Part I.

A. Situations Involving War, International Tensions That Threaten National Security, and Other Presidentially Declared Emergencies

We have included, within the category of authorities that could be used in the enumerated factual situations, provisions that by their terms authorize the Presi-

[167] Functions originally delegated under those provisions to the Administrator of the Federal Energy Administration have been transferred to the Secretary of Energy. *See* 42 U.S.C. § 7151(a).

dent to act in the interests of promoting the national defense and national security of the United States:[168]

Defense Production Act, 50 U.S.C. app. §§ 2071(a) & (b), 2158, 2160
Trade Expansion Act, 19 U.S.C. § 1862
International Emergency Economic Powers Act, 50 U.S.C. § 1702
Trading with the Enemy Act, 50 U.S.C. app. § 5
Export Administration Act of 1979, 50 U.S.C. app. § 2406
Outer Continental Shelf Lands Act, 43 U.S.C. § 1341(b)
Magnuson Act, 50 U.S.C. § 191

B. Events Resulting in Activation of the International Energy Program

We construe the category described as "events resulting in activation of the International Energy Program" to encompass authorities that are expressly contingent on activation of the IEP emergency system in the event of a 7 percent oil shortage, in accordance with Chapter IV of the IEP Agreement. We do not include in this category other statutory authorities that may be relevant to participation by the United States in the IEP, but that do not necessarily depend on activation of the IEP emergency system:

Energy Policy and Conservation Act, 42 U.S.C. §§ 6271, 6272[169]

C. Less Severe Events or Situations

Included within this category are additional provisions that authorize presidential or executive action in situations other than those necessarily involving the national defense or security, or requiring activation of the IEP emergency system:

Energy Policy and Conservation Act, 42 U.S.C. §§ 6212, 6214, 6231–6241, 6261–6262
Defense Production Act, 50 U.S.C. app. § 2071(c)
Emergency Energy Conservation Act, 42 U.S.C. §§ 8501–8541
Export Administration Act, 50 U.S.C. app. § 2406
Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8374(b)
Public Utility Regulatory Policies Act, 15 U.S.C. § 717z
Federal Power Act, 16 U.S.C. §§ 824a(c), 824i, 824j
Natural Gas Act, 15 U.S.C. §§ 717b, 717f
Natural Gas Policy Act, 15 U.S.C. §§ 3361, 3363

[168] Inclusion in this category of particular statutory authorities that do not, by their terms, require a presidential declaration of a national emergency, should not be construed to suggest that any such declaration would be a prerequisite for exercise of authority under that statute, or that exercise of that authority would be subject to the NEA. *See supra* at n.78.

[169] As described *supra* at 58–59, § 252, 42 U.S.C. § 6272, and the implementing regulations, Voluntary Agreement, and Plan of Action permit limited information exchange by companies prior to activation of the IEP emergency system.

Mineral Lands Leasing Act, 30 U.S.C. § 192
Outer Continental Shelf Lands Act, 43 U.S.C. § 1341(b)
Interstate Commerce Act, 49 U.S.C. §§ 10928, 11123
Clean Air Act, 42 U.S.C. § 7410(f)
Disaster Relief Act, 42 U.S.C. §§ 5145, 5146
Foreign Assistance Act of 1961, 22 U.S.C. §§ 2346, 2357, 2393

IV. Conclusion

In conclusion, it is important to emphasize again that the discussion in this Memorandum of the statutory authorities that may be available to the President in the event of a petroleum emergency cannot possibly be exhaustive or entirely authoritative, because the nature and extent of that authority will necessarily differ depending on the factual situation presented by an actual petroleum shortage. Many of the legal issues raised with respect to the President's authority therefore cannot be fully resolved in the abstract. Within that significant constraint, we have attempted here to discuss as fully as possible each of the statutory authorities that we believe may be relevant in a future petroleum emergency, and to address specific legal issues raised by Congress during its consideration of § 3 of the EEPA. Consistent with the terms of that section, we hereby submit this Memorandum of Law, for transmission by the President to Congress.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Use of the Disaster Relief Act of 1974 in an "Immigration Emergency"

The Disaster Relief Act authorizes the provision of federal aid to state and local governments in the event of an emergency or major disaster, whether resulting from natural or man-made causes. Whether a particular "immigration emergency" so threatens property or human life as to fall within the scope of the Act is a matter for the President in his discretion to determine.

November 19, 1982

MEMORANDUM OPINION FOR
THE ASSOCIATE ATTORNEY GENERAL

This responds to your inquiry whether it would be appropriate for the President to use the Disaster Relief Act, 42 U.S.C. §§ 5121–5202 (1982) (Act), in a situation comparable to the recent Cuban boatlift or other similar "immigration emergency." The legal question raised is whether such an "immigration emergency" would constitute either an emergency[1] or a major disaster[2] under the Act. We have concluded that the Act covers emergencies arising from both man-made and natural disasters. We have also concluded that whether a particular situation—such as an "immigration emergency"—falls within the scope of the Act is a matter for the President to determine—a determination that has been placed wholly within the President's discretion. 42 U.S.C. § 5122(2). We believe that the Act was meant to encompass catastrophic events—either impending or actual—that threaten property and the lives of people. In the absence of specific facts, we are unable to say with certainty whether a particular "immigration emergency" would constitute such a catastrophic event. Similarly, we are unable

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[1] The Act defines an emergency as

> any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the United States which requires Federal emergency assistance to supplement State and local efforts to save lives and protect property, public health and safety or to avert or lessen the threat of a disaster

42 U.S.C. § 5122(1) (1982)

[2] A "major disaster" is any of the events listed in the definition of "emergency," *supra*, n 1, which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter, above and beyond emergency services by the Federal Government, to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

42 U.S.C. § 5122(2) (1982)

to say that the Act could never apply. Rather, we will outline what we believe to be the touchstones of an emergency under the Act.

I. The Disaster Relief Act

The Act is the most recent version of legislation that was first enacted in 1950. Disaster Relief Act of 1950, Pub. L. No. 81–875, 64 Stat. 1109 (1950). A major disaster was originally defined by a somewhat shorter list,[3] but the central purpose—to create a coherent framework for dealing with the unexpected—was, from the beginning, expressed clearly:

> The purpose of the bill is to provide for an orderly and continuing method of rendering assistance to the States and local governments in alleviating suffering and damage resulting from a major peacetime disaster and in restoring public facilities and in supplementing whatever aid the States or local governments can render themselves.

S. Rep. No. 2571, 81st Cong., 2d Sess. 1 (1950).[4]

The 1950 legislation was intended to create permanent legislation to deal with what had, to that point, been covered in an *ad hoc,* haphazard manner:[5]

> For obvious reasons, it is not possible for the committee to approve legislation in each disaster in any particular area. Our committee would be overworked with legislation of that kind. The legislation that is before us today is the kind that will meet all emergencies of a disaster, and gives the President the necessary authority for not only providing the relief but for coordinating the relief.

96 Cong. Rec. 11902 (1950). The Act was drafted by Members of Congress who were willing to exchange the careful congressional evaluation of each event that had heretofore been involved for the quicker response that an emergency situation usually calls for, a response that the Executive, acting alone, can provide. From the beginning, Congress realized that the Act, because of this calculus, placed broad discretionary power in the hands of the President. Statements from

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[3] The list of covered events included "floods, drought, fire, hurricane, earthquake, storm or other catastrophe." 42 U S C § 1855a(a) (1952).

[4] *See also* H.R Rep No 2727, 81st Cong., 2d Sess. 2 (1950), 96 Cong Rec. 11895–96, 11907 (1950).

[5] Rep Hagen inserted a list of 128 acts passed by Congress since 1803 to cover various disasters. 96 Cong. Rec 11900–02 (1950). It is not evident that this list was necessarily intended to identify the kinds of disasters the 1950 legislation was intended to cover. It is interesting to note that although Rep. Hagen referred to it as covering "sufferers from floods, fires, earthquakes and other natural disasters," 96 Cong Rec. 11899 (1950), the list in fact included statutes that covered man-made disasters. food for Florida residents driven from their homes by Indian depredations, 5 Stat. 131 (1836); monetary relief for survivors of an Indian massacre, 12 Stat 652 (1863); relief from import duties for charitable contributions sent to blacks "who may have emigrated from their homes to other States," 21 Stat. 66 (1880); money for the relief of destitute American citizens in Cuba, 30 Stat. 220 (1897); money for losses suffered by the crew of the U S.S Maine when it exploded, 30 Stat 346 (1898), and supplies for the relief of destitute Cubans who were suffering from the disruptions of war, 30 Stat. 419 (1898) *Id.* at 1069 (1899).

the 1950 debate reflect this recognition, including the awareness that, as with any grant of discretionary authority, there was a danger of abuse.

> When it comes to providing for human suffering, to provide for the protection of human life, we must give some discretion. I will risk the President of the United States and the governors of the States.

96 Cong. Rec. 11898 (1950) (statement of Rep. Whittington).[6]

The debate continued:

> MR. KEATING: [I]t seems to me that the essential difference between the way we have been handling this and the way it is proposed to handle it under . . . this measure is that heretofore Congress has passed upon the need for the funds, but under this it is left entirely to the Executive to say whether the disaster threatens to be of sufficient severity and magnitude to warrant disaster assistance by the Federal Government.
>
> MR. WHITTINGTON: . . . That is exactly what we had done.

96 Cong. Rec. 11910 (1950).

> MR. ROBERTSON: Is it the Senator's interpretation that the bill would apply to whatever disaster the President might be pleased to have it apply?
>
> MR. McCLELLAN: That is correct. . . .
>
> However, I think we certainly can rely upon whoever may be President of the United States having some judgment, and also having some humanitarian feelings and applying such feelings in making a decision as to what is a major disaster, where people have suffered or are about to suffer, and where the Federal Government should step in and assist.

96 Cong. Rec. 15096, 15097 (1950).

We have not found anything in the subsequent amendments to this legislation indicating a desire to limit this discretion.

II. Natural and Man-made Disasters

There has been some confusion over the years as to whether the phrase "or other catastrophe" includes events other than those usually thought of as

[6] Rep Whittington was Chairman of the House Committee on Public Works, which had drafted the bill

"natural," *i.e.*, hurricanes, earthquakes, and tornadoes.[7] We believe that the Federal Emergency Management Agency (FEMA) and its predecessors have administered the Act to cover man-made as well as natural events. Given the many years of congressional acquiescence in this administration of the Act, this administrative interpretation would normally, without more, be regarded as authoritative and correct.

When the 1950 legislation was being debated, most references were to what are generally considered "natural" disasters. But reference was made to a nuclear disaster. Referring to the $5,000,000 appropriation made under the bill, Rep. Keating said:

> [A]s the gentleman from Wisconsin said, $5,000,000 is just a starter. If a major disaster struck this Nation, such as an atomic explosion or something of that kind, the Congress of the United States would be the first on the spot to alleviate any suffering in such a situation as that.

96 Cong. Rec. 11911 (1950).

It is true that when the Act was under consideration in 1974, its sponsors referred to the "natural" hazards that will be covered.[8] But there was also reference, albeit ambiguous, to the definition as covering "any one of a number of natural hazards *or other catastrophes* causing damage that requires emergency assistance." 120 Cong. Rec. 4169 (1974) (statement of Sen. Burdick, floor manager) (emphasis added). Extensive hearings were held,[9] but they were held in towns that had suffered from the most recent disasters—Hurricanes Camille and Agnes, and the Rapid City, South Dakota flood—all of which happened to be natural, and the testimony received focused on the aid needed, not on the disasters' causes.[10]

In order to clarify whether the Act can properly be used to cover man-made disasters, an issue that is apparently now disputed by FEMA,[11] we have examined the administrative practice under the Act and its predecessors. It is apparent from the list provided to us by FEMA of all the emergencies that have been covered since May 1, 1953, by the Act or its predecessors, that man-made disasters have been covered for as long as there has been specific disaster legislation. A survey of the list shows that the President has declared a disaster to cover the presence of

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[7] This Office once examined the issue in terms of "natural" *versus* man-made disasters and concluded that the damage caused by the riots of the late 1960s was not covered by the Act. Memorandum for David Ginsberg, Executive Director, National Advisory Commission on Civil Disorders, from Warren Christopher, Deputy Attorney General, Nov. 22, 1967. Our files contain an unsigned memorandum, however, dated Aug. 16, 1965, that arrives at the opposite conclusion.

[8] *See, e g*, 120 Cong Rec. 4162, 4165, 4166 (1974) (statement of Sen. Burdick)

[9] *To Investigate the Adequacy and Effectiveness of Federal Disaster Relief Legislation. Hearings Before the Subcomm. on Disaster Relief of the Senate Comm on Public Works, Pts 1–6*, 93rd Cong , 1st and 2d Sess. (1973–1974)

[10] The same is true of the hearings held in 1950. *See Disaster Relief. Hearing on S. 2415 Before the Subcomm. of the Senate Comm on Public Works*, 81st Cong., 2d Sess (1950), and *infra*, n 23

[11] *Compare* Letter to Ms Renee L Szybala, Special Assistant to the Associate Attorney General, from George W Jett, General Counsel, FEMA, Aug. 2, 1982, *with* Memorandum for Robert Bedell, Office of Management and Budget, from George W. Jett, General Counsel, FEMA, May 3, 1980.

a sunken barge in the Mississippi River because of its cargo of 2,200,000 pounds of liquid chlorine;[12] a massive power failure in Alaska;[13] the presence of chemical wastes in the soil underlying a residential area;[14] explosions in the sewer system of Louisville, Kentucky because of illegal chemical dumping;[15] dam collapses due solely to engineering failures;[16] fires due to arson;[17] and the sudden influx of approximately 250,000 illegal aliens from Cuba. 16 Weekly Comp. 868 (1980). There is no indication in the legislative history of the Act or any of its predecessors that Congress intended the President to distinguish between floods caused by rivers swollen by melting snow, floods caused by the collapse of dams eroded by heavy rains, *see* 9 Weekly Comp. 657 (1973), and floods caused by the collapse of mechanically flawed dams, *see* note 16 *supra*. Nor is there any indication that the Executive was to spend valuable time distinguishing—if it were possible—between, for example, brush fires started by arsonists and those started by lightning. Rather, revisions to the Act have focused on improving the delivery of aid, and increasing the kinds that are available. Unless we are willing to read "naturally occurring" into the statute as a modifier to "fire" and "explosion," we cannot read it in to modify "catastrophe."

We would note that the Act has been amended five times since 1950,[18] and that each time the President and his aides have been criticized for various delays in providing aid. Each time there have been calls for more, not less, aid, and quicker response times.[19] We have not been able to find suggestions that the President delay the delivery of aid while the exact cause of the disaster is unearthed. The whole point of the Act is to provide assistance to those in need as soon as possible and to leave the careful sifting of cause and effect by time-consuming investigations to the future.[20]

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[12] The emergency was declared on October 6, 1962 *United States* v *Cargill*, 367 F.2d 971 (5th Cir 1966), *aff'd sub nom. Wyandotte Transportation Co* v *United States*, 389 U S. 191 (1967). The United States successfully raised the barge and sued to recover the $3,081,000 cost, much of which was for measures taken to alert the public to potential risks and to protect them in case the chlorine tanks ruptured *See also* N Y. Times, October 11, 1962, at 24, col. 2, *id.*, November 6, 1962 at 12, col. 5.

[13] 10 Weekly Comp. 1149 (1974) The federal government provided supplementary generators until power could be restored

[14] 16 Weekly Comp 967 (1980) (Love Canal).

[15] 17 Weekly Comp. 333 (1981) The explosions were later found to be the responsibility of a company whose soybean mill leaked a highly explosive industrial solvent into the sewers.

[16] 12 Weekly Comp 1036–37, 1049 (1976) (Grand Teton Dam).

[17] 17 Weekly Comp 1351 (1981) (Massachusetts fire set by arsonist that caused $40 million in damage); 16 Weekly Comp. 2780 (1980) (California brush fire started by illegal campfire that caused $25 million in damage)

[18] Although the law was amended in 1962 to cover the territories, Pub L No 87–502, 76 Stat 111 (1962), and in 1966, Pub. L. No 89–769, 80 Stat 1316 (1966), and 1969, Pub. L. No. 91–79, 83 Stat. 125 (1969), to increase the kinds of assistance available, it was not until 1970 that it was comprehensively amended. Pub L. No. 91–606, 84 Stat. 1744 (1970) The 1970 law reenacted the major provisions of the earlier laws, consolidating in one statute provisions that had been scattered throughout the Code, and added several new forms of aid. *See* 116 Cong. Rec. 31045 (1970) (statement of Sen. Bayh), S Rep 1157, 91st Cong., 2d Sess (1970). The definition of major disaster was specifically retained, *see* H.R Rep No. 1752, 91st Cong , 2d Sess 18 (1970); S. Rep No 1157, 91st Cong , 2d Sess 25 (1970), except for certain specific additions to the list: tornadoes, high water, wind-driven water and tidal waves. 42 U.S.C. § 4401 (1970) The 1974 Act, which contains the most recent amendments, had as its central purpose the same kind of consolidation and expansion. *See* H.R Rep No. 1037, 93rd Cong., 2d Sess (1974); S. Rep No 1778, 93rd Cong., 2d Sess (1974).

[19] *See, e.g* , 116 Cong Rec. 34795 (1970) (statement of Rep. Clausen) ("It is our intent to equip the executive branch, which we believe is now hampered, with the kind of authority to move in the direction of a definite action program to give immediate relief to the people who need it at the most possibly important time in their life ")

[20] Indeed, in some cases the cause will never be known, *i.e.*, experts may suspect that a fire was arson but find it impossible to prove.

Given this prior administrative practice, the breadth of the President's discretion as perceived by Congress, and the fact that Congress could have limited the statute to natural disasters,[21] we believe that the Act covers man-made as well as natural disasters.

III. Immigration Emergencies

FEMA has taken the position that use of the Act for an immigration emergency is inappropriate for three reasons. While we do not, as indicated below, find any of these reasons persuasive, obviously the Act will not be available for every immigration emergency. Rather, we believe that the President may use the Act in any emergency, including an immigration emergency, if he finds that the damage, loss, hardship, or suffering is of the kind encompassed by the Act. As a guide, we detail below some of the indicia which may be relevant in determining when a crisis is an emergency covered by the Act.

FEMA advances three reasons why the Act is not available for immigration emergencies. First, as an indication of Congress' concern with the Act's use for man-made emergencies, it points to S. 2250, a bill which passed the Senate in June and has now been referred to the House Public Works Committee. S. 2250 would change the last phrase in 42 U.S.C. § 5122(2) to "or other *natural* catastrophe." S. 2250, § 5(1), 97th Cong., 2d Sess. (1982) (emphasis added). The accompanying report recognizes that the Act has been used to cover non-natural catastrophes. S. Rep. No. 459, 97th Cong., 2d Sess. 2 (1982), and that these uses have "provoked recent Congressional concern." *Id.* We would note that this amendment would only limit the declaration of a "major disaster," 42 U.S.C. § 5122(2), not the more limited declaration of an "emergency." *Id.* § 5122(1).

This proposed amendment is of minimal use in interpreting the statute as presently enacted. Congressional critics may take issue with particular non-natural emergencies the President has chosen to cover, but the Senate report itself recognizes the long history of the President's reliance on the Act to respond to non-natural emergencies. This would seem to undercut any argument that only natural emergencies may be covered. In fact, S. 2250's retention of a definition of "emergency" that is not limited to "natural" events would seem to indicate a continued desire that some federal aid remain available for man-made emergencies.

Second, FEMA indicates that Lee Thomas, Associate Director for State and Local Programs and Support, testified during his Senate confirmation hearings that he would only recommend coverage for an emergency if it were a natural disaster or one specifically mentioned in the Act. We have been asked a legal question about underlying authority to act, not the policy question about when FEMA will recommend that the President exercise his discretion to act. We defer

[21] *Compare* Wisc. Stat. § 49.19 (11)(b) (1975) (aid limited to "natural disaster"), discussed in *Kozinski* v. *Schmidt*, 436 F. Supp 201 (E.D. Wisc. 1977).

to Mr. Thomas on the latter question, but it is one that has no relevance to our discussion of the legal issues.

Finally, FEMA cites two cases decided by the district court in Puerto Rico which held that the Act was only intended to cover natural disasters. *Colon* v. *Carter*, 507 F. Supp. 1026, 1031–32 (D.P.R.), *vacated on other grounds*, 633 F.2d 964 (1st Cir. 1980); *Commonwealth of Puerto Rico* v. *Muskie*, 507 F. Supp. 1035, 1044–45 (D.P.R.), *vacated on other grounds*, 668 F.2d 611 (1st Cir. 1981). Even if both decisions had not been vacated by the First Circuit, with the court specifically noting that there was no need to reach the issue of whether the Act applied, *Colon*, *supra*, 633 F.2d at 966 n.3, we would remain unpersuaded. The district court assumed that all the events listed in the Act were "natural" disasters and did not consider that fires and explosions, for example, can be man-made. Nor did the district court address the longstanding administrative practice—a practice of which it may well have been unaware.[22]

We should note that in 1980, at the start of the Cuban boatlift, this Office was asked, on an expedited basis, to examine the Act's applicability. No formal opinion was issued but, despite some doubts as to its availability for man-made disasters, we did not interpose any objection to the use of the Act. We relied in part on FEMA's determination that the Act was available. *See* note 11, *supra*.

We believe that whether a disaster is triggered by human or natural agents is legally irrelevant. The issue for the President is whether it has caused "damage of sufficient severity and magnitude" to warrant additional federal assistance to alleviate "the damage, loss, hardship or suffering caused thereby." 42 U.S.C. § 5122(2). There is usually general agreement about what a disaster is—whether it comes in the form of a hurricane or as the imminent meltdown of a nuclear reactor—but in those cases in which there is some question, Congress has given the President guidance for determining the extent of his discretion. The most prominent of these is the request for aid by a state governor. "The basis which has always been applied is that the disaster must be of such major proportions that the governor of the State in which the disaster takes place feels that it is beyond the power of the State and of the local units of government to meet it adequately." 96 Cong. Rec. 15097 (1950) (statement of Sen. Holland). This requirement ensures that the chief executive of the affected area believes there is a severe problem that state and local resources are inadequate to handle. The President can then consider whether the emergency calls for the kind of aid made available under the Act. If an event calls for one or more of several forms of assistance, it seems likely that Congress intended the Act to cover it.[23] The President should,

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[22] The district court states that the legislative history supports this interpretation but refers only to a House report issued during the 1966 amendments. *Colon*, *supra*, 507 F. Supp. at 1032. Since this Department appealed the district court's decision to the First Circuit, it is self-evident that neither this Department nor the Executive in any way acquiesced in the reading given the Act by the district court.

[23] Major disasters that may strike American communities can be of all kinds. No two disasters are alike in nature, scope of damage, or amounts of available State and local government resources.

Consequently, the kind and amount of Federal aid required will vary in each case. In one case the principal Federal assistance may be medical aid; in another case, temporary housing, in another case, evacuation transportation, and so forth.

Disaster Relief: Hearings on H.R. 8396, H.R 8461, H.R. 8420, H.R. 8390, and H R. 8435 Before the House Comm. on Public Works, 81st Cong., 2d Sess. 78–79 (1950) (statement of Elmer B. Staats, Assistant Director of the Bureau of the Budget).

therefore, in deciding whether an event is an emergency or a major disaster, examine the following statutory factors:

1. The need for immediate centralized coordination of federal agency relief efforts;[24]

2. The need for a central federal officer to coordinate with private relief organizations;[25]

3. The need to take immediate steps to safeguard lives and property; to perform essential community services; or to distribute food and medicine;[26]

4. The need to provide emergency mass care, including shelter and the provision of food and other essential needs;[27]

5. The need to take immediate steps to clear roads, build bridges, demolish unsafe structures, or erect temporary ones;[28]

6. The need to warn the public about a risk;[29]

7. The need to give priority to certain locales for applications for public housing and for repair and construction of public facilities;[30]

8. The need to allocate, on a temporary basis, materials necessary for construction;[31]

9. The need to take immediate steps to repair and restore certain nonprofit facilities, such as schools, hospitals, and utilities;[32]

10. The need to remove debris and wreckage;[33]

11. The need to take immediate steps to provide temporary rent-free housing or mortgage or rental payments;[34]

12. The need to provide extraordinary unemployment assistance, individual or family grants, and food stamps;[35]

13. The need to provide assistance to those in need of immediate psychiatric counseling;[36]

14. The need to set up emergency communications and transportation systems.[37]

It is obviously not possible, without specific facts, to opine on whether a particular set of facts constitutes an emergency or a major disaster. We have not found anything, either in the Act, its legislative history, or administrative practice under it, that would disqualify an emergency or major disaster merely because it involved a massive influx of aliens into the country. President Carter used the Act to declare an emergency during the Cuban boatlift, and the specifics of the damage being done to Florida at that time will no doubt aid others in evaluating

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[24] 42 U.S.C. § 5142(a).
[25] 42 U.S C. § 5143(b)(3).
[26] 42 U S C § 5145
[27] 42 U S.C § 5146(a)(4)
[28] 42 U S.C. § 5146(a)(4)
[29] 42 U.S.C § 5146(a)(4).
[30] 42 U.S.C. § 5153(a).
[31] 42 U.S C. § 5158.
[32] 42 U.S C. § 5172(b).
[33] 42 U S C § 5173.
[34] 42 U S C § 5174.
[35] 42 U S.C. §§ 5177, 5178.
[36] 42 U S.C. § 5183.
[37] 42 U.S C. §§ 5185, 5186

the merits of future requests. Not every immigration emergency will necessarily be an emergency or major disaster under the Act—the President must make separate determinations for each. We do not believe, however, that there is anything in the Act to preclude him from using the Act if he did determine that the requisite need and suffering existed.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Proposed Cooperative Agreement for the Administration of the San Antonio Missions National Historical Park

The proposed cooperative agreement between the Secretary of the Interior and the Archbishop of San Antonio, for the administration of church-owned properties within the San Antonio Missions National Historical Park, does not on its face present such a risk of advancing religion or involving the government in an entangling relationship with the church, in violation of the Establishment Clause of the First Amendment, that it may not be executed.

Any federal funds to be expended under the agreement would not relieve the church of any obligation it would otherwise have, or confer any recognizable benefit on the church, and thus could not be said to "advance" religion within the meaning of the test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971). Nor is the extent of the federal presence at the Missions contemplated by the proposed agreement likely to confer any imprimatur of government approval on a religious sect or practice, or commit the government to religious goals.

December 2, 1982

MEMORANDUM OPINION FOR THE SOLICITOR OF THE INTERIOR

This responds to your request for our opinion whether a proposed agreement between the Secretary of the Interior and the Archbishop of San Antonio, as owner of the Spanish Missions of San Antonio, violates constitutional provisions regarding the separation of church and state. This agreement, dated May 5, 1982, was developed pursuant to the authority given the Secretary in § 201 of Pub. L. No. 95–629, 92 Stat. 3636 (1978), 16 U.S.C. § 410ee (Supp. II 1978) (Act), which established the San Antonio Missions National Historical Park (Park). Section 201(b) of the Act authorizes the Secretary to acquire certain historic properties within the established boundaries of the Park, and to enter into "cooperative agreements" with the owners of those properties "in furtherance of the purposes of [the Act]." In apparent recognition of the possible issues under the Establishment Clause of the First Amendment which might be raised by cooperative agreements relating to the administration of properties within the Park, § 201(b) of the Act also specifies that:

> the Secretary shall submit all proposed cooperative agreements to the Department of Justice for a determination that the proposed agreements do not violate the constitutional provisions regarding the separation of church and state.

We have reviewed the terms of the proposed cooperative agreement in light of additional factual information provided us by members of your staff and by the

Superintendent of the Park in San Antonio, and find no basis on which to object to its execution on Establishment Clause grounds.

In the following discussion we briefly review the history of the Missions and their present-day function and operation, and describe the relevant provisions of the proposed cooperative agreement. We then analyze the agreement in terms of applicable principles of constitutional law.

I.

The San Antonio Missions National Historical Park was established in 1978 "[i]n order to provide for the preservation, restoration and interpretation of the Spanish Missions of San Antonio, Texas, for the benefit and enjoyment of present and future generations of Americans . . . ." 16 U.S.C. § 410ee(a). The Park consists of four 18th century Spanish missions located on alternate sides of the San Antonio River as it flows through the southern part of the city,[1] and an associated irrigation system which includes an 18th century aqueduct and dam. The Missions contain within their walled compounds a variety of structures which reflect the institution's several historic functions.[2]

In addition to a church and associated buildings, three of the four Missions include some portion of the land and many of the non-religious structures which were once enclosed by the mission walls. These structures, in varying states of disrepair and decay, include granaries, shops, schools, kilns, and living quarters for the Indians whom the missionaries sought to convert and "civilize." All that remains of Mission Concepcion, the closest of these Missions to downtown San Antonio, is a church and "convento," which historically contained the priest's living quarters, offices, a refectory, and sometimes shops and workrooms.

Ownership of the land and structures within the present boundaries of the Missions has remained in the hands of the Roman Catholic Archdiocese of San Antonio. And, at each of the four Missions there is an active parish church which is used today for a variety of religious and ceremonial purposes. Between 500 and 900 families are served by each of the Mission parishes. None of the Mission parishes has a community hall, an adult education program, or any other regular parish activity beyond the weekly religious services themselves. Except for a parish priest who occupies living quarters within the compound at two of the Missions, there are no religious or other church personnel in residence or regularly present at any of the four Missions.

All four of the Missions are separately listed on the National Register of Historic Places, 16 U.S.C. § 470a, and are open to the sightseeing public.

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[1] The four Missions are described in § 201(a) of the Act as "Concepcion, San Jose, San Juan, and Espada." *See* 16 U.S.C. § 410ee(a). We use these shortened versions of the full names whenever we refer separately in this memorandum to one of the Missions.

[2] According to an "Environmental Assessment" prepared by the National Park Service in October 1981, the Spanish missions in the Southwest were originally established both as religious institutions and as fortresses by which the Spanish extended and defended their frontiers in the Western Hemisphere. The Missions prospered and declined over a period of about 60 years, and by the early 19th century had ceased to operate as an arm of the Spanish government. Since that time, the San Antonio Missions have experienced neglect and decay despite their recognized historic and architectural significance. Notable among the sporadic attempts to preserve and reconstruct them in the last century are those of the federal Works Project Administration during the 1930s.

Mission San Jose has the most extensive interpretive program, and under a 1941 agreement is administered jointly by the Texas Parks and Wildlife Department and the Archdiocese of San Antonio.[3] The three other Missions are administered by the Archdiocese alone, and at each an informational leaflet is made available by the Archdiocese to complement a self-guided tour. Other than the limited state funds which have been made available for upkeep and maintenance at Mission San Jose, the Archdiocese is now solely responsible for the cost of preserving and maintaining the Missions.

II.

The proposed cooperative agreement between the Secretary and the Archbishop, negotiated by the Secretary pursuant to the authority given him in § 201(b) of the Act,[4] contemplates a comparatively limited federal financial commitment to the Park.[5] Ownership of the Missions remains with the Catholic Church, as does responsibility for their "overall maintenance, repair and security." The Secretary is authorized by the Archbishop to "provide public interpretation of the Missions' secular historical significance in the development of the Southwest Region of the United States." In furtherance of this purpose, the Secretary is given free access to the Mission grounds and "secular Mission buildings,"[6] the use of the latter for administrative purposes, and authority to erect "informational and interpretive signs and exhibits on the Missions grounds." The Secretary in turn undertakes to provide "wear and tear maintenance and repair of the Missions grounds and secular buildings as occasioned by the use of the property for [Park] purposes," and "such security of the Missions grounds and secular buildings as is appropriate in light of the hours of public access." He agrees also to pay the cost of utilities occasioned by Park use. Finally,

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[3] The Secretary of the Interior was also a party to the 1941 agreement by which the State of Texas undertook to assist the Catholic Archdiocese in its maintenance and administration of the San Jose Mission In that agreement, the Secretary agreed to designate Mission San Jose as a National Historic Site, to "cooperate" with the Archbishop and the state in the "preservation and use" of the Mission as a historic site, and to "provide technical assistance in planning and executing measures for such preservation and use, within the limits of available appropriations." We have been informed by members of your staff that no appropriated funds have ever been allocated by the Secretary of the Interior pursuant to the 1941 agreement. We do not know whether federal funds have otherwise been made available in the past for the preservation and use of the Missions. *See, e.g.*, 16 U S C. § 470a(a), which authorizes the Secretary of the Interior to make grants to states for the development and preservation of properties listed on the National Register of Historic Places.

[4] Section 201(b) of the 1978 Act authorized the Secretary of the Interior "to enter cooperative agreements with the owners of any historic properties" within the boundaries of the Park, including the four Missions themselves, "in furtherance of the purposes of [the Act]." 16 U.S.C. § 410ee(b)(2) Each such cooperative agreement was to include terms obligating the owner of the property to preserve its historic features, and to allow the public "reasonable access to those portions of the property to which access is necessary in the judgment of the Secretary for the proper appreciation and interpretation of its historical and architectural value " 16 U S C. § 410ee(b). In addition, the Secretary was authorized to agree to maintain and operate such interpretive facilities and programs on the land as he deemed appropriate. *Id.* Whatever funds are necessary for the administration of the Park may be allocated by the Secretary from the general appropriation for the National Park System, pursuant to the authority contained in 16 U S.C § 3 *et seq.*

[5] The agreement is described in its preamble as "an interim means to further the purposes of the Act pending consideration of related budgetary and legal issues by the Secretary."

[6] "Secular Mission buildings" are identified in an exhibit appended to the agreement, and comprise all structures within the Mission compound except the present-day church and, in the case of Missions San Juan and Espada, the nearby pastor's residence.

the Secretary must not "undertake any actions or activities which disturb the structural integrity and condition of the Missions or the Archbishop's use of the Missions for religious or other church purposes . . . ."

The agreement allows the Archbishop unconditionally to continue the "ecclesiastical use" of the Missions. However, he must not alter or remove any of the Missions' historic features, or erect any markers or structures on their premises "without the prior concurrence of the Secretary." While Park visitors may be permitted to enter non-secular buildings within the compound without charge, the Secretary assumes no responsibility for the maintenance of those buildings. In addition, the agreement expressly provides that

> The Secretary shall not participate in any activities conducted by the Archbishop within non-secular buildings of the Missions nor shall he participate in any religious or other church uses of the Mission grounds.[7]

The agreement may be amended at any time by mutual agreement, and terminated by either party upon 60 days' written notice. At the expiration or termination of the agreement, the Secretary agrees to "remove all property of the United States from the Mission at his expense."[8]

III.

The general test for determining whether a legislative enactment violates the Establishment Clause was set forth by the Supreme Court in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."

See Committee for Public Education v. *Regan*, 444 U.S. 646 (1980). This three-part test is equally applicable to governmental actions and policies based on a legislative enactment, such as the execution and administration of the cooperative agreement at issue here. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Allen* v. *Morton*, 495 F.2d 65, 68 (D.C. Cir. 1973).

We agree readily with your opinion that the agreement satisfies the "secular purpose" aspect of the *Lemon* test. The stated purpose of the Secretary, in entering into the cooperative agreement, is "to provide public interpretation of the Missions' secular historical significance in the development of the Southwest

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[7] The Archbishop agrees to provide the Secretary reasonable notice of all religious and other church use of the Missions, and to hold the Secretary harmless against all damage claims by persons "attending a religious service or other church activity conducted by the Archbishop."

[8] The proposed cooperative agreement also suspends for the period of its duration the 1941 agreement between the Secretary, the Archbishop, and the state. *See* note 6, *supra*.

Region of the United States . . . ." This secular purpose is consistent with that of Congress in establishing the Park.[9]

We also concur with your view that the "principal or primary effect" of the agreement is not one which "advances [or] inhibits religion." It is true that, in construing this aspect of the *Lemon* test, the Supreme Court has disapproved the use of public funds to provide support to sectarian institutions even where the funds have themselves been earmarked exclusively for "secular" purposes, on the grounds that "in aiding a religious institution to perform a secular task, the [government] frees the institution's resources to be put to sectarian ends." *Roemer* v. *Board of Public Works of Maryland,* 426 U.S. 736, 748 (1976).[10] In this case, however, no federal funds are to be provided directly to either the Archdiocese or the parish churches within the Mission walls, and no expenditure is authorized which would indirectly relieve either of any obligation it would otherwise have. Indeed, it would appear that federal funds expended under the agreement will not confer any recognizable benefit on the Archdiocese or parish churches. While the legislation which established the Park authorizes a more extensive use of federal funds in connection with the restoration and rehabilitation of the Missions, the cooperative agreement explicitly limits the federal financial commitment to such "wear and tear maintenance" and "security" as is occasioned by the use of the Missions as a National Park. Given the almost certain need for additional maintenance occasioned by this use, we do not believe an agreement by the federal government to pay its cost could be regarded as conferring a benefit on or otherwise advancing the interests of a religious institution.[11]

It is of course possible to argue that the very presence of a national park at the Missions will have some tendency to "advance religion" by enhancing the visibility of and facilitating public access to religious functions, both past and present. However, any such effect is at this point entirely speculative. Even if this

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[9] While the introductory phrases of the Act speak generally of the "preservation, restoration and interpretation" of the Missions, subsequent provisions in the law make clear that Congress' interest in the Missions was confined to their "historical and architectural value." *See* 16 U.S.C. § 410ee(b) and (d). The secular purpose of the legislation is confirmed by its legislative history. *See* 124 Cong. Rec. 36192 (1978) (remarks of Sen. Bentsen). *See generally San Antonio Missions National Historical Park, Texas: Hearings on H.R. 14064 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 2d Sess. (1976); *San Antonio Missions National Historical Park, Texas: Hearings on S. 1156 Before the Subcomm. on Parks and Recreation of the Senate Comm. on Energy and Natural Resources,* 95th Cong., 1st Sess. (1977). The legislation establishing the Park was never reported out of committee in either House or Senate, but was added as a floor amendment in the Senate to a bill dealing, *inter alia,* with the Pennsylvania Avenue Development Corporation. *See* 124 Cong. Rec. 36183 (Oct. 12, 1978).

[10] *Compare Meek* v. *Pittenger,* 421 U.S. 349 (1975) (state may not provide auxiliary instructional material and services to sectarian schools) and *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973) (lump sum grants to sectarian schools for building maintenance and repair prohibited); *with Wolman* v. *Walter,* 433 U.S. 229 (1977) (state funds may be used to provide standardized tests and scoring services to sectarian schools) and *Committee for Public Education* v. *Regan,* 444 U.S. at 654 (1980) (state may reimburse sectarian schools for costs of state-mandated tests).

[11] If enough federal money were spent in connection with maintenance and security at the Missions, some question might be raised as to whether a monetary benefit was in fact being conferred on the Archdiocese or parishes. However, it is our understanding from discussions with the Superintendent of the Park that the budget presently projected for the Park for fiscal 1983 permits an overall commitment to the four Missions of only about $125,000 for maintenance, of which about $75,000 would go to pay custodial salaries and another $50,000 to contract for such basic services as trash collection and weed removal. Another $12,000 is available for "natural resource management." There is no money in the 1983 budget for "repairs."

effect could at some future point be shown, we doubt that it would be regarded as "primary," as that term has been construed by the Supreme Court. The Court has "put to rest any argument that the [government] may never act in such a way that has the incidental effect of facilitating religious activity." *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. at 747. And a number of courts have ruled that governmental sponsorship of the secular aspects of religious institutions and ceremonies does not impermissibly advance religion. *See, e.g., Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (school board's adoption of policy permitting observance of religious holidays did not unconstitutionally advance religion); *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (government sponsorship of Christmas Pageant of Peace, which included Nativity crèche, did not have primary effect of advancing religion); *Citizens Concerned* v. *City and County of Denver*, 526 F. Supp. 1310 (D. Colo. 1981) (public funds may be used for Nativity scene as part of city's Christmas display). *Compare Fox* v. *City of Los Angeles*, 587 P.2d 663 (Cal. 1978) (display of lighted Latin cross on city hall prohibited, on grounds that it impermissibly favored one religion over others). The government's proposed interpretive program for the Park focuses on the Missions' historical and architectural aspects; any reference to the Missions' historically religious character is likely to have "only a remote and incidental effect advantageous to [the Catholic Church]." *Committee for Public Education* v. *Nyquist, supra*, 413 U.S. at 784 n.39. Nor do we think that Park visitors' access to the active parish churches within the Missions will necessarily advance religion in a constitutionally impermissible manner. While sightseers may have an opportunity on their own initiative to enter the non-secular buildings on the Mission grounds, these buildings will not be integrated into the Park's interpretive program. Nor will Park staff or other government officials be permitted to participate in any religious activities in those buildings or on Mission grounds.[12]

Finally, the extent of the federal presence at the Missions contemplated by the cooperative agreement is not likely to "confer any imprimatur of [governmental] approval on religious sects or practices," or "commit the [government] . . . to religious goals." *Widmar* v. *Vincent, supra*, 454 U.S. at 274. *Compare Gilfillan* v. *City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980) (extensive involvement of public officials with religious personnel in planning the Pope's visit, and expenditure of public funds on altar and loudspeakers, had effect of "placing the City's imprimatur of approval on the Catholic religion"). Properly administered in accordance with the terms of the agreement, the government's program at the Park will be "confine[d] . . . to secular objectives, and neither advance nor impede religious activity." *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. at 747.

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[12] We do not know how extensive the "religious and other church uses of the Missions grounds" referred to in the agreement will be. It is possible that frequent and extensive use of the Mission buildings and grounds for religious ceremonies, during hours when they are open to the sightseeing public and staffed by Park Service personnel, could give rise to the appearance of an "imprimatur of [governmental] approval" of religious practices generally and those of the Catholic Church in particular. Our discussion with members of your staff and the Park Superintendent suggest no basis for concern that this will occur

With regard to the third and last part of the *Lemon* test, we do not believe that the relationship between the government and the church contemplated by the proposed cooperative agreement presents any substantial risk of "excessive and enduring entanglement between state and church." *Lemon* v. *Kurtzman*, 403 U.S. at 619. The Supreme Court has been particularly concerned with the potential for state-church entanglement where direct money subsidies to sectarian institutions are involved. In *Lemon* the Court remarked that "[t]he history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance." 403 U.S. at 621. *See also Levitt* v. *Committee for Public Education*, 413 U.S. 472, 480 (1973). Here, however, no financial benefit accrues to the Archdiocese or the Mission parishes so as to necessitate the kind of prophylactic administrative measures which the Court has found likely to produce excessive entanglement. Moreover, the agreement requires no regular or recurring contact between federal officials and either the Archdiocese or the Mission parishes. While the agreement does provide that each party should "appoint a representative on site at the Missions to deal with routine Missions management," (p. 6) there is no area of joint church-state responsibility which is likely to produce "an intimate and continuing relationship" between these representatives. 403 U.S. at 622. The agreement gives church officials no role in or authority over the federal government's interpretive or maintenance program at the Missions. At the same time, it expressly prohibits Park officials from participating in any religious or other church uses of the Mission buildings or grounds. *Compare* the extensive involvement of federal officials in the planning and administration of the Christmas Pageant of Peace, held unconstitutional on entanglement grounds in *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973). The only provision in the agreement which seems to require some official contact between governmental and church officials is that which prohibits the Archbishop from altering or removing any of the Mission's historic features, or erecting markers or structures on their premises, "without the prior concurrence of the Secretary." *See supra*. While we have no doubt that these and other provisions in the agreement will result in some contact from time to time between government and church officials, we do not think the agreement as a whole or any provision of it necessarily leads to the sort of "intimate and continuing relationship" forbidden by the Supreme Court in *Lemon*.[13]

Lemon also recognized a second branch of the entanglement test, the possibility that governmental action will result in intensified "[p]olitical fragmentation and divisiveness on religious lines" because of "the need for continuing annual appropriations and the likelihood of larger and larger demands as costs

[13] The mere presence of the parish churches within the Mission grounds need not lead to an entangling relationship. *Cf Lanner* v. *Wimmer*, 662 F.2d 1349, 1360 (10th Cir. 1981) (physical proximity of buildings and shared communications system does not preclude public school from implementing released time program with religious seminary on "entanglement" grounds) As previously noted, with the exception of the parish priests in residence at Missions Espada and San Juan, there are no religious personnel regularly present at any of the Mission sites. And, we have been informed by the Park Superintendent that the Archdiocese does not contemplate continuing any aspect of its own interpretive program at the Missions once the federal program is in place

and populations grow." 403 U.S. at 623. However, like the reimbursement scheme held constitutional in *Committee for Public Education* v. *Regan, supra,* the cooperative agreement "[o]n its face . . . suggests no excessive entanglement, and we are not prepared to read into the [agreement] as an inevitability the bad faith upon which any future excessive entanglement would be predicated." 444 U.S. at 660–61.

IV.

In summary, the cooperative agreement between the Secretary and the Archbishop for the administration of the San Antonio Missions as part of the Park does not present such an "appreciable risk" of advancing religion or involving the government in an impermissible relationship with the church that it may not be executed. *See Committee for Public Education* v. *Regan, supra,* 444 U.S. at 662. We emphasize, however, that while we do not believe the agreement on its face violates the Establishment Clause, the constitutionality of any given church-state relationship depends to some extent on its own particular facts. We therefore cannot know in advance whether specific Establishment Clause problems will arise in connection with the implementation and administration of the agreement. We expect, though, that appropriate precautionary measures can be devised by the Secretary and the National Park Service to minimize the likelihood of such problems occurring.

RALPH W. TARR
Deputy Assistant Attorney General
Office of Legal Counsel

Administrative Determination of Eligibility for Veterans' Beneficiary Travel Reimbursement

The Veterans Administration (VA) has discretion to determine on a case-by-case basis whether VA beneficiaries should be reimbursed for transportation costs incurred in connection with their receipt of VA medical care, and is not required to do so in all cases.

The permissive statutory term "may," used to describe the VA's administrative authority to reimburse transportation costs, should be interpreted in light of its plain meaning unless the legislative history reveals that such an interpretation would lead to absurd results, or consequences obviously at variance with the policy of the statute as a whole. The legislative history of the Veterans' Benefit Act of 1957 and its predecessor statutes is ambiguous with respect to Congress' intent in using the word "may" in the 1957 Act, and is thus not sufficiently compelling to contradict the plain language of the statute.

Notwithstanding the VA's consistent interpretation of the relevant provisions since 1957 to mandate travel reimbursement, legislative ratification of this administrative interpretation in subsequent amendments to the statute will not be found in the absence of clear and unambiguous congressional acceptance of the VA's position.

December 7, 1982

MEMORANDUM FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, AND THE GENERAL COUNSEL, VETERANS ADMINISTRATION

This memorandum responds to Mr. Horowitz's request for our opinion whether the Veterans Administration (VA) has discretionary authority to determine administratively the eligibility of VA beneficiaries to receive reimbursement for certain travel expenses. Under 38 U.S.C. §§ 111, 601, 610, and 612,[1] the VA is authorized to reimburse certain transportation costs of eligible veterans traveling to receive VA covered medical benefits. The Office of Management and Budget (OMB) believes these sections do not require the VA to make such payments.[2] This conclusion is based on the fact that § 111 uses the permissive term "may" in describing the administrative authority to reimburse transportation expenses. The VA, on the other hand, construes these statutes as mandating payment of covered travel expenses of eligible veterans who are receiving VA

[1] All statutory references herein will refer to Title 38 of the U.S. Code unless otherwise specifically noted

[2] *See* Memorandum from Michael J. Horowitz, Counsel to the Director, OMB, to Theodore B. Olson, Assistant Attorney General (AAG), Office of Legal Counsel (OLC), June 11, 1982

medical care.[3] It argues that Congress intended the word "may" as used in all of these provisions to be mandatory, and that over the years Congress has never challenged the VA's interpretation that such payments are mandatory. The VA recognizes, however, that it has some discretion in determining the eligibility of certain veterans for travel expense reimbursement and in establishing the rate and mode of such reimbursement.

We have carefully studied both of your memoranda on this question. While there is some confusion over what Congress intended when passing these sections and amending them over the years, we believe the plain meaning of the language of these provisions indicates that Congress initially intended to grant the Administrator of the VA discretion regarding reimbursement of transportation costs. Because nothing in the legislative history of the relevant statutes and amendments to them clearly establishes that these statutes should be interpreted in a manner contrary to the plain meaning of the words employed and, in fact, the legislative history provides some support, albeit somewhat ambiguous, for the view that Congress intended these statutes to be discretionary, we conclude that the Administrator is not required under the relevant statutory provisions to reimburse the transportation costs of VA beneficiaries traveling to receive covered care.

We emphasize that our opinion does not suggest that the Administrator's current practices regarding payment of transportation should or must be changed. The Administrator may wish to continue present practices and is clearly authorized to do so. We merely conclude that such reimbursement is not mandated by the relevant statutory provisions.

I. Statutory Language

Whether the Administrator must reimburse the travel expenses of eligible veterans depends upon the interpretation of four interrelated statutory provisions—§§ 111, 601, 610, and 612.

Section 610 supplies the basic authority for the Administrator of the VA to provide hospital and domiciliary care to veterans "within the limits of Veterans' Administration facilities." According to this section, the Administrator "may" furnish "hospital care" to veterans suffering from service-connected disabilities, to veterans who are suffering from non-service connected disabilities and who are unable to defray the necessary medical expense, and to veterans who meet certain other selected criteria.[4] The Administrator "may" also generally furnish

[3] *See* Memorandum from John P Murphy, General Counsel, VA, to Theodore B. Olson, AAG, OLC, June 16, 1982 (VA Memorandum).

[4] The Administrator may also provide hospital care to a veteran "whose discharge or release from the active military, naval, or air service was for a disability incurred or aggravated in line of duty"; "who is in receipt of, or but for the receipt of retirement pay would be entitled to, disability compensation"; who is 65 years or older; or who is a former prisoner of war. *See* § 610(a)(2), (3), (4), and (6) In addition, § 610 covers care for a veteran who served on active duty in Vietnam during the Vietnam War era and who the Administrator determines may have been exposed to dioxin or a toxic substance found in a herbicide or defoliant used for military purposes, or for a veteran who was exposed while on active duty to ionized radiation from the detonation of a nuclear device in a test of such device or during the American occupation of Japan in 1945–1946, so long as the VA Chief Medical Director does not find that the disability arises in either of these cases from a cause other than these two types of exposure *See* §§ 610(a)(5) and (e).

domiciliary care, pursuant to § 610(b), to veterans unable to defray the necessary expense, to veterans discharged from active service for a disability incurred or aggravated in the line of duty, or to permanently disabled persons in receipt of disability compensation who are incapacitated from earning a living and who have no adequate means of support.

Similarly, § 612 generally provides that the Administrator "may," "within the limits of Veterans Administration facilities," furnish "medical services" to veterans for any service-connected disability.[5]

The terms "hospital care," "medical services," and "domiciliary care" are defined in § 601 (5), (6), and (7), respectively, to include "travel and incidental expenses pursuant to the provisions of § 111 of this title." Section 111, in turn, provides that the Administrator "may pay the actual necessary expense of travel (including lodging and subsistence) or in lieu thereof an allowance based upon mileage traveled, of any person to or from a Veterans' Administration facility or other place in connection with vocational rehabilitation, counseling . . ., or for the purpose of examination, treatment, or care." Section 111, however, imposes a separate and independent limitation on the Administrator's authority to reimburse the transportation costs of veterans receiving *non*-service-connected care, as distinguished from service-connected care. With respect to such non-service-connected care, transportation expenses "may" only be covered when the Administrator has determined that a veteran is unable to defray the cost of travel, is receiving or is eligible to receive a VA pension under § 521, or has an annual income which does not exceed the maximum annual rate which would be payable to him under a VA pension. Thus, the Administrator is generally granted the *authority* to pay transportation costs of persons traveling to receive medical services, hospital care, or domiciliary care covered by the VA, but only in the circumstances specified in § 111 and pursuant to regulations prescribed by the President.

The VA argues that it is required to pay for covered transportation expenses because the word "may" in §§ 610 and 612 should be read to be mandatory. In the VA's view, §§ 610 and 612 require the Administrator to provide hospital care, domiciliary care, and medical services to eligible veterans, "within the limits of Veterans' Administration facilities." Because the terms hospital care, domiciliary care, and medical services are defined in § 601 to include transportation, transportation is an "integral part" of medical care, according to the VA. Thus, the argument continues, once a person is determined to be eligible for one of these benefits, that person is automatically eligible for and must also be afforded transportation. The VA recognizes that the clause "within the limits of Veterans' Administration facilities" gives it some discretion to set *priorities* for access to VA facilities among classes of veterans when facilities are limited. In its view,

[5] Medical services may also be provided to veterans if such services are in preparation to, would obviate the need for, or are necessary to complete treatment incidental to, hospital care covered under § 610; if the veteran has a service-connected disability rating of 50 percent or more, if the veteran is a former prisoner of war; if the veteran was discharged from active service for a disability incurred or aggravated in the line of duty; or if the veteran meets certain other selected criteria. *See* § 612(a), (f), and (g).

however, it is required to reimburse covered transportation costs whenever veterans receive care covered by the VA, unless such reimbursement is specifically precluded by § 111.

OMB, on the other hand, contends that the definitions of the medical benefits described in § 601 specifically make the transportation component subject to the provisions of § 111, which states that the Administrator "may" pay for certain travel expenses. The plain meaning of the word "may," according to OMB, is that the Administrator has discretion; OMB emphasizes that this construction is supported by the fact that subdivision (e) of § 111 uses the word "shall" to require the Administrator of the VA to conduct specified studies and surveys of travel costs and to report them to Congress. The VA answers this argument by contending that § 111 should be read as merely adding discretion as to the alternative modes of calculating reimbursement mandated under §§ 610 and 612, and not as providing discretion to refuse to reimburse transportation costs on some basis.[6]

In resolving this dispute, we begin by observing that the use of the word "may" in all of these provisions clearly supports OMB's conclusion that reimbursement of transportation costs is permissive. A statute's terms are normally to be interpreted in light of the usual or customary meaning of the words themselves. *See, e.g., Southeastern Community College* v. *Davis*, 442 U.S. 397, 405–406 (1979). The word "may" ordinarily indicates that one has permission or liberty to do something, not that one is required or compelled to do something. *See Webster's Third New International Dictionary*, 1396 (1976). Absent some compelling evidence of a contrary intent, the courts have interpreted the word "may" as used in a statute to be permissive. *See, e.g., Anderson* v. *Yungkau*, 329 U.S. 482 (1947); *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 662–63 (1923) (Brandeis, J.); *Burglin* v. *Morton*, 527 F.2d 486, 488 (9th Cir. 1975), *cert. denied*, 42 U.S. 973 (1976); *United States* v. *Bowden*, 182 F.2d 251, 252 (10th Cir. 1950). This interpretation is buttressed in the case of veterans' medical benefits by the fact that § 111(e)(1), (3), and (4) provides that the Administrator "shall" conduct an annual study on travel costs and "shall" submit a report to Congress on the rate he proposes to set for reimbursement. Similarly, § 612(h) and (i) provides that the Administrator "shall" furnish certain medicinal drugs to eligible beneficiaries and "shall" establish an order of priority for access to medical services. Finally, in §§ 511–562, Congress used the term "shall" in describing the Administrator's obligation to pay veterans' pensions. This contrast in the use of terms suggests strongly that when Congress wanted to impose a mandatory requirement in this title—indeed, in two of the very provisions at

[6] Although we believe this description of the VA's position is accurate, the VA's interpretation of § 111 over the years has been somewhat strained, if not inconsistent. In an August 23, 1960, opinion attached to the VA Memorandum, the VA found that § 111 not only furnished independent authority for reimbursement of certain transportation expenses that were not covered in §§ 612 or 610 at that time, but also mandated reimbursement of those expenses. In a June 30, 1976, opinion also attached to the VA Memorandum, however, the VA found that it had greater discretion in reimbursing transportation independently authorized under § 111 than transportation authorized under § 610, although it did not specify the limits of that discretion. Thus, according to the VA, the word "may" as used in § 111 is mandatory with respect to certain types of transportation, but provides some discretion with respect to others.

issue—it knew how to do so. *See Anderson* v. *Yungkau*, 329 U.S. at 485 (when "may" and "shall" used in the same provision, "normal inference is that each is used in its usual sense"); *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U.S. at 662–63.[7]

In addition, §§ 610 and 612 provide that care "may" only be provided "within the limits of Veterans' Administration facilities." Thus, in contrast to the sections imposing an unqualified obligation on the Administrator to pay pensions, *see, e.g.*, §§ 511, 512, 521 ("Administrator shall pay . . . ."), §§ 610 and 612 expressly state that the Administrator need not deliver care to the extent that the VA does not have adequate facilities. Put another way, Congress has no legal obligation under these provisions to appropriate sufficient money to ensure that facilities exist so that every veteran made eligible under these statutes may obtain services. In the absence of adequate facilities, moreover, the Administrator is free to choose between categories of beneficiaries in rationing the use of scarce facilities. Thus, these provisions clearly do not require that all eligible veterans receive medical benefits and, on the other hand, give the Administrator wide discretion in allocating resources. All things being equal, this limitation suggests that the word "may" was used in its ordinary permissive sense—to grant the Administrator discretion to balance the provision of the various types of care.

The only federal court which, to our knowledge, has addressed the question of what Congress intended when it used the language of the provisions under discussion in this memorandum has found that § 610 does not require the Administrator to provide domiciliary care to veterans. In *Moore* v. *Johnson*, 582 F.2d 1228, 1233 (9th Cir. 1978), the court dismissed an action brought under 28 U.S.C. § 1361 to require the Administrator to place certain veterans' beneficiaries in specific domiciliary facilities, reasoning that "the benefits made available by 38 U.S.C. § 610, being such as the Administrator 'may furnish' and 'within the limits of Veterans Administration facilities,' are thus committed to agency discretion by law."[8]

In light of the plain meaning of the language of these provisions, we must act

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[7] The VA Memorandum places some significance on the fact that § 111(e)(2)(A) makes persons receiving or eligible to receive a VA pension, or with an income below that provided by a VA pension, automatically eligible for reimbursement of transportation expenses, even though they may otherwise be able to "defray" the expense of such travel according to the regulations promulgated by the Administrator. The VA draws the inference from this that "[t]his section now directs the Administrator to prescribe regulations to limit payment in some case[s] to assure a real inability to pay for the necessary travel, while making it clear that *the authority to so limit does not apply with respect to certain other categories of individuals*." VA Memorandum at 5 (emphasis added) Subsection (e)(2), however, merely establishes various restrictions on the Administrator's authority to provide travel reimbursement ("In no event shall payment be provided under this section . . ."). Subparagraph A, which sets forth the basic restriction that a person seeking reimbursement must demonstrate an inability to defray the expenses before the Administrator is authorized to afford such reimbursement, specifically exempts from this mandatory means test veterans "receiving benefits for or in connection with a service-connected disability" or who fall into the other categories noted above. Thus, by operation of the statutory double negative, placing veterans in these exempted categories merely puts them back in the basic posture of being subject to whatever discretion the Administrator may have under the term "may."

[8] In contrast, the Supreme Court, *see Reynolds* v. *United States*, 292 U.S. 443, 446 (1934), the lower federal courts, *see United States* v *St Paul Mercury Indemnity Co.*, 238 F.2d 594, 596 (8th Cir. 1956); *United States* v. *Alperstein*, 183 F. Supp. 548, 550 (S.D. Fla. 1960), *aff'd*, 291 F.2d 455 (5th Cir. 1961); *United States* v. *Petrik*, 154 F. Supp. 598, 599 (D. Kan. 1956); and the Attorney General, *see* 37 Op. Att'y Gen. 551, 557 (1934), have interpreted the word "shall" in predecessor statutes on veterans' medical benefits to be mandatory. The distinction between the use of the word "may" and "shall" is discussed *infra*.

> within certain well-defined constraints. If a legislative purpose [of a statute] is expressed in "plain and unambiguous language, . . . the . . . duty of the courts is to give effect according to its terms." Exceptions to clearly delineated statutes will be implied only where essential to prevent "absurd results" or consequences obviously at variance with the policy of the enactment as a whole.

United States v. *Rutherford*, 442 U.S. 544, 551–52 (1979) (citations omitted) (quoting *United States* v. *Lexington Mill & Elevator Co.*, 232 U.S. 399, 409 (1914)). Thus, §§ 111, 610, and 612 should be interpreted as permissive unless the legislative history reveals that such an interpretation would lead to "'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *Id.*

II. Legislative History

The current statutory scheme was essentially established in the Veterans' Benefits Act of 1957, Pub. L. No. 85–56, 71 Stat. 83, 110 (1957) (1957 Act). Although subsequent amendments added new types of covered care and new categories of eligible veterans, and made certain structural changes discussed below, this Act first adopted the word "may" in 38 U.S.C. §§ 2510 and 2512 (1952) (Supp. V), which were recodified the next year as §§ 610 and 612. *See* Pub. L. No. 85–857, §§ 610, 612, 72 Stat. 1105, 1141–42 (1958). Unfortunately, the legislative history of the 1957 Act itself is not helpful in determining what Congress intended when it adopted this language. Except for certain minor changes not pertinent to this memorandum, the 1957 Act was passed, according to the committee reports and repeated floor comments, merely to incorporate, recodify and simplify existing laws, and not to change the substance of veterans' benefits.[9] There was no specific discussion as to why the word "may" was adopted or whether medical care or transportation was intended to be mandatory or permissive. In addition, the 1957 Act had substantively different provisions on medical benefits than the laws it replaced, which mandated the delivery of certain types of services and only authorized the delivery of others. Thus, in understanding what Congress intended when it passed the 1957 Act with regard to travel expense reimbursement, we must review in detail the history of the veterans laws leading up to 1957 and attempt to assess from this general history what Congress intended when it passed the 1957 Act.

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[9] *See* Letter from Comptroller General to Chairman, Committee on House Affairs, B–124054 (Jan 30, 1957), H.R. Rep. No 279, 85th Cong., 1st Sess. 2 (1957) ("bill . . . does not adversely affect the basic entitlement of any veteran or dependent presently on the compensation or pension rolls, nor does it liberalize, except in very minor areas, the provisions of law which govern the eligibility of veterans and their dependents for such benefits"); 103 Cong. Rec. 4915 (1957) (remarks of Rep. Teague) (stating that "[t]here is no intent on the part of the committee to incorporate changes other than on the basis indicated" and not indicating any intent to change the substantive right to medical benefits); 103 Cong. Rec. 4916 (1957) (remarks of Rep. Adair) (bill is not "designed particularly to change the substance of these laws but merely to put them in better form"); 103 Cong Rec 8176 (1957) (remarks of Sen. Byrd) ("bill contains only a few minor substantive changes in the existing law, generally of a minor liberalization . . .").

A. Status of Law Before Passage of 1957 Act

During the period between 1917—when the first act dealing purely with veterans' medical benefits was passed—and 1957—when the various existing veterans' benefit laws were incorporated and simplified—Congress passed numerous laws mandating medical benefits for some veterans and authorizing care for others. Originally, under the 1917 Act, the provision of medical benefits was clearly mandated for all groups covered by the law at that time. The 1917 Act provided that medical and hospital services "shall be furnished" to World War I veterans with service-connected injuries. *See* Pub. L. No. 65–90, § 302(g)(3), 40 Stat. 398, 406 (1917). In 1922, these mandatory services, which included transportation, were expanded to include hospital care for neuropsychiatric or tubercular diseases of veterans of the Spanish American War, the Philippine Insurrection, and the Boxer Rebellion. Pub. L. No. 76–194, § 4, 42 Stat. 496, 497 (1922).

In 1924, however, Congress passed the World War Veterans' Act, which generally continued the mandatory category, but *authorized* the Veterans' Bureau (the predecessor to the VA) to provide hospital care, insofar as "existing Government facilities permit," to veterans of any war, military occupation, or military expedition since 1897, with preference to be given to those unable to defray the expense. *See* Pub. L. No. 86–242, § 202(e)(10), 43 Stat. 607, 620–21 (1924). According to a subsequent report prepared by the General Counsel's Office of the VA reviewing the legal developments during this period:

> The passage of the World War Veterans' Act in 1924 brought about a complete change of policy with regard to the construction of additional hospital facilities. A large influx of veterans of all types into Government institutions taxed the capacity of existing facilities. It then became necessary to plan a program of construction which would eventually take care of the men and women needing hospitalization or domiciliary care from a veteran population of over 5 million. Notwithstanding that the Congress during the next 7 years authorized and appropriated the sum of $68,677,000 for new hospital construction, the demand for beds from veterans with non-service-connected disabilities exceeded the number of beds available.

Legislative Background of Hospitalization for Non-Service-Connected Disabilities, prepared by General Counsel's Office, VA, October 1, 1956, *reprinted in Hearings Before House Committee on Veterans' Affairs*, July 16, 1958, p. 4022 (VA Legislative Background Study). Because the delivery of care to the new groups covered by the 1924 Act was discretionary, and was to be provided only when "existing Government facilities permit," the decision on the level of services to be provided was made essentially through the congressional appropriations process, where funding levels were set for construction of new VA facilities. *See* VA Legislative Background Study, pp. 4022–24.

With the onset of the Depression, Congress passed the so-called Economy Act, Pub. L. No. 73–2, § 6, 48 Stat. 8, 9 (1933), which repealed prior medical care acts and made the provision of *all* medical care by the Administrator permissive. This basic act, which remained in effect with certain amendments until 1957, "authorize[d]" the Administrator, "under such limitations as may be prescribed by the President, and within the limits of existing Veterans' Administration facilities, to furnish the men discharged . . . for disabilities incurred in [the] line of duty and to veterans of any war . . . domiciliary care where they are suffering with permanent disabilities, tuberculosis or neuropsychiatric ailments and medical and hospital treatment for diseases or injuries." Pub. L. No. 73–2, § 6, 48 Stat. 8, 9 (1933) *as amended by* Pub. L. No. 73–78, 48 Stat. 283, 301–302 (1933). In explaining the reasons for this new grant of discretionary authority, a subsequent report prepared by the Solicitor of the VA and presented to Congress reviewed the reasons for the Economy Act's passage:

> It was not until 1930 when the Veterans' Administration was created, and all agencies dealing with veterans' relief consolidated therein that the glaring discrepancies and injustices existing in these laws became apparent. Following this, the Congress, recognizing the need for remedial action, appointed a joint committee of the Senate and the House to study the question. This committee went deeply into the question of veterans' relief, and was in the process of formulating a report, but before a final report was made the President presented his program of economy with reference to veterans' benefits which was enacted into law.
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> It was apparent that in order to insure elimination of inequalities and injustices revealed by the exhaustive studies and reports the program should call for legislation expressing the broad principles governing the relief to veterans and the limits within which benefits could be administered, *leaving the details to the President*. This program insured immediate action by the Congress and as subsequently revealed by veterans' regulations the program within the limits prescribed by Congress has been effectuated in such manner that the desired results have been realized within the minimum length of time and with the establishment of an acceptable system of administration.
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> That the method suggested by the President was the only method which could be expected to attain results must be conceded by all who are familiar with the subject. While the Congress had recognized the evils of the existing situation it became early apparent during the deliberations of the joint committee that there was no unanimity of opinion as to what should be done. One member or

> group of members believed that this or that should be done, but the other should not be done. Other members believed that other different benefits were the ones which should be changed. *It was only by placing the authority in the President to make corrections relying on his fairness of mind and courage to tackle the problem and solve it that definite accomplishment could be realized.*

Comparative Study of Veterans' Legislation, prepared by Solicitor, VA, *reprinted in* 78 Cong. Rec. 2550, 2554 (1934) (emphasis added).

The President promulgated several veterans' regulations under the Economy Act, which, under the terms of the Economy Act, Pub. L. No. 73–2, § 19, 48 Stat. 8, 12 (1933), could not be amended by the President after March 20, 1935, two years after the Economy Act's enactment.[10] These regulations authorized the Administrator to establish a complicated priority system for hospital and domiciliary care with service-connected care generally having a higher priority than non-service-connected care. *See* VA Regulation 6(a), *reprinted in* notes to 38 U.S.C. § 739 (1946). The presidential regulations also stated that the Administrator "may" provide certain medical services, although no system of priority was established for these services. *See* VA Regulation 7(a), *reprinted in* notes to 38 U.S.C. § 739 (1946). Finally, the regulations provided that the Administrator "may" "in his discretion" reimburse transportation expenses of those beneficiaries traveling to receive VA covered care. *See* Executive Order No. 6094, section III (March 31, 1933); Executive Order No. 6232, section III (July 28, 1933); Executive Order No. 6566, paragraph 2 (Jan. 19, 1934).

Soon after the passage of the Economy Act, Congress became disturbed over the VA's failure to use all available beds in VA hospitals, *see* 78 Cong. Rec. 3288–89 (1934) (remarks of Sen. Steiwer), and added a new clause to § 706 specifically *requiring* the Administrator to pay for hospital and domiciliary care (including transportation) for veterans of any war who were unable to defray the expense of their care or transportation. This provision stated in full:

> That any veteran of any war who was not dishonorably discharged, suffering from disability, disease, or defect, who is in need of hospitalization or domiciliary care, and is unable to defray the necessary expenses therefor (including transportation to and from the Veterans' Administration facility), *shall* be furnished necessary hospitalization or domiciliary care *(including transportation)* in any Veterans' Administration facility, within the limitations existing in such facilities, irrespective of whether the disability, disease, or defect was due to service. The statement under oath of the applicant on such form as may be prescribed by the Administrator of Veterans' Affairs shall be accepted as sufficient evidence of inability to defray necessary expenses.

[10] We have not examined the constitutional implications of such a process.

Pub. L. No. 73–141, § 29, 48 Stat. 509, 525 (1934) (emphasis added). Unlike the Economy Act which only gave the Administrator "permissive authority" to provide care, this amendment, as its author noted, was "mandatory in its requirement" with respect to war veterans when available hospital and domiciliary facilities existed. 78 Cong. Rec. 3288–89 (1934) (remarks of Sen. Steiwer).[11] The courts which interpreted this section uniformly found that, by using the word "shall," it required the Administrator to provide hospital care for needy war veterans under the specified circumstances. *See United States* v. *St. Paul Mercury Indemnity Co.*, 238 F.2d 594, 596 (8th Cir. 1956); *United States* v. *Alperstein*, 183 F. Supp. 548, 550 (S.D. Fla. 1960), *aff'd*, 291 F.2d 455 (5th Cir. 1961); *United States* v. *Petrik*, 154 F. Supp. 598, 599 (D. Kan. 1956). The Attorney General reached the same conclusion in an opinion for the President in 1934. *See* 37 Op. Att'y Gen. 551, 557 (1934). Apparently in response to the 1934 amendment, the President amended the presidential regulation on veterans' benefits to provide that transportation "will" be provided for persons traveling to and from a VA facility for hospital or domiciliary care if they were unable to defray the necessary expense. *See* Executive Order No. 6775, paragraph 2 (June 30, 1934).

Despite its mandatory language, however, the 1934 amendment does not appear to have required the Administrator to change his system of priority for access to VA care. Under that system, care for service-connected disabilities was given priority over non-service-connected care, even though veterans with service-connected disabilities might be able to defray the cost of their care, and veterans with non-service-connected medical problems might not. The author of the amendment stated that the purpose of the amendment was to ensure that excess beds in VA hospitals did not remain vacant while indigent veterans could not obtain medical care. He expressed no intent to end the system of priority to medical care that had generally given veterans with service-connected injuries first calling on VA medical care since 1917. *See* note 11, *supra*. The Executive Branch apparently adopted this interpretation of the amendment, for the President retained the system of priority to care established under the presidential regulations, *see* VA Regulation 6(a), *reprinted in* notes to 38 U.S.C. § 739 (1946), and the Attorney General did not find the system to be inconsistent with the requirements of the amendment. *See* 37 Op. Att'y Gen. 551 (1934). Indeed, congressional committees overseeing the operations of the VA during this period explicitly approved of the system of priority established by the President. *See* VA

[11] The Senator also noted:

> It occurs to us that there is no objection at all to making mandatory the furnishing of hospital treatment within the limitations of existing facilities when the United States has the facilities and the personnel to furnish the service and when there are indigent sick veterans unable to care for themselves, who, if they are not cared for through the agencies of the United States Government, must be cared for by charity in private hospitals or in State and other local institutions.
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> We hope that the Senate will take favorable action so as to make mandatory the use of these vacant beds. There are now some 7,000 vacant beds in these facilities Prior to the liberalization of Veterans' Administration policy and to the use of the facilities for the C.C.C. and other Federal agencies, there were nearly 13,000 vacant beds, made vacant by the drastic restrictions under the Economy Act. The object of this proposal is to bring about the utilization in behalf of sick and indigent soldiers of these available unused facilities.

78 Cong. Rec. 3289 (1934)

Legislative Background Study at 4029–31. Thus, the 1934 amendment does not appear to have limited the ability of the Administrator to give those needing service-connected care first access to VA facilities.

The final statute passed prior to the adoption of the 1957 Act was a predecessor provision of § 111, and was principally intended to permit the Administrator to substitute a mileage allowance for reimbursement of actual costs. The Comptroller General found in a 1938 opinion solicited by the VA that the VA did not have the authority to substitute a mileage allowance for repayment of actual costs for beneficiary travel. *See* Comp. Gen. Op. A–98336 (Oct. 11, 1938). The Administrator sought[12] and obtained passage of this provision to give him that authority. *See* 38 U.S.C. § 76 (1946).[13]

Thus, in 1957, the statutory framework can be summarized as follows: The Administrator was authorized to provide hospital care, domiciliary care, and medical services for any veteran. When extra beds were available in VA hospitals or domiciliary facilities, the Administrator was required, after care had been provided for service-connected disabilities, to use the remaining facilities to provide care for war veterans unable to defray the necessary expenses. Finally, when the Administrator did provide hospital or domiciliary care, he was required to reimburse the transportation expenses of those unable themselves to defray such expenses.

B. 1957 Act

With the passage of the 1957 Act the veterans' provisions in Title 38 were recodified and §§ 76 and 706 were replaced with new §§ 2510, 2512, and 2121 adopting the permissive language now used in §§ 610, 612, and 111, respectively. *See* Pub. L. No. 85–56, §§ 510, 512, 2101, 71 Stat. 83, 111, 112, 154–55 (1957). Although the legislative history of the Act clearly demonstrates, as we noted above, that Congress did not intend to make any substantive changes in the provision of veterans' benefits, except for several explicit changes not relevant here,[14] the recodification eliminated the word "shall," but retained the permissive tone of the original portion of § 706. The new provisions—§§ 2510, 2512, 2121—stated that the Administrator "may" furnish hospital care, domiciliary care, medical services, and transportation payments to the same groups of veterans to which he had previously been required to provide care and transportation under § 706. Thus, Congress used the term "may" in the new statute to cover the care of groups to which the Administrator clearly had previously been required to provide care, as well as to the groups to which he clearly had not been

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[12] *See* S. Rep No. 920, 76th Cong., 1st Sess. 2 (1939) (quoting VA Administrator's statement that bill "has been prepared with a view of securing authorization to provide by regulation for an allowance on a mileage basis in lieu of expense of such travel including necessary expense for mea[l]s and lodging") *See also* H R Rep No 1579, 76th Cong , 3d Sess. 1–3 (1940).

[13] Pub L. No 76–432, 54 Stat. 49 (1940). The Act also provided that payment of mileage allowance could be made before completion of travel and that "when any such person requires an attendant other than an employee of the Veterans' Administration for the performance of such travel, such attendant may be allowed expenses of travel upon a similar basis " *Id* at 50.

[14] *See* note 9, *supra*

required to provide care. The basic language of § 76, which stated that the Administrator "may" pay the actual costs or per mile costs of veterans traveling for examination or care, was also incorporated in a new § 2121.

Congress' intent in using the word "may" in the 1957 Act is certainly not self-evident. Each alternative interpretation of this language finds some element of the legislative history or statutory language which arguably does not support it. In light of this ambiguity, however, the legislative history, in our view, is not sufficiently compelling to contradict the plain language of the statute, and, indeed, can be read generally to support a permissive interpretation.

First, the legislative history of all of these provisions reflects one overwhelming fact—the Administrator must have wide discretion to set priorities and balance resources in the provision of medical benefits for veterans. Since the passage of the World War Veterans Act in 1924, veterans' facilities and resources have never matched the needs of all of those who were eligible for care, thereby necessitating that the delivery of care would be largely discretionary.[15] This need for administrative discretion is also reflected in the ubiquitous provision that care can only be supplied "within the limits of Veterans' Administration facilities." Although Congress did limit this administrative discretion somewhat by passing the 1934 amendment to the Economy Act, the amendment appears to have been intended merely to ensure that excess VA beds were used, and not to limit the Administrator's overall authority to balance resources and priorities for care. In light of this history of general administrative discretion, it is reasonable to assume that, by using the word "may" in the 1957 Act, Congress intended to permit the Administrator to engage in a general balancing of resources with respect to medical and transportation expenses.

Second, Congress' announced intention in passing the 1957 Act—not to alter the substantive provisions on veterans' benefits—cannot be taken at face value. Despite the general statement of purpose, the text of the 1957 Act clearly reveals that Congress not only removed the mandatory language in § 706, but also terminated the eligibility for certain categories of veterans. For example, § 706 had given the Administrator the authority to cover hospital and domiciliary care for non-service-connected injuries, even though the veterans had the money to defray the expense. *See also* VA Regulation 6(a)(1)(f), *reprinted in* notes to 38 U.S.C. § 739 (1946). Section 2510 (renumbered to current § 610 by the 1957 Act), however, limited coverage to those who were receiving service-connected care or who were unable to defray the medical expense.

Third, Congress must be charged with knowledge that, by removing the mandatory language in § 706 and adopting the permissive word "may" in §§ 2510 and 2512, these provisions were susceptible to the natural interpretation of the term to give the Administrator permissive authority. Before the 1957 codification, Congress had expressly distinguished in § 706 between the mandatory use of the word "shall," as adopted in the 1934 amendment, and the

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[15] A similar system of priority to medical services was statutorily mandated in 1976 amendments to § 612. *See* Pub. L. No. 94-581, § 103(a)(8), 90 Stat. 2842, 2845 (1976)

permissive language in the Economy Act—a distinction which was recognized by the courts and the Attorney General. The President had also amended the presidential veterans' regulations on transportation from "may" to "will" apparently in response to this change. *Id.* Thus, when Congress chose to delete the word "shall" in 1957 and employ the permissive term "may," Congress must be presumed to have understood the significance of its choice of terms. *See* 2A, C. Sands, Sutherland Statutory Construction § 51.02 ("if words used in a prior statute to express a certain meaning are omitted, it will be presumed that a change of meaning was intended") (footnote omitted).

Finally, to interpret these provisions to require the Administrator to reimburse the covered transportation costs of eligible beneficiaries would lead to an unlikely result. If the Administrator lacks the facilities to provide all the care specified in the statute, a situation which the legislative history reveals to be the usual circumstance, he has explicit authority, by virtue of the clause "within the limits of Veterans' Administration facilities," to allocate resources between classes of veterans. An interpretation that the Administrator is required to make transportation payments to beneficiaries traveling to receive medical benefits, however, would protect transportation services at the expense of medical services, hospital care, and domiciliary care. In a situation where the Administrator lacks sufficient funds to cover all medical and transportation services, he would be required to reduce hospital care, domiciliary care, and medical services to a level that would ensure that persons receiving medical benefits received all covered transportation reimbursement. Thus, conceivably, this interpretation would require the Administrator to deny medical benefits to some eligible veterans in order to provide medical benefits *and* transportation benefits to a smaller number of eligible veterans.

Thus, while the issue is not free from doubt, the legislative history surrounding Congress' adoption of the permissive language now contained in §§ 610 and 612 generally supports the conclusion that Congress did not intend to require the Administrator to reimburse all transportation costs of VA beneficiaries traveling to receive covered care. Certainly, nothing in the legislative history suggests that an interpretation of these provisions as discretionary leads to " 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *United States* v. *Rutherford*, 442 U.S. 544, 552 (1979) (citations omitted).

III. Legislative Ratification

Having concluded that the legislative history prior to 1957 does not rebut the plain meaning of the language of these provisions, we still must explore the VA's argument that the VA has consistently interpreted the relevant provisions since 1957 to mandate travel reimbursement and that Congress has been fully aware of this view. Although not stated explicitly, the VA is apparently suggesting that Congress has ratified the VA's interpretation.

A. Requirements for Finding a Legislative Ratification

Legislative ratification has generally served as a device for resolving ambiguities in statutory language. The principle is an outgrowth of the related concept that the well-reasoned interpretation of a statute by the agency charged with its enforcement is entitled to great deference. *See, e.g., Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). When the agency's interpretation of a statute has been publicly conveyed to members and committees of Congress, *see, e.g., Haig* v. *Agee*, 453 U.S. 280, 299 (1981); *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103, 121 (1978); *Zuber* v. *Allen*, 396 U.S. 168, 193–94 (1969), and Congress has failed to challenge the agency's position in circumstances suggesting adoption of it, *see, e.g., Haig* v. *Agee*, 453 U.S. at 300–301; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. at 381–82; *Zemel* v. *Rusk*, 381 U.S. 1, 11–12 (1965), the courts have "held [the legislative acquiescence] to constitute persuasive evidence that that interpretation is the one intended by Congress." *Zemel* v. *Rusk*, 381 U.S. at 11 (footnote omitted).

In light of the foregoing principles, those attempting to establish a congressional ratification of the administrative construction of the veterans' benefit provisions with respect to beneficiary travel carry a heavy burden. First, the language of the relevant provisions is not facially ambiguous. The Supreme Court has ordinarily found a legislative ratification of an administrative interpretation only where the agency has construed an ambiguous statute. *See Securities and Exchange Commission* v. *Sloan*, 436 U.S. at 121. Generally speaking, "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933) (Cardozo, J.). *See F.M.C.* v. *Seatrain Lines*, 411 U.S. 726, 745 (1973); *United States* v. *Southern Ute Indians*, 402 U.S. 159, 173 n.8 (1971); *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39, 52 (1939). Although we would not exclude the possibility that Congress could ratify an interpretation contrary to the ordinary meaning of a statute, *cf. Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915), we believe the burden upon those seeking to demonstrate Congress' ratification in such a circumstance is demonstrably greater.

Second, the Administrator's longstanding practice of reimbursing such costs is consistent with either interpretation of the statute, namely, that he is required to reimburse transportation costs *or* that he has authority to terminate such payments, but has simply chosen not to exercise his discretion to do so. Thus, this situation is distinguishable from the facts of most ratification cases where the actions of the agency are *in*consistent with the alternative construction and thus can be said to put Congress on notice that it must challenge the agency's view and amend the statute if it disagrees with the agency's interpretation. *See, e.g., Red Lion Broadcasting Co.* v. *Federal Communciations Commission*, 395 U.S. at 377–379; *Zemel* v. *Rusk*, 381 U.S. at 10–11; *Kent* v. *Dulles*, 357 U.S. 116,

127–128 (1958). *But cf. Haig* v. *Agee*, 453 U.S. at 302–303. Congress' failure to challenge the administrative construction in the present situation, therefore, might not evidence an acceptance of the Administrator's legal position, but merely of the policy decision to reimburse transportation costs.

Finally, the decisions of the VA which Congress has supposedly ratified do not provide a detailed, persuasive legal analysis of the relevant statutes. The general doctrine deferring to the interpretation of a statute by an administrative agency has far less application where the decisions of the agency lack "specific attention to the statutory authorization," or evidence a lack of "thoroughness . . . in its consideration" or "validity of its reasoning." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n. 5 (1978). *See Securities and Exchange Commission* v. *Sloan*, 436 U.S. at 117–18. With respect to the reimbursement of travel expenses, the VA originally found in a 1960 opinion that it was required to cover costs for certain veterans because the word "may" in § 111 should be interpreted as mandatory. *See* Opinion of General Counsel, VA, Aug. 23, 1960. This conclusion was based not on an analysis of the legislative history of this provision, but rather on the fact that the VA itself had previously interpreted one of its *own regulations* using the word "may" to be mandatory. *Id.* at 2. The General Counsel also relied in the 1960 opinion on the fact that Congress had, in extending medical services to such veterans in a 1960 amendment, included a cost estimate of transportation for those obtaining medical services. The opinion apparently reasons, in a logical *non sequitur*, that Congress thereby intended to *require* transportation costs be covered. Based on the analysis of this 1960 decision, the VA has held in later opinions that transportation costs must be reimbursed. *See* Opinion of General Counsel, VA, June 30, 1976; Opinion of General Counsel, VA, Dec. 12, 1980. This line of decisions hardly constitutes, in our view, the type of attention to statutory authorization and exercise of administrative expertise which normally has provided the basis for judicial deference to an agency's interpretation and a finding of congressional ratification of that construction. While we do not exclude the possibility that Congress could ratify an administrative interpretation under such circumstances, we believe, in light of the clarity of the statute and the lack of clarity in the VA decisions, that, to constitute ratification of such a construction, Congress' acceptance of the administrative position must, at a minimum, be clear and unambiguous.

B. Congressional Response to VA's Statutory Construction

Although all of these provisions have been amended numerous times during the period after 1957, on only three occasions, in 1976, 1979, and 1980, when amendments were made to § 111, has the authority of the Administrator to cut transportation payments arguably been at issue. Bearing in mind the heavy burden upon those claiming that Congress has ratified the administrative interpretation in this case, we do not believe that the history of any of these amendments reflects sufficient evidence of a congressional adoption of the VA's construction.

(i) 1976 Amendment. The first amendment, which was passed in 1976, does not raise a serious question of legislative ratification, and thus we deal with it only briefly here. The 1976 amendment made three changes with respect to beneficiary travel reimbursement. First, it amended § 601 to incorporate, for the first time, the requirements of § 111 in the definitions of hospital care, domiciliary care, and medical services. *See* Pub. L. No. 94–581, §§ 102, 202(b), 90 Stat. at 2843–44, 2855. Previously, the definition of hospital and domiciliary care in § 601 had merely stated that such care included specified transportation costs, and the definition of medical services had not included any specific reference to transportation reimbursement. *See* 38 U.S.C. § 601 (1970). Second, the 1976 Act amended § 111 to permit the Administrator to require the beneficiary to submit an annual declaration and certification of his inability to defray travel expenses in order to ensure that reimbursement for travel costs was not paid to ineligible veterans. *See* Pub. L. No. 94–581, § 101, 90 Stat. at 2842. Finally, the 1976 Act added the provision that the Administrator "shall" conduct an annual study of the costs of travel and "shall" set the rates of reimbursement based on this study. *See id.* at 2842–43.

Neither the language nor the legislative history of this Act, which was generally passed in order to reduce the cost of beneficiary travel, *see* S. Rep. No. 1206, 94th Cong., 2d Sess. 56–57, 71, 76–77 (1976), evidence any belief by Members of Congress that the Administrator did not have discretion in reimbursing the travel costs of eligible beneficiaries. To the contrary, although Congress did not specifically consider whether the Administrator could eliminate travel reimbursement, the fact that it chose to use the word "shall" rather than "may" in amending § 111 suggests that it understood "may" was used in its permissive sense elsewhere in § 111. Moreover, as the floor comments on these amendments emphasize, these changes were not intended to eliminate the "Administrator's present authority to change the rate" of reimbursement for transportation. 121 Cong. Rec. 40629 (1975) (remarks of Rep. O'Brien). *See also id.* (remarks of Rep. Teague) (bill "does not take away the Administrator's right or responsibility to change the rate"). Thus, the adoption of this amendment suggests, if anything, that the Administrator has broad discretion in allocating funds to beneficiary travel.

(ii) 1980 Amendment. The 1980 amendment also does not raise a serious question of legislative ratification. This amendment was passed in response to the Carter Administration's initial attempt to eliminate reimbursement for beneficiary travel under the authority of the Appropriations Act of 1980, Pub. L. No. 96–86, § 112, 93 Stat. 656, 661 (1979). The Appropriations Act put a cap on the total amount of funds which could be obligated for travel and transportation "for officers and employees of the executive branch. . . ." OMB initially took the position that the Act limited the funds which could be obligated for VA beneficiary travel, and thus moved to limit beneficiary travel payments. Ultimately, the Administration agreed not to limit expenditures for beneficiary travel as a result of Pub. L. No. 96–86. *See* S. Doc. No. 49, 96th Cong., 2d Sess. 8–9 (1980). In response to the threatened cutback, however, Congress passed an Act which

stated that henceforth "[n]o provision . . . which imposes any restriction or limitation on the availability of funds for the travel and transportation of officers and employees of the executive branch" shall be applicable to veterans obtaining travel expenses under § 111 "unless such provision is expressly made applicable to the travel of such veterans. . . ." Pub. L. No. 96-330, § 406, 94 Stat. 1030, 1052 (1980), *reprinted in* notes to § 111.

Like the 1976 Amendment, the passage of this provision does not clearly constitute an adoption of the Administrator's position on beneficiary travel by Congress. The only question at issue was the Administrator's obligation under the 1980 Appropriations Act or similar acts to reduce the costs of beneficiary travel along with government employee travel. The amendment did not deal with the question of the Administrator's authority to reduce travel costs under § 111.

We recognize and have carefully considered that during the hearings over the proposed cutbacks, two members of the House Committee on Veterans Affairs and the representatives of the VA stated, without analysis, that the Administrator was required to reimburse the covered transportation costs of VA beneficiaries in the absence of the budgetary cap. *See* Letter of Apr. 1, 1980 from Rep. Ray Roberts to James McIntyre, Jr., Director, OMB, *reprinted in Hearings on VA Beneficiary Travel Before the House Subcommittee on Special Investigations of the Committee on Veterans Affairs*, 96th Cong., 2d Sess. 29 (May 21, 1980) (Travel Hearings); Travel Hearings at 1 (remarks of Rep. Mottl); *id.* at 27 (remarks of Dr. Custis); *id.* at 32 (remarks of Mr. Coy). This legal issue, however, was not the focus of the hearing, nor of the subsequent amendment to § 111 dealing with general budget caps on travel expenses. There is no indication, moreover, that Congress as a whole ever considered this issue in passing the amendment. We cannot find a congressional adoption of the Administrator's position "based only upon a few isolated statements in the thousands of pages of legislative documents," especially where that interpretation is "at odds with the language of the section in question and the pattern of the statute as a whole." *Securities and Exchange Commission* v. *Sloan*, 436 U.S. at 121.

(iii) 1979 Amendment. The 1979 amendment to § 111, which gave the Administrator broad authority to determine by regulation whether recipients were able to defray the cost of travel, *see* Pub. L. No. 96–151, 201(a), 93 Stat. 1092, 1093 (1979), raises a more serious question of legislative ratification and thus must be considered in greater detail than the other two changes. In 1979 the Administrator originally proposed that § 111 be amended to abolish reimbursement of transportation for non-service-connected care, except where a special mode of transportation was needed for medical reasons. *See* S. Rep. No. 177, 96th Cong., 1st Sess. 15–16, 52–53 (1979). The Administrator noted in a letter to the Senate that "this proposal will result in significant cost savings to the Government so that limited VA resources may be more effectively utilized . . . ." Letter to Walter Mondale, President, U.S. Senate, from Max Cleland, Administrator, VA, *reprinted in* S. Rep. No. 177, 96th Cong., 1st Sess. 53 (1979). In hearings before the committee, officials of the VA appeared to concede, albeit without any legal analysis, that the VA could not bring about

savings in the travel program without the enactment of its proposal. *See Hearings on VA Health Resources and Program Extensions Before the Senate Committee on Veterans Affairs*, 96th Cong., 1st Sess. 64 (1979) (remarks of Dr. Custis, Deputy Chief Medical Director, VA). *Cf. id.* at 70 (enactment of restriction on beneficiary travel would save $39 million dollars).

The position adopted by the Senate Veterans Affairs Committee could be read to suggest that it agreed with this view. The Committee initially opposed these and other cutbacks because "the nearly $100 million that the VA estimated would be saved *if the cost-savings provisions were enacted*, would be subtracted from the already strained VA budget." S. Rep. No. 177, 96th Cong., 1st Sess. 16 (1979) (emphasis added). Subsequently, the Senate Committee agreed to report a modified version of the Administration proposal, which reduced the reimbursement of transportation costs for non-service-connected care, but only *if* the Administration also agreed to use the extra funds reaped from the cost savings for the hiring of additional medical personnel at VA hospitals. *See* S. Rep. No. 177, 96th Cong., 1st Sess. 7 (1979). *See also* 125 Cong. Rec. 15163, 15172, 15175 (1979) (remarks of Sen. Cranston); 125 Cong. Rec. 15167, 15173 (1979) (remarks of Sen. Humphrey). The agreement was necessary, as one Senator noted, because the VA was "prohibited from enforcing the cost savings unless it also hires the extra medical personnel" to which it had agreed. 125 Cong. Rec. 15177–78 (1979) (remarks of Sen. Morgan). *See also* 125 Cong. Rec. 34985 (1979) (remarks of Sen. Cranston). The Administrator assented to this bargain because "*[e]nactment* of these provisions *[would] free up resources* to make possible additional VA medical facility staffing . . . ." Letter of June 15, 1979, to Sen. Alan Cranston from Max Cleland, Administrator, VA, *reprinted in* 125 Cong. Rec. 15163 (1979) (emphasis added). By making such an agreement, therefore, it might be argued that the Senate committee *and* the Administrator recognized that the Administrator did not have authority to reap these cost savings by eliminating reimbursement for beneficiary travel without this amendment. Ultimately the Administrator acquiesced and adopted the personnel increases before passage of the amendments, *see* 125 Cong. Rec. 34985 (1979) (remarks of Sen. Cranston), and the Senate and House compromise limited even further the cutbacks on beneficiary travel which had been adopted by the Senate. *See id.* (remarks of Sen. Cranston); *id.* at 34989–90 (Senate-House Report on Compromise).

Although the significance of the 1979 legislative history is not free from doubt, we do not believe that this one brief period of bargaining between the Administrator and the Senate committee constitutes a ratification by Congress of the legal position of the VA with respect to the reimbursement of travel costs. We cannot find in these circumstances sufficient evidence of congressional adoption of the VA's construction of the statutory provisions here in issue. First, there is no indication the Senate as a whole or the House agreed with the position of the Senate committee. Second, the circumstances of the bargaining process suggest that members of the committee may have been motivated more by a desire to secure concessions from the Administrator on staffing levels under circumstances

in which they otherwise agreed with the policy of limited travel expenses, than any underlying agreement with his legal position. In this regard, we note that there was no discussion or consideration of the legal basis of the Administrator's supposed obligation to provide transportation payments in the committee report or floor comments. Finally, and most importantly, we are aware of no other occasion where a congressional report has specifically addressed the authority of the Administrator to eliminate reimbursement for beneficiary travel under §§ 111, 610, and 612. In the absence of any sustained and general treatment of this issue or a more specific focus on it, we do not believe that this single period of bargaining between the Administrator and the Senate committee can be said to rebut the plain words of the statute.

Accordingly, in light of the plain language of the statute and the lack of persuasiveness of the Administrator's decisions, we conclude that none of these amendments constitutes a congressional ratification of the VA's legal position.

IV. Conclusion

In summary, we believe the plain language of §§ 111, 601, 610, and 612 indicates that the Administrator is not required to reimburse the transportation costs of eligible veterans' beneficiaries traveling to obtain medical benefits. We are reluctant to construe a term which provides discretion to an agency as creating a mandatory requirement unless there is reasonably strong and persuasive evidence that Congress intended to limit both the agency's discretion and Congress' discretion in the appropriations process. The legislative history of these provisions, however, although somewhat confused, generally supports a permissive interpretation. The history surrounding Congress' recent amendments to § 111, moreover, does not evidence any general and clear congressional acceptance of the VA's position that such payments are mandatory so as to constitute a congressional ratification of this view. Thus, we agree with OMB that the VA has discretionary authority to determine in what cases it will reimburse the covered transportation expenses of veterans who are eligible to receive such payments under §§ 111, 601, 610, and 612. We emphasize that our conclusion does not require the Administrator of the VA to make any changes in pending policies or practices. We find only that the language of the relevant statutes does not prevent him from doing it.

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Continuing Effect of a Congressional Subpoena Following the Adjournment of Congress

A congressional subpoena lacks present force and effect after the adjournment *sine die* of a Congress, and it therefore imposes no continuing duty to comply with its directives; similarly, it will not support the continued exercise by Congress of the power to punish for contempt.

Judicial construction of the procedure by which a congressional committee's contempt citation is certified for prosecution under 2 U.S.C. § 192 indicates that it would require action by the whole House and not simply the Speaker if the contempt occurs while Congress is in session. Accordingly, if the contempt in this case were not reported to the House while it was still in session, or if the House failed to act on the resolution, the citation would die upon Congress' adjournment and be of no further force and effect

If a successor committee in the subsequent Congress brought a civil action to enforce the prior committee's subpoena, its success might depend upon whether the court viewed the prior subpoena and refusal to comply as a historical fact whose validity could not now be adjudicated. This rationale would support an action for declaratory relief, but not one for injunctive relief.

December 14, 1982

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked us to consider the question of the continuing effectiveness of a congressional subpoena following the adjournment of a Congress. There are at least four situations in which the issue might arise, including whether the subpoena provides a basis for: (1) a continuing obligation to produce the requested documents; (2) congressional contempt proceedings within the inherent power of Congress; (3) criminal contempt prosecution under 2 U.S.C. § 192 (1976); and (4) civil enforcement in the district court.

We believe that the better view is that the subpoena is not effective as a predicate for the first three proceedings but that it might be for the last. For the first two, there could be no continuing assertion of congressional authority because the subpoena will have lost present force and effect. For the third, judicial interpretation of the process by which a committee's citation for contempt is certified under 2 U.S.C. § 194 for prosecution under 2 U.S.C. § 192, coupled with appropriate separation of powers principles, should prevent further congressional action after adjournment.[1] For the last, the issue is whether the

[1] This memorandum does not address the separate issue whether 2 U.S.C. § 192 and § 194 can ever be applied to executive officials *See* Letter of June 18, 1956, from William P. Rogers, Deputy Attorney General, to Hon. John E. Moss, Chairman, Government Information Subcommittee, Committee on Government Operations, *reprinted in Availability of Information from Federal Departments and Agencies Hearings Before a Subcomm of the House Comm. on Government Operations*, 84th Cong , 2d Sess. 2891 (1956)

historical fact of the viability of the subpoena and lack of compliance in the past is a sufficient basis for further congressional action.

I. Continuing Obligation to Produce Documents

It is clear that upon the adjournment *sine die* of a Congress, a House subpoena would cease to have any current effectiveness as far as imposing a continuing obligation to produce documents. This lapse in effectiveness of the subpoena results from the same factors that produce, at that same time, the death of all pending legislation not enacted, *see* F. Riddick, *The United States Congress* 56 (1949), and the termination of congressional authority to hold a contumacious witness in custody. *See Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821); *Marshall* v. *Gordon*, 243 U.S. 521, 542 (1917). Because the subpoena would lack any present force or effect, it would impose no continuing duty to comply.

II. Inherent Congressional Power to Punish for Contempt

It is similarly clear from *Anderson* and *Marshall* that any confinement for contempt imposed *by Congress* in the exercise of its inherent constitutional powers must terminate upon adjournment *sine die*. *See United States* v. *Fort*, 443 F.2d 670, 676 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971). The duration of confinement, in fact, is measured by the session, and not the term, of Congress. This shorter duration seems to indicate that the limitation is imposed not merely out of a recognition that the subpoena lacks any present force or effect and will therefore not support the continued exercise of the power to impose a penalty for contempt. Whatever the alternative rationale which requires the more strenuous limitation, the result is clear that the effect of adjournment is the end of congressional power.

III. Criminal Prosecution Under 2 U.S.C. § 194

Section 194 of Title 2, United States Code, provides:

> Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to

> certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States Attorney, whose duty it shall be to bring the matter before the grand jury for its action.

The predicate offense under § 192 of refusal to testify or produce papers is set out in the footnote.[2]

Section 194 appears to require a vote by a committee of Congress to hold the witness in contempt and a report by that committee of such fact to the House or the Senate while Congress is in session or to the Speaker of the House or the President of the Senate when Congress is not in session. The Speaker or the President of the Senate shall then certify the facts to the United States Attorney for prosecution. Judicial interpretation, however, has placed several important glosses on the statute.

In *Wilson* v. *United States*, 369 F.2d 198 (D.C. Cir. 1966), the court considered the procedures for a contempt committed and reported while Congress was not in session. The court held that the Speaker of the House did not have a mandatory duty to certify the statements to the United States Attorney; "his automatic certification, under a disclaimer denying his jurisdiction to make any inquiry or take any different course, was invalid." *Id.* at 200.

The court reasoned that the apparently mandatory language of § 194 regarding certification was the same whether Congress was in session or not. Yet it had been the practice of Congress since 1857 that the Speaker was not under a mandatory duty to certify the report of the committee when Congress was in session. Instead, a member of the committee would offer a resolution for the consideration of the House involved. The court stated:

> It is clear that where the alleged contempts are committed while Congress was in session, the Speaker may not certify to the United States Attorney the statements of fact prepared by the Committee until the report of alleged contempt has been acted upon by the House as a whole.

369 F.2d 202. The court supported its conclusion by a brief discussion of prior judicial construction.[3]

The court also rejected the argument that even if House or Senate consideration was necessary if Congress was in session, the statute contemplated automatic

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[2] Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2 U.S.C. § 192.

[3] *In re Chapman*, 166 U.S. 661 (1897) (holding that the Speaker or the President of the Senate may not certify the facts to the United States Attorney if a contempt resolution is defeated by the House whose action initiated the contempt action); *United States* v. *Costello*, 198 F.2d 200, 204–05 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952) (referring to resolution of the Senate citing defendant to contempt as "required by 2 U.S.C. § 194").

certification without further legislative consideration if Congress was not in session. The court reasoned that the single statutory phrase could not have such two radically different readings. Moreover, by scheduling hearings when Congress was not in session or postponing reports until after adjournment, a committee might be able to insulate its actions on contempt matters from consideration by the full House or Senate. The 1936 amendment to the statute, which added the certification requirement, precluded an interpretation that would allow that result.[4] If certification were mandatory, there would be no such check on the committee.

The court then concluded that the established legislative practice required the interpretation that 2 U.S.C. § 194 "vests jurisdiction in the Speaker of the House and the President pro tempore of the Senate, when Congress is not in session, to provide a substitute for the kind of consideration which would be provided by the house involved if it were still in session." 369 F.2d 203–04.

From the text of § 194, as construed by *Wilson*, and certain well-established rules of legislative practice, the following principles seem clear. After the committee vote, a written report is required. If the report is prepared while Congress is in session, it must be submitted to the full House[5] in the form of a resolution directing the Speaker to certify the facts to the United States Attorney. If the House votes down the resolution, the committee citation is of no further force or effect; adjournment of the Congress presents no novel issue in this situation. Similarly, if the House fails to act on the resolution before adjournment, the resolution also dies; again, no novel issue is presented by the particular kind of resolution. If the House votes in favor of the resolution, it would be certified to the United States Attorney.[6]

If the committee fails to report the fact of the contempt while Congress is in session, *Wilson*, as well as general principles of separation of powers, can be read to preclude the committee from submitting the report to the Speaker for his action.[7] The *Wilson* court stated that if the contempt occurred while Congress was in session, the Speaker could not certify the statement of facts until the report was acted upon by the House as a whole.[8] Given the clear preference of the courts

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[4] Both committee reports on the 1936 amendment state that "the requirement that the statement of facts first be filed with the President of the Senate or the Speaker of the House constitutes a check against hasty action on the part of a committee" H R Rep No 1667, 74th Cong., 1st Sess 2 (1935), S Rep. No 2037, 74th Cong , 2d Sess. 2 (1936)

[5] *See also Kinoy* v. *District of Columbia*, 400 F 2d 761, 765 n 6 (D.C. Cir 1968)

> Appellant, however, forcefully argues that there are both substantive and procedural advantages to a contempt proceeding, the most important of which is that where Congress calls upon the courts to prosecute a contempt charge under 2 U.S.C. § 192 (1964), affirmative action by the subcommittee, the full committee and finally by the House (if it is in session) is required. 2 U S.C. § 194 (1964) *See Wilson* v. *United States*, 125 U S. App D.C 153, 369, F 2d 198 (1966).

[6] Again, this procedure assumes that §§ 192 and 194 would be applicable to an Executive Branch official. *But see* note 1, *supra*

[7] This conclusion does not depend on whatever requirement might be imposed by internal committee or House rule that all action of the committee be reported to the House while Congress is in session; whether the committee could meet during the adjournment to prepare the report; or whether, even regardless of the general rules for reporting committee action, the report of a contempt would be treated differently, given that § 194 at least on its face seems to reflect the possibility of action by the Speaker and not the full House

[8] It may be argued that this interpretation extends *Wilson* too far. The statement in *Wilson*, in context, appears to stand only for the point that certification by the Speaker is not mandatory because House action would be required if Congress were in session.

for action by the full House before anyone is held to answer for an alleged contempt,[9] *Wilson* could be read to require action by the House and not merely the Speaker if the contempt occurs while Congress is in session.

These concerns are especially important in the context of a dispute between the Executive and the Congress which arises because of a clash between the Executive's enforcement responsibilities and Congress' investigative responsibilities. In that situation, there seems additional reason to believe that a court would require the judgment of the full House that an Executive Branch official, acting directly pursuant to a direction from the President, should be held in contempt of Congress.

Under this reading of § 194, if the committee failed to report the contempt to the House before the adjournment, or, as noted above, if the House failed to act on the resolution, the citation would be of no further force and effect. It would die upon adjournment as does all uncompleted committee action.[10]

IV. Civil Enforcement of the Subpoena

Whether a civil action to enforce the subpoena could be brought following the adjournment might depend on whether a successor committee in the subsequent Congress again issued a subpoena for the documents and was again refused or whether it merely tried to bring an action based on the subpoena issued and refused in this Congress. The availability of relief might also depend on whether the action were brought for declaratory or injunctive relief.

A. Subpoena and Refusal in the New Congress

It seems clear that the successor committee in the new House could request the same documents again and that, upon the Executive's refusal to produce, it could seek authority from the Congress, if it does not already exist, to bring a civil action to enforce the subpoena. Declaratory relief would be available; and if the court rejected the claim of executive privilege, it could order injunctive relief. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (*en banc*).

B. Enforcement by the New Congress of the Prior Subpoena

An argument can be made that the new House committee could not bring an action upon the prior subpoena because the House is not a continuing body. *See*

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[9] As noted above, the *Wilson* court expressed its concern that a committee might insulate its actions by postponing reports until after adjournment. Even though discretionary review by the Speaker when Congress was not in session, which the *Wilson* court required, would alleviate this concern to some extent, action by the Speaker alone still does not provide the same statement of congressional intent as would action by the full House. *See also Kinoy* v *District of Columbia*, *supra*, note 5.

[10] It may be, however, that if a court accepted the view that action by the Speaker alone was inconsistent with appropriate respect for the Executive, the court might allow the Speaker to refer the matter to the House in the next Congress out of a similar respect for the Legislature.

Gojack v. *United States*, 384 U.S. 702, 706–07 n.4 (1966).[11] It is possible, however, that the court might view the prior subpoena and refusal as a historical fact, the validity of which could be adjudicated notwithstanding the adjournment of Congress. Thus, if the civil action were authorized by existing law or specific action by the new Congress, the court might entertain it even without a repeated request for and refusal of the documents.

The limitation recognized in *Gojack* arose in the context of a criminal prosecution in which current committee authority was a predicate for committee action and thus the contempt prosecution. A similar limitation might not be imposed if the House were to seek instead civil adjudication based on the prior fact of the alleged contempt.[12]

Other references to the termination of the legislative existence of the particular Congress are also inconclusive. These statements were made in the context of Congress' inherent power to punish contempt. In *Anderson* v. *Dunn*, *supra*, the Court held that Congress had the inherent constitutional power to impose confinement for contempt but limited the duration of confinement to the session of Congress:

> [B]y the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows that imprisonment must terminate with that adjournment.

19 U.S. at 231.

The limitation, however, seems not to reflect the absence of legislative existence and thus power in the traditional sense, which is measured not by a session of Congress but by a term. Thus, the limitation seems to have been imposed because the power was implied, and not express; the Court therefore held that the extent of the punishing power was limited to "the least possible power adequate to the end proposed." *Id.*[13] Confinement imposed pursuant to a criminal contempt conviction, in fact, is not similarly limited to the term of Congress. *Marshall* v. *Gordon*, *supra*.

To these distinctions should be added two additional considerations. First, it is possible that a court might rely on traditional notions of mootness, which preserve for court review disputes which are capable of repetition yet evading review. *See, e.g., Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 514–16 (1911). Second, the Supreme Court has recognized the desirability of adjudicat-

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[11] This rule might be different for the Senate, which is a continuing body. *See McGrain* v *Daugherty*, 273 U.S 135, 181 (1927)

[12] Even the conclusion in *McGrain*, *supra*, note 11, that the Senate is a continuing body is not unambiguous because the Court went on to invoke traditional considerations of mootness, which would not have been necessary if the Court were relying on some continuing authority of the Senate derived from its status as a continuing body

[13] Other considerations of separation of powers and due process may also have been involved The Court might have wanted to avoid having itself to decide what limitation on confinement should be imposed and yet have been unwilling to accept that there might be no limitation

ing issues of executive privilege in a civil action and not a contempt proceeding. *United States* v. *Nixon*, 418 U.S. 683 (1974). One lower court has expressed a clear preference for determining constitutional privilege in a civil action and not a criminal prosecution. *Tobin* v. *United States*, 306 F.2d 270, 276 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).[14]

It may be, therefore, that there is no absence of congressional power to proceed upon the prior fact of refusal to produce documents in response to a subpoena. Under this view, a question would be raised about what kind of relief could be obtained in the civil action. The above rationale would support an action for declaratory relief based upon the historical facts. It might not support injunctive relief if the court were to conclude that the successor committee was not an entity entitled to receive the documents requested by its predecessor. In that situation, however, the new committee could rely upon an adjudication that the prior refusal was not supported by executive privilege, and could seek the documents by a new subpoena.

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[14] Whether these considerations would be persuasive only if Congress did not seek criminal sanctions in addition to the civil action is not clear. It is possible that the court would find that Congress elected its remedy in the criminal prosecution and thus refuse it additional consideration in the context of a civil action

History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress

[The following two memoranda, prepared by the Office of Legal Counsel at the request of the Attorney General, describe instances since the founding of the Republic in which officials in the Executive Branch have refused to disclose information or produce documents requested by Congress. The first memorandum, dated December 14, 1982, sets forth examples of situations in which a President has personally directed that information be withheld, relying on the doctrine of executive privilege. The second memorandum, dated January 27, 1983, documents incidents where the Attorney General or some other executive official refused to provide information or documents to Congress in situations involving law enforcement, security, or personnel investigations. . . .]

PART I—Presidential Invocations of Executive Privilege Vis-à-Vis Congress

December 14, 1982

MEMORANDUM FOR THE ATTORNEY GENERAL

This memorandum briefly describes those incidents in which a President personally directed the withholding of information from Congress.[1] Included are incidents in which a President found it necessary to withhold specific documents or information, as well as general directives of a President concerning the withholding of information from Congress.

No effort has been made to catalogue the numerous instances in which information was withheld from Congress by executive officers other than the President; nor does this survey discuss the countless examples of full disclosure by the Executive. The objective of the memorandum is neither to show how frequently the Executive Branch has refused congressional requests for information, nor to demonstrate how often an accommodation between the branches has been achieved. Rather, the memorandum seeks to show that presidentially

[1] Although an attempt has been made to be as thorough as possible, no claim is made that the following list is comprehensive. In this regard, we note Deputy Assistant Attorney General Mary Lawton's statement in a memorandum to Rep. William S. Moorhead, dated Apr 25, 1973.

> In response to your request . . I regret that it is not physically possible to furnish you with a comprehensive list of presidential refusals of information to Congress. To give you all of the instances of such refusals since the beginning of the Republic would require an amount of historical research which the Office of Legal Counsel lacks the resources for handling. In addition, there is a categorization problem of distinguishing the relatively few instances of exercise of Executive Privilege *per se* [*i.e* . a refusal to disclose by the President personally] from the many instances of agreed accommodations . . for nonappearance of witnesses, nondisclosure or partial disclosure.

mandated refusals to disclose information to Congress—though infrequent—are by no means unprecedented acts of this or any other Administration.

1. Washington Administration

St. Clair Incident

On March 27, 1792, the House of Representatives established a congressional committee to investigate the failure of General St. Clair's military expedition against the Indians. The House authorized the committee "to call for such persons, papers, and records, as may be necessary to assist their inquiries."[2]

The committee subsequently asked the President for those papers pertaining to the St. Clair campaign. Since this was the first occasion in which Congress had established a committee to investigate the performance of the Executive and had authorized it to request documents from the President, and wishing "that so far as it should become a precedent, it should be rightly conducted,"[3] President Washington held a meeting with his Cabinet, attended by Jefferson, Hamilton, Randolph and Knox. Jefferson described the conclusions reached by the Nation's first Cabinet:

> We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. *Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion.* Fourth, that neither the committees nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.[4]

Although the Cabinet "agreed in this case, that there was not a paper which might not be properly produced,"[5] the President apparently felt it advisable nevertheless to negotiate with Congress a non-confrontational resolution of the problem. Jefferson thereupon agreed to speak individually to members of the House committee in order to "bring them by persuasion into the right channel."[6] Jefferson's conciliation efforts were successful, for on April 4, 1792, the House resolved,

> that the President of the United States be requested to cause the proper officers to lay before this House *such papers of a public*

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[2] 3 Annals of Cong. 493 (1792)

[3] 1 The Writings of Thomas Jefferson 303 (Lipscomb ed., 1905).

[4] *Id.* at 303–04 (emphasis added)

[5] *Id.* at 305.

[6] *Id. See generally* Younger, *"Congressional Investigations and Executive Secrecy. A Study in the Separation of Powers,"* 20 U. Pitt. L. Rev. 755, 757 (1959).

> *nature*, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair.[7]

Correspondence Involving United States Minister to France

In 1794, the Senate requested by resolution correspondence between the United States Minister to France and the Republic of France, and between the Minister and the State Department.[8] President Washington submitted certain of the correspondence requested, but withheld "those particulars which, in my judgment, for public considerations, ought not to be communicated."[9]

The Jay Treaty

On March 24, 1796, the House of Representatives requested by resolution that the President disclose to the House his instructions to the United States Minister who negotiated the Jay Treaty with Great Britain, along with correspondence and documents relative to that Treaty. Implementation of the Treaty apparently required an appropriation which the House was called upon to vote.[10] President Washington denied the House's right to demand and receive any of the papers requested. Though the President had provided "all the papers affecting the negotiation with Great Britain" to the Senate in the course of its deliberations on the Treaty, Washington determined that the House had no legitimate claim to those papers:

> The nature of foreign negotiations requires caution; and their success must often depend on secrecy; and even, when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic: for this might have pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making Treaties in the President with the advice and consent of the Senate; the principle on which the body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign Power, would be to establish a dangerous precedent.

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[7] 3 Annals of Cong. 536 (1792) (emphasis added).
[8] Senate Journal, 3d Cong., 1st Sess. 42 (1794).
[9] 1 J. Richardson, Messages and Papers of the Presidents 152 (1896)
[10] *See* W. Binkley, *President and Congress* 53–4 (3d rev. 1947).

Subsequently, the House debated Washington's refusal for a full month, but took no action.[11] It is highly instructive, however, that during the debate Rep. James Madison, although disagreeing with President Washington's message in some respects, acknowledged on the House floor,

> that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time. And if the refusal of the President had been founded simply upon a representation, that the state of the business within his department, and the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticize it.[12]

2. Adams Administration

Diplomatic Material Concerning United States Representatives to France

In 1798 the House of Representatives by resolution requested from the President documents containing instructions to, and dispatches from, representatives of the United States to France.[13] On April 3, 1798, President Adams transmitted some of that material to both Houses, but omitted "some names and a few expessions descriptive of the persons" involved.[14]

3. Jefferson Administration

The Burr Conspiracy

In January 1807, the House of Representatives by resolution requested that the President

> lay before this House any information in possession of the Executive, *except such as he may deem the public welfare to require not to be disclosed,* touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together

[11] 5 Annals of Cong. 760 (1796); *see id.* at 426–783. The House did pass two resolutions, one declaring that the House had authority to consider the expediency of carrying a treaty into effect, the second that the House need not state the purpose for which it required information from the Executive. *See id.* at 771, 782–83.

[12] *Id.* at 773.

[13] House Journal, 5th Cong., 2d Sess. 249 (1798).

[14] 1 Richardson, *supra*, at 265.

> with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same.[15]

President Jefferson replied by detailing the activities of Aaron Burr, but declined to mention the names of other alleged participants. Jefferson declared:

> The mass of what I have received in the course of these transactions is voluminous, but little has been given under the sanction of an oath so as to constitute formal and legal evidence. It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question.[16]

4. Monroe Administration

Stewart Incident

In 1825, the House of Representatives requested by resolution that the President provide the Congress with documents concerning charges against certain naval officers, so far as he deemed such disclosure compatible with the public interest.[17] President Monroe refused to submit the documents, stating:

> In consequence of several charges which have been alleged against Commodore Stewart, touching his conduct while com-

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[15] 16 Annals of Cong. 336 (1806) (emphasis added). Professor Raoul Berger has argued that the exception clause in the House resolution refutes any argument that Jefferson's subsequent withholding of documents was based on an executive privilege R. Berger, Executive Privilege: A Constitutional Myth 179–81 (1974) (describing Jefferson's explanation for withholding information as "gratuitous"). *See also* Cox, *Executive Privilege*, 122 U Pa L. Rev. 1383, 1397–98 (1974) (arguing that those historical examples of executive withholding which are preceded by a congressional authorization to withhold do not qualify as examples of executive privilege) One could just as well read the exception clause, however, as an early illustration of congressional recognition of the executive privilege. *See* § 1, C, *supra*, note 19 *infra*.

Moreover, it is highly unlikely Jefferson actually relied upon the exception clause as the basis for withholding information from the House, given the conclusions he reached while serving in President Washington's Cabinet, *see* § 1, A, *supra*, and given the views he expressed in a letter to the United States District Attorney for Virginia, who was then in charge of the Burr prosecution·

> Reserving the necessary right of the President of the U.S. to decide, *independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, & to whom*, I assure you of my readiness under that restriction, voluntarily to furnish . . whatever the purposes of justice may require.

9 The Writings of Thomas Jefferson 55 (P. Ford ed 1898) Professor Berger also fails to note other occasions on which President Jefferson let it be known that he regarded himself free to withhold certain "confidential" information "given for my information in the discharge of my executive functions, and which my duties & the public interest forbid me to make public." *Id.* at 63–64 (certificate to the court in Burr prosecution).

[16] 1 Richardson, *supra*, at 412

[17] House Journal, 18th Cong , 2d Sess. 102–03 (1825).

manding the squadron of the United States [at] sea, it has been deemed proper to suspend him from duty and to subject him to trial on those charges. It appearing also that some of those charges have been communicated to the Department by Mr. Prevost, political agent at this time of the United States at Peru . . . and that charges have likewise been made against him by citizens of the United States engaged in commerce in that quarter, it has been thought equally just and proper that he should attend here, as well to furnish the evidence in his possession applicable to the charges exhibited against Commodore Stewart as to answer such as have been exhibited against himself.

In this stage the publication of those documents might tend to excite prejudices which might operate to the injury of both. It is important that the public servants in every station should perform their duty with fidelity, according to the injunctions of the law and the orders of the Executive in fulfillment thereof. It is peculiarly so that this should be done by the commanders of our squadrons, especially on distant seas, and by political agents who represent the United States with foreign powers. . . . It is due to their rights and to the character of the Government that they be not censured without just cause, which cannot be ascertained until, on a view of the charges, they are heard in their defense, and after a thorough and impartial investigation of their conduct. Under these circumstances it is thought that a communication at this time of those documents would not comport with the public interest nor with what is due to the parties concerned.[18]

5. Jackson Administration[19]

Correspondence Between United States and the Republic of Buenos Aires

On December 28, 1832, President Jackson refused to provide the House of Representatives with the copies of correspondence between the United States and the Republic of Buenos Aires and instructions given to the United States chargé d'affairs there, that it had requested. President Jackson replied that since negotia-

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[18] 2 Richardson, *supra*, at 278.

[19] Former Columbia Law Professor and current Federal District Judge Abraham D. Sofaer has noted:

> Available historical sources reveal that, although much information was provided voluntarily, all Presidents from Washington to Jackson withheld large quantities of material, especially diplomatic correspondence, from their voluntary transmittals. Congress frequently requested the information thus withheld, and Presidents usually complied. Far more often than not, requests for information on sensitive issues contained qualifications authorizing the President to withhold material the disclosure of which might prejudice the nation. Qualifications of information requests dealing with such important issues as the Burr conspiracy exemplify a tradition of legislative deference and trust, surely worth considerable weight in the debate about the discretion inherently possessed by the President.

Sofaer, Book Review, 88 Harv. L Rev 281, 289 (1974) (reviewing R. Berger, *Executive Privilege: A Constitutional Myth)*

tions with the Republic had only been suspended and not broken off, it would "not be consistent with the public interest to communicate the correspondence and instructions requested by the House so long as the negotiation shall be pending."[20]

Negotiations with Great Britain Over the Northeastern Boundary

In response to the Senate's request for information regarding negotiations carried on with Great Britain over the Northeastern Boundary, and particularly with respect to the Maine settlement, President Jackson informed the Senate on March 2, 1833, that negotiations with Great Britain were in progress and that in the meantime it was "not deemed compatible with the public interest" to communicate the conditional arrangements made with the State of Maine.[21] The House of Representatives also requested information concerning the settlement of the Northeastern Boundary, and on January 6, 1835, President Jackson advised the House that it would be "incompatible with the public interest" to communicate such information.[22] However, the President did furnish this information to the Senate at the next session, stating that "as the negotiation was undertaken under the special advice of the Senate, I deem it improper to withhold the information which the body has requested, submitting to them to decide whether it will be expedient to publish the correspondence before the negotiation has been closed."[23]

Bank of the United States Document

On December 12, 1833, President Jackson responded to a resolution of the Senate requesting him to provide " 'a copy of the paper which has been published, and which purports to have been read by him to the heads of the Executive Departments . . . relating to the removal of the deposits of the public money from the Bank of the United States and its offices.' " President Jackson declined to provide the document on the ground that the Legislature had no constitutional authority to "require of me an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet council . . . [nor] might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own."[24]

Correspondence with France

On February 6, 1835, President Jackson furnished extracts from the dispatches between the United States and the government of France that the House of

[20] 2 Richardson, *supra*, at 608–09
[21] *Id.* at 637.
[22] 3 Richardson, *supra*, at 127
[23] *Id.* at 229–30.
[24] *Id.* at 36.

Representatives had requested, declining to send the full documents on the ground that it was not at that time in the public interest to do so.[25]

Removal of the Surveyor General

On February 10, 1835, President Jackson sent a message to the Senate declining to comply with its resolution which requested the production of copies of charges made to the President against Gideon Fitz, the Surveyor General, which resulted in Mr. Fitz's removal from office. The resolution based the Senate's need for the documents on: 1) the need to nominate Mr. Fitz's successor, and 2) a pending Senate investigation into fraud in the sale of lands.

The President refused to furnish the documents on the ground that they related to subjects which belonged exclusively to the functions of the Executive. In addition, the President said that disclosure of the documents would subject the motives of the President in removing Mr. Fitz to the review of the Senate when not sitting as judges in an impeachment proceeding, and that the Executive's acquiescence in the Fitz case might be used by Congress as a precedent for similar and repeated requests. The President said:

> This is another of those calls for information made upon me by the Senate which have, in my judgment, either related to the subjects exclusively belonging to the executive department or otherwise encroached on the constitutional powers of the Executive. Without conceding the right of the Senate to make either of these requests, I have yet, for the various reasons heretofore assigned in my several replies, deemed it expedient to comply with several of them. It is now, however, my solemn conviction that I ought no longer, from any motive nor in any degree, to yield to these unconstitutional demands. Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive.
>
> . . . . Such a result, if acquiesced in, would ultimately subject the independent constitutional action of the Executive in a matter of great national concernment to the domination and control of the Senate. . . .
>
> I therefore decline a compliance with so much of the resolution of the Senate as requests "copies of the charges, if any," in relation to Mr. Fitz, and in doing so must be distinctly understood as neither affirming nor denying that any such charges were made. . . .[26]

[25] *Id.* at 129
[26] *Id.* at 132–34.

6. Tyler Administration

Correspondence Regarding Negotiations with Great Britain Over the Northeastern Boundary

In response to the House of Representatives' request for all correspondence not previously communicated regarding the United States' negotiation with Great Britain over the Northeastern Boundary, President Tyler withheld the documents and sent a February 26, 1842, message to Congress saying that "in my judgment no communication could be made by me at this time on the subject of its resolution without detriment or danger to the public interests."[27]

Information Regarding Executive Appointments

On March 23, 1842, President Tyler refused to comply with a House resolution requesting that the President and the heads of departments communicate the names of such Members of the 26th and 27th Congresses who had applied for office, what office, and whether such application had been made in person, in writing, or through friends. President Tyler refused to disclose such information on the ground that it was by nature confidential, the disclosure of which could serve no "useful object connected with a sound and constitutional administration of the Government in any of its branches," and further, that

> compliance with the resolution which has been transmitted to me would be a surrender of duties and powers which the Constitution has conferred exclusively on the Executive, and therefore such compliance can not be made by me nor by the heads of Departments by my direction. The appointing power, so far as it is bestowed on the President by the Constitution, is conferred without reserve or qualification. The reason for the appointment and the responsibility of the appointment rest with him alone. I can not perceive anywhere in the Constitution of the United States any right conferred on the House of Representatives to hear the reasons which an applicant may urge for an appointment to office under the executive department, or any duty resting upon the House of Representatives by which it may become responsible for any such appointment.[28]

Treaty to Suppress Slave Trade

In response to the House of Representatives' request to furnish, "'so far as may be compatible with the public interest,'" a copy of the quintuple treaty between the five powers of Europe for the suppression of the African slave trade

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[27] 4 Richardson, *supra*, at 101.
[28] *Id.* at 105–06.

and certain correspondence with respect to it, President Tyler replied on June 20, 1842, that he had not received an authentic copy of the treaty and that "[i]n regard to the other papers requested, although it is my hope and expectation that it will be proper and convenient at an early day to lay them before Congress, . . . yet in my opinion a communication of them to the House of Representatives at this time would not be compatible with the public interest."[29]

Information Regarding Steps Taken to Obtain Recognition of American Claims by Mexican Government

The Senate had requested the President to provide information, "so far as he might deem it compatible with the public interest," concerning what measures, if any, had been taken to obtain recognition by the Mexican government of certain claims of American citizens. President Tyler replied on August 23, 1842, that "[i]n the present state of the correspondence and of the relations between the two Governments on these important subjects it is not deemed consistent with the public interest to communicate the information requested. The business engages earnest attention, and will be made the subject of a full communication to Congress at the earliest practicable period."[30]

Negotiations Regarding Northwestern Boundary

In response to the Senate's request for information concerning the United States' negotiations with Great Britain for settlement of the Northwest Boundary, President Tyler replied on December 23, 1842, that measures had been taken to settle the dispute and that "under these circumstances I do not deem it consistent with the public interest to make any communication on the subject."[31]

Hitchcock Investigation

On January 31, 1843, President Tyler invoked executive privilege against a request by the House of Representatives to the Secretary of War to produce investigative reports submitted to the Secretary by Lieutenant Colonel Hitchcock concerning his investigations into frauds perpetrated against the Cherokee Indians. The Secretary of War consulted with the President and under the latter's direction informed the House that negotiations were then pending with the Indians for settlement of their claims, and that in the opinion of the President and the Department, publication of the report at that time would be inconsistent with the public interest. The Secretary of War further stated that the reports sought by the House contained information which was obtained by Colonel Hitchcock through *ex parte* questioning of persons whose statements were not made under oath, and which implicated persons who had no opportunity to contradict the

[29] *Id* at 158
[30] *Id.* at 178–79.
[31] *Id* at 210–11

allegations or provide any explanation. The Secretary of War expressed the opinion that to publicize such statements at that time would be unjust to the persons mentioned, and would defeat the object of the inquiry. He also stated that the Department had not yet been given a sufficient opportunity to pursue the investigation, to call the affected parties for explanations, or to make any other determinations regarding the matter. The President stated:

> The injunction of the Constitution that the President 'shall take care that the laws be faithfully executed,' necessarily confers an authority, commensurate with the obligation imposed to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective these inquiries must often be confidential. They may result in the collection of truth or of falsehood, or they may be incomplete and may require further prosecution. To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be promulgated . . . would deprive him at once of the means of performing one of the most salutary duties of his office. . . . To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive.[32]

In response to the House's claim that it had a right to demand from the Executive and heads of departments any information in the possession of the Executive which pertained to subjects under the House's deliberations, President Tyler stated that the House could not exercise a right to call upon the Executive for information, even though it related to a subject of the deliberations of the House, if, by so doing, it would interfere with the discretion of the Executive.[33]

Instructions to Navy Officers

In response to the House of Representatives' request for copies of instructions given to British and American commanding officers who were charged, pursuant to a treaty with Great Britain, with suppressing the slave trade off the coast of Africa, President Tyler sent a May 18, 1844, message to the House declining to provide the information on the ground that to do so would be incompatible with the public interest.[34]

Foreign Correspondence Regarding the Ownership and Occupation of Oregon Territory

In June 1844, President Tyler sent a message to the Senate explaining his refusal to comply with its request for documents relating to the ownership and

[32] *Id.* at 222.
[33] *Id* at 222–23.
[34] *Id.* at 320.

occupation of the Oregon Territory. "[I]n the present state of the subject-matter," the President wrote, "it is deemed inexpedient to communicate the information requested. . . ."[35]

7. Polk Administration

Foreign Relations Expenditures of Prior Administration

In 1846, President Polk refused to provide the House of Representatives with confidential memoranda regarding certain expenses incurred for the conduct of foreign relations during the Tyler Administration. In refusing to comply with a House resolution requesting documentation of these expenses, President Polk stated that where a past President had placed a seal of confidentiality upon an expenditure, and the matter was terminated before he entered office,

> [a]n important question arises, whether a subsequent President, either voluntarily or at the request of one branch of Congress, can without a violation of the spirit of the law revise the acts of his predecessor and expose to public view that which he had determined should not be "made public." If not a matter of strict duty, it would certainly be a safe general rule that this should not be done. Indeed, it may well happen, and probably would happen, that the President for the time being would not be in possession of the information upon which his predecessor acted, and could not, therefore, have the means of judging whether he had exercised his discretion wisely or not.[36]

Polk concluded that the President making an expenditure, deemed by him confidential, may, if he chooses, keep all the information and evidence upon which he acts in his own possession. If, for the information of his successors, he leaves some evidence upon which he acts in the confidential files of one of the executive departments, such evidence does not thereby become publicly available.

Military and Diplomatic Instructions with Respect to Mexico

On January 12, 1848, President Polk sent a message to the House transmitting reports of the Secretaries of State, War, and the Navy in response to a congressional resolution seeking copies of all instructions given to American military and diplomatic officers relating to the return of President General Lopez de Santa Anna to Mexico. President Polk stated that he was transmitting the documents,

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[35] *Id.* at 327.
[36] *Id.* at 433.

which contain all the information in the possession of the Executive which it is deemed compatible with the public interests to communicate. . . .

The customary and usual reservation contained in calls of either House of Congress upon the Executive for information relating to our intercourse with foreign nations has been omitted in the resolution before me. The call of the House is unconditional. It is that the information requested be communicated, and thereby be made public, whether in the opinion of the Executive (who is charged by the Constitution with the duty of conducting negotiations with foreign powers) such information, when disclosed, would be prejudicial to the public interest or not. It has been a subject of serious deliberation with me whether I could, consistently with my constitutional duty and my sense of the public interests involved and to be affected by it, violate an important principle, always heretofore held sacred by my predecessors, as I should do by a compliance with the request of the House. President Washington, in a message to the House of Representatives of the 30th of March, 1796, declined to comply with a request contained in a resolution of that body, to lay before them "a copy of the instructions to the minister of the United States who negotiated the treaty with the King of Great Britain, together with the correspondence and other documents relative to that treaty, excepting such of the said papers as any existing negotiation may render improper to be disclosed."

. . . Indeed, the objections to complying with the request of the House contained in the resolution before me are much stronger than those which existed in the case of the resolution in 1796. This resolution calls for the "instructions and orders" to the minister of the United States to Mexico which relate to negotiations which have not been terminated, and which may be resumed. The information called for respects negotiations which the United States offered to open with Mexico immediately preceding the commencement of the existing war. The instructions given to the minister of the United States relate to the differences between the two countries out of which the war grew and the terms of adjustment which we were prepared to offer to Mexico in our anxiety to prevent the war. These differences still remain unsettled, and to comply with the call of the House would be to make public through that channel, and to communicate to Mexico, now a public enemy engaged in war, information which could not fail to produce serious embarrassment in any future negotiation between the two countries. I have heretofore communicated to Congress all the correspondence of the minister of the United States to Mexico which in the existing state of our relations with

that Republic can, in my judgment, be at this time communicated without serious injury to the public interest.

Entertaining this conviction, and with a sincere desire to furnish any information which may be in possession of the executive department, and which either House of Congress may at any time request, I regard it to be my constitutional right and my solemn duty under the circumstances of this case to decline a compliance with the request of the House contained in their resolution.[37]

Diplomatic Instructions Relating to United States–Mexico Treaty

On July 29, 1848, President Polk refused to comply with a request by the House of Representatives for copies of instructions provided to commissioners who negotiated the treaty with Mexico on the ground that "it would be 'inconsistent with the public interests' to give publicity to these instructions at the present time." He added that, "as a general rule applicable to all our important negotiations with foreign powers, it could not fail to be prejudicial to the public interest to publish the instructions of our ministers until some time had elapsed after the conclusion of such negotiations."[38]

President Polk did transmit these documents to the House on February 8, 1849, at which time he reaffirmed the general rule enunciated on July 29, but stated that, notwithstanding that, "as [the documents] have been again called for by the House, and called for in connection with other documents, to the correct understanding of which they are indispensable, I have deemed it my duty to transmit them."[39]

8. Fillmore Administration

Diplomatic Instructions

Upon receipt of a request from the Senate to furnish, if not inconsistent with the public interest, information concerning the seizure of the American steamship *Prometheus* by a British war vessel and the measures taken to vindicate "the honor of the country," President Fillmore, on December 15, 1851, transmitted excerpts from a communication giving the facts of the case, but without the instructions given to the United States Minister in London. He declared that "[s]ufficient time has not elapsed for the return of any answer to this dispatch from him, and in my judgment it would at the present moment be inconsistent with the public interest to communicate those instructions. A communication, however, of all the correspondence will be made to the Senate at the earliest moment at which a proper regard to the public interest will permit."[40]

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[37] *Id.* at 565, 566, 567.
[38] *Id.* at 602.
[39] *Id.* at 679.
[40] 5 Richardson, *supra*, at 139–40.

Documents Involving American Claims Against the Mexican Government

In response to a Senate request for papers and proofs on file with the Executive Branch regarding the claim of Samuel A. Belden & Co. against the Mexican government, on May 29, 1852, President Fillmore forwarded all documents save those of a diplomatic nature, and stated that because the claim was still being negotiated it was therefore "not deemed expedient . . . to make public the documents which have been reserved."[41]

Sandwich Islands

On August 14, 1852, President Fillmore refused to provide information to the Senate regarding a proposition made by the King of the Sandwich Islands to transfer the islands to the United States, as not comporting with the public interest.[42]

9. Buchanan Administration

Law Enforcement Files

On January 11, 1859, President Buchanan responded to a request by the Senate for information relating to the landing of a slave ship on the coast of Georgia. The President transmitted a report from the Attorney General which stated that an offense had been committed and that measures were being taken to enforce the law. However, he concurred with the opinion of the Attorney General that "it would be incompatible with the public interest at this time to communicate the correspondence with the officers of the Government at Savannah or the instructions which they have received."[43]

10. Lincoln Administration

Fort McHenry Arrests

On July 27, 1861, President Lincoln refused to provide to the House of Representatives documents revealing the grounds, reasons, and evidence upon which Baltimore police commissioners were arrested at Fort McHenry for the reason that disclosure at that time would be incompatible with the public interest.[44]

Arrest of Brigadier General Stone

On May 1, 1862, President Lincoln refused to comply with a request by the Senate for more particular information regarding the evidence leading to the

[41] *Id.* at 151.
[42] *Id* at 159.
[43] *Id.* at 534.
[44] 6 Richardson, *supra*, at 33.

arrest of Brigadier General Stone on the ground that the determination to arrest and imprison him was made upon the evidence and in the interest of public safety, and that disclosure of more particular information was incompatible with the public interest.[45]

Negotiations with New Granada

The House of Representatives had requested the Secretary of State to communicate to it, "if not in his judgment incompatible with the public interest," information concerning American relations with New Granada, and what negotiations, if any, had been had with General Herran of that country. President Lincoln, on January 14, 1863, replied to the resolution giving a résumé of developments in New Granada. However, with respect to official communications with General Herran, he stated that "[n]o definitive measure or proceeding has resulted from these communications, and a communication of them at present would not, in my judgment, be compatible with the public interest."[46]

11. Johnson Administration

Military Correspondence

On January 26, 1866, President Johnson refused to disclose to the Senate certain communications from military officers regarding violations of neutrality on the Rio Grande on the ground that such disclosure would not be consistent with the public interest.[47]

Confinement of Jefferson Davis

On February 9, 1866, President Johnson refused, on advice from the Secretary of War and the Attorney General, to comply with a request by the House of Representatives for a report by the Judge Advocate General concerning the confinement of Jefferson Davis, and others, on the ground that disclosure would not be in the public interest.[48]

New Orleans Investigations

On May 2, 1866, President Johnson refused to provide the House of Representatives with a copy of a report that it had requested concerning General Smith's and James T. Brady's New Orleans investigations, citing the public interest in nondisclosure.[49]

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[45] *Id.* at 74.
[46] *Id.* at 147, 149.
[47] *Id.* at 376–77.
[48] *Id.* at 378.
[49] *Id.* at 385.

12. Grant Administration

Performance of Executive Functions

In April 1876, President Grant was requested by the House of Representatives to provide information which would show whether any executive acts or duties had been performed away from Washington, the lawfully established seat of government. (This was an attempt to embarrass the President for having spent the hot summer at Long Beach.) On May 4, 1876, the President refused on the ground that the Constitution did not give the House of Representatives authority to inquire of the President where he performed his executive functions, and that, moreover, the House's lawful demands on the Executive were limited to information necessary for the proper discharge of its powers of legislation or impeachment.[50]

13. Cleveland Administration

Dismissal of District Attorney

In response to a resolution by the Senate requesting the Attorney General to provide certain documents concerning the administration of the United States Attorney's Office (then District Attorney) for the Middle District of Alabama, and the President's dismissal of the incumbent district attorney, President Cleveland sent a message on March 1, 1886, to the Senate stating that he was withholding the requested documents because they contained information addressed to him and to the Attorney General by private citizens concerning the former district attorney, and that the documents related to an act (the suspension and removal of an Executive Branch official) which was exclusively a discretionary executive function.[51]

"Rebecca" Schooner Incident

On February 26, 1887, President Cleveland refused to provide the Senate with information that it requested regarding the seizure and sale of the American schooner *Rebecca* at Tampico, and the resignation of the Minister of the United States to Mexico, on the ground that publication of the requested correspondence would be inconsistent with the public interest.[52]

14. Harrison Administration

International Conference on the Use of Silver

In response to the Senate's request for information regarding the steps taken toward holding an international conference on the use of silver, President Har-

[50] 7 Richardson, *supra*, at 361–66
[51] 8 Richardson, *supra*, at 375.
[52] *Id.* at 538

rison stated on April 26, 1892, that "in my opinion it would not be compatible with the public interest to lay before the Senate at this time the information requested, but that at the earliest moment after definite information can properly be given all the facts and any correspondence that may take place will be submitted to Congress."[53]

15. Cleveland Administration

Cuba Matters

In response to a request by the House of Representatives for copies of all correspondence relating to affairs in Cuba since February 1895, President Cleveland transmitted on February 11, 1896, a communication from the Secretary of State and such portions of the correspondence requested as he deemed it not inconsistent with the public interest to communicate.[54]

Correspondence with Spain

On May 23, 1896, President Cleveland transmitted to the Senate a requested copy of the protocol with Spain, but withheld copies of certain correspondence with Spain on the ground that it would be incompatible with the public good to furnish such correspondence.[55]

16. McKinley Administration

War Department Investigations

In response to a request made by the Senate to the Secretary of War for a report on the War Department's investigation into receipts and expenditures of Cuban funds, President McKinley informed the Senate on January 3, 1901, that it was not deemed compatible with the public interest to transmit the document at that time.[56]

17. Theodore Roosevelt Administration

United States Steel Proceedings

On January 4, 1909, the Senate passed a resolution directing the Attorney General to inform the Senate whether certain legal proceedings had been instituted against the United States Steel Corporation, and if not, the reasons for its non-action. A request was also made for the opinions of the Attorney General regarding this matter, if any had been written. President Roosevelt replied to the Senate on January 6, 1909, stating that he had been orally advised by the Attorney

[53] 9 Richardson, *supra*, at 238–39.
[54] *Id.* at 666.
[55] *Id.* at 669.
[56] 9 Richardson, *supra*, at 6458 (Bur of Nat'l Literature ed. 1911).

General that there were insufficient grounds for instituting legal action against U.S. Steel, and that he had

> instructed the Attorney General not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever.[57]

When the Senate was unable to get the documents from the Attorney General, it subpoenaed the Commissioner of Corporations to produce all papers and documents regarding U.S. Steel in his possession. The Commissioner reported the request to the President, who sought an opinion from Attorney General Bonaparte regarding the Commission's statutory obligation to withhold such information except upon instruction by the President. The Attorney General advised the Commissioner that the discretion to make public the requested documents was vested in the President and that, accordingly, he should turn over all documents within the scope of the subpoena to the President.[58] The Commissioner did so, and President Roosevelt then informed the Judiciary Committee that he had the papers and that the only way the Senate could get them was through his impeachment. President Roosevelt also explained that some of the facts were given to the government under a pledge of secrecy and that the government had an obligation to keep its word.[59]

18. Coolidge Administration

Bureau of Internal Revenue Oversight

On April 11, 1924, President Coolidge responded to a request by the Senate for a list of all companies in which the Secretary of the Treasury "was interested" (for the purpose of investigating their tax returns) as a part of a general oversight investigation of the Bureau of Internal Revenue. President Coolidge refused to provide the information on the ground that it was confidential information the disclosure of which would be detrimental to public service, calling the Senate's investigation an "unwarranted intrusion," born of a desire other than to secure information for legitimate legislative purposes.[60]

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[57] 43 Cong Rec. 528 (1909).
[58] 27 Op Att'y Gen. 150 (1909).
[59] E Corwin, The President—Office and Powers 429 (1957).
[60] 65 Cong. Rec 6087 (1924)

19. Hoover Administration

London Treaty Letters

On July 11, 1930, President Hoover responded to a request addressed to the Secretary of State from the Senate Foreign Relations Committee for certain confidential telegrams and letters leading up to the London Naval Conference and the London Treaty. The Committee members had been permitted to see the documents with the understanding that the information contained therein would be kept confidential. The Committee asserted its right to have full and free access to all records touching on the negotiation of the Treaty, basing its right on the constitutional prerogative of the Senate in the treaty-making process. In his message to the Senate, President Hoover pointed out that there were a great many informal statements and reports which were given to the government in confidence. The Executive was under a duty, in order to maintain amicable relations with other nations, not to publicize every negotiating position and statement which preceded final agreement on the Treaty. He stated that the Executive must not be guilty of a breach of trust, nor violate the invariable practice of nations. "In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest."[61]

20. Franklin D. Roosevelt Administration

FBI Records

On April 30, 1941, at the direction of President Roosevelt, Attorney General Jackson wrote the Chairman of the House Committee on Naval Affairs, stating his refusal to provide the Committee with certain FBI records. Attorney General Jackson declared 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."[62]

Radio Intelligence Material

Pursuant to a January 19, 1943, resolution, a House Select Committee to Investigate the Federal Communications Commission (FCC) subpoenaed the Director of the Bureau of the Budget on July 9, 1943, to appear before the Select Committee and produce Bureau files and correspondence dealing with requests by the War and Navy Departments to the President for an executive order transferring the functions of the FCC's Radio Intelligence Division to the military establishments. The Director refused, citing Attorney General Jackson's letter of

[61] S. Doc No. 216, 71st Cong , Special Sess 2 (1930).
[62] 40 Op. Att'y Gen 45, 46 (1941)

April 30, 1941, and a presidential instruction that the Bureau's files were to be kept confidential, because disclosure would not comport with the public interest.[63]

In addition, the Acting Secretary of War was requested to appear before the Select Committee to produce documents bearing on the War and Navy Departments' requests to the President and to bring several Army officers to testify. The Acting Secretary refused to provide the documents on the President's direction, on the ground that doing so would be incompatible with the public interest, and, pursuant to his own judgment, refused to permit the Army officers to appear.[64]

FBI Records

In 1944, the same Select Committee subpoenaed the Director of the Federal Bureau of Investigation to testify concerning fingerprint records and activities at Pearl Harbor, and also to identify a certain document which he was alleged to have received in the course of his duties. The Director refused to give testimony or to exhibit a copy of the President's directive requiring him, in the interest of national security, to refrain from testifying or disclosing the contents of the Bureau's files.[65] Attorney General Biddle wrote a letter to the Select Committee, dated January 22, 1944, informing the Committee that communications between the President and the heads of departments were privileged and not subject to inquiry by congressional committees.[66]

21. Truman Administration

Condon Incident

In March 1948, the House Committee on Un-American Activities issued a subpoena to the Secretary of Commerce directing him to appear before the Committee and to bring with him a letter from the Director of the FBI concerning the loyalty of Dr. Condon, Director of the National Bureau of Standards, together with all records, files, and transcripts of the loyalty board relating to Dr. Condon. On March 13, 1948, President Truman issued a directive providing for the confidentiality of all loyalty files and requiring that all requests for such files from sources outside the Executive Branch be referred to the Office of the President, for such response as the President may determine. 13 Fed. Reg. 1359 (1948). At a press conference held on April 22, 1948, President Truman indicated that he would not comply with the request to turn the papers over to the Committee.[67]

Steelman Incident

On March 6, 1948, during an investigation into a strike among employees of Government Services, Inc., a subcommittee of the House Committee on Educa-

[63] *Study and Investigation of the Federal Communications Commission Hearings on H Res. 21 Before the House Select Comm. to Investigate the Federal Communications Commission*, 78th Cong., 1st Sess 37 (1943).

[64] *Id* at 67–68

[65] *Id.* at 2304–05.

[66] *Id* at 2337–39

[67] The Public Papers of the Presidents, Harry S Truman, 1948, at 228

tion and Labor issued a subpoena to presidential assistant John R. Steelman.[68] Mr. Steelman returned the subpoena to the chairman of the subcommittee on the ground that "the President directed me, in view of my duties as his assistant, not to appear before your subcommittee."[69] The minority report to H.R. Rep. No. 1595 commented on Mr. Steelman's failure to comply with the subpoena as follows:

> the purpose of the subpoena on Mr. Steelman was to obtain from him the contents of any oral or written communications which had been made to him by the President with reference to the strike prevailing in the restaurants maintained by Government Services, Inc. I cannot believe that any congressional committee is entitled to make that kind of investigation into the private conferences of the President with one of his principal aides. I cannot conceive that the views of a Senator or Congressman on a pending bill may be extracted by a court or by a congressional committee by subpoenaing the Senator's of [sic] Congressman's administrative assistant or any other assistant, secretary, or confidential employee. Likewise, I regard it as a direct invasion of the Executive's prerogative to invade the work and time of his assistant in this manner. Dr. Steelman I think acted with the utmost propriety in referring the matter to the President. The Chief Executive very naturally and properly directed Dr. Steelman not to appear before the subcommittee.[70]

State Department Employee Loyalty Investigation

On March 28, 1950, a subcommittee of the Senate Foreign Relations Committee investigating allegations of disloyalty among State Department employees served subpoenas on the Secretary of State, the Attorney General, and the Chairman of the Civil Service Commission, demanding the production of all files bearing on the loyalty of certain State Department employees. After reference of the subpoena to the President pursuant to the directive of March 13, 1948, the President on April 3, 1950, directed the officials not to comply with the subpoena.[71] Thereafter it appeared that the subpoenaed documents had been made available to the preceding Congress prior to the issuance of the March 13, 1948, directive. President Truman thereupon agreed to make the files available to the subcommittee on the theory that this would not constitute a precedent for subsequent exceptions from the March 13, 1948, directive.[72]

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[68] *Investigation of GSI Strike: Hearings on H. Res 111 Before a Special Subcomm. of the House Comm. on Education and Labor*, 80th Cong., 2d Sess. 347–53 (1948).

[69] H.R. Rep. No. 1595, 80th Cong., 2d Sess. 3 (1948); *see id* Pt. 2, at 8.

[70] *Id.* Pt. 1, at 12

[71] The Public Papers of the Presidents, Harry S Truman, 1950, at 240.

[72] S. Rep. No. 2108, 81st Cong., 2d Sess. 9 (1950)

General Bradley Incident

During the investigation into the circumstances surrounding the dismissal of General Douglas MacArthur held by the Senate Committees on Armed Services and Foreign Relations in 1951, General Bradley refused to testify about a conversation with President Truman in which he had acted as the President's confidential adviser. The Chairman of the Committee, Senator Russell, recognized Bradley's claim of privilege. When that ruling was challenged, the Committee upheld it by a vote of 18 to 8.[73] At a press conference held on May 17, 1951, President Truman indicated that he had previously taken the position that his conversation with General Bradley was privileged and that he was "happy" with the Committee's action.[74]

Refusal to Comply with an Excessively Burdensome Demand for Information

During an investigation into the administration of the Department of Justice by a special subcommittee of the House Judiciary Committee, the chairman of the subcommittee requested a number of departments and agencies to furnish the following information:

> A list of all cases referred to the Department of Justice or U.S. Attorneys for either criminal or civil action by any governmental department or agency within the last six years, in which:
>
> a. Action was declined by the Department of Justice, including in each such case the reason or reasons assigned by said Department for such refusal to act.
>
> b. Said cases were returned by the Department of Justice to the governmental Department or agency concerned for further information or investigation. In such cases, a statement of all subsequent action taken by the Department of Justice should be included.
>
> c. Said cases have been referred to the Department of Justice and have been pending in the Department for a period of more than one year and are not included in b. above.[75]

President Truman instructed the heads of all agencies and departments not to comply with that request for the following reasons set forth in his letter, dated March 7, 1952, to the chairman of the subcommittee:

> [T]his request of yours is so broad and sweeping in scope that it would seriously interfere with the conduct of the Government's business if the departments and agencies should undertake to

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[73] *Military Situation in the Far East: Hearings Before the Senate Comm. on Armed Services and the Senate Comm. on Foreign Relations*, 82d Cong., 1st Sess. 763, 832–72 (1951).

[74] The Public Papers of the Presidents, Harry S Truman, 1951, at 289.

[75] The Public Papers of the Presidents, Harry S Truman, 1952–53, at 199.

comply with it. I am advised that it would require the examination of hundreds of thousands of files, that it would take hundreds of employees away from their regular duties for an extensive period of time, and that it would cost the Government millions of dollars. All this would be done, not for the purpose of investigating specific complaints, not for the purpose of evaluating credible evidence of wrongdoing, but on the basis of a dragnet approach to examining the administration of the laws.

I do not believe such a procedure to be compatible with those provisions of the Constitution which vest the executive power in the President and impose upon him the duty to see that the laws are faithfully executed.[76]

Confidentiality of Administration of Loyalty Security Program

In the spring of 1952 members of a Senate Appropriations subcommittee sought detailed information on the administration of the Loyalty Security Program. In response to a request for guidance by the Department of State, President Truman on April 3, 1952, issued detailed instructions which provided for the confidentiality of the Loyalty Security Program. These instructions provided, *inter alia:*

> There is no objection to making available the names of all members of an agency loyalty board, but it is entirely improper to divulge how individual board members voted in particular cases or to divulge the members who sat on particular cases. If this type of information were divulged freely, the danger of intimidation would be great, and the objectivity, fairness and impartiality of board members would be seriously prejudiced.[77]

22. Eisenhower Administration

Executive Branch Deliberative Discussions

During the Army-McCarthy Hearings, the counselor of the Army was questioned about discussions which had taken place during a conference of high-level government officials.

On May 17, 1954, President Eisenhower directed the Secretary of Defense to instruct the employees of his Department not to testify on those issues. The President's letter stated:

> Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters,

[76] *Id.*
[77] *Id.* at 235–36.

> and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications, or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.[78]

This letter was interpreted as requiring every officer and employee of the government to claim privilege on his own in any situation covered by that letter. Hence there were a considerable number of invocations of executive privilege during the Eisenhower Administration which were not referred to, or specifically authorized by, the President.

Conversation with Presidential Assistant Sherman Adams

During hearings in July 1955 on the Dixon-Yates Contract before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, Securities and Exchange Commission Chairman Armstrong was questioned on various issues. During most of his testimony, questions of privilege were disposed of without reference to the White House. When questioned about a telephone conversation with Presidential Assistant Sherman Adams, he sought the advice of the Special Counsel to the President who, upon advice of the Attorney General, directed that Mr. Armstrong could testify as to existence of the conversation, but not as to matters discussed during the conversation.[79]

Killian and Gaither Panel Reports

In connection with an investigation into satellite and missile programs in January 1958, then-Senator Lyndon Johnson asked for the release of the so-called Killian and Gaither Panel reports. President Eisenhower denied the request in part on the ground that the reports had been prepared with the understanding that the advice contained in them would be kept confidential. The President added that "these reports are documents of the National Security Council. Never have the documents of this Council been furnished to the Congress."[80]

Confidentiality of ICA Country Reports

Between 1957 and 1959 the International Cooperation Administration (ICA), the predecessor to the Agency for International Development (AID), repeatedly

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[78] The Public Papers of the Presidents, Dwight D Eisenhower, 1954, at 483–84

[79] *Power Policy. Dixon-Yates Contract· Hearings on S Res 61 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm on the Judiciary,* 84th Cong., 1st Sess. 751 (1955).

[80] The Public Papers of the Presidents, Dwight D. Eisenhower, 1958, at 117–18.

denied to Congress and to the Comptroller General access to its country evaluation reports on the ground that they contained confidential opinions and tentative recommendations on matters involving foreign policy. These refusals were made without express presidential authorization.

When this issue came up at President Eisenhower's news conference of July 1, 1959, the President approved these withholdings largely on the ground that the release of the reports would jeopardize the ability of the United States to obtain confidential information.[81]

The Mutual Security legislation of 1959–1961 provided in effect that the ICA could withhold information from Congress or the Comptroller General only upon a presidential certification that he had forbidden the document be furnished and stated the reason for so doing. President Eisenhower made the following certifications:

November 12, 1959, relating to an evaluation report on Vietnam;[82]

December 22, 1959, relating to evaluation reports on Iran and Thailand;[83]

December 2, 1960, relating to evaluation reports on several South American countries. These reports apparently were made available to the Comptroller General during the following Administration.[84]

23. Kennedy Administration

Confidentiality of Names of Specific Government Employees

During an investigation into military cold war education and speech review policies conducted by the Senate Committee on Armed Services, Senator Thurmond requested the names of individual government employees of the Department of Defense and the Department of State who made or recommended changes in specific speeches.

On February 8, 1962, President Kennedy directed the Secretary of Defense and all personnel under the jurisdiction of his Department not to give any testimony or produce any documents which would disclose such information. The letter stated:

> [I]t would not be possible for you to maintain an orderly Department and receive the candid advice and loyal respect of your subordinates if they, instead of you and your senior associates, are to be individually answerable to the Congress, as well as to you, for their internal acts and advice.
>
> * * * * *
>
> I do not intend to permit subordinate officials of our career

[81] *Id.*, 1959, at 488, 489.
[82] *Id.* at 776.
[83] *Id.* at 874
[84] *Id*, 1960–61, at 881

> services to bear the brunt of congressional inquiry into policies which are the responsibilities of their superiors.[85]

Chairman Stennis upheld the claim of privilege. The ruling was upheld by the Subcommittee.[86] On February 9, 1962, President Kennedy sent a similar letter to the Secretary of State.[87]

Confidentiality of National Security Council Papers

Later, during the same investigation into military cold war education and speech review policies, Senator Thurmond demanded certain National Security Council papers. In a letter to Chairman Stennis dated June 23, 1962, President Kennedy refused to release those papers on the ground that "the unbroken precedent of the National Security Council is that its working papers and policy documents cannot be furnished to the Congress."[88]

24. Johnson Administration

Exemption of Presidential Assistants from Appearance Before Congressional Committees

In 1968, during hearings on the nomination of Justice Fortas to be Chief Justice of the United States, Treasury Under Secretary Barr, Associate Special Counsel to the President DeVier Pierson, and Secretary of Defense Clark Clifford were invited to appear before the Senate Committee on the Judiciary to testify on the question whether Justice Fortas had participated in high-level White House meetings dealing with the development of legislation authorizing the Secret Service to protect presidential candidates.

By letters dated September 16, 1968, Mr. Barr and Mr. DeVier Pierson both declined the invitation. Mr. Barr's letter contained the following pertinent language:

> In the development of this legislation, I participated in meetings with representatives of the White House and discussed the matter directly with the President.
>
> Based on long-standing precedents, it would be improper for me under these circumstances to give testimony before a Congressional committee concerning such meetings and discussions. Therefore, I must, with great respect, decline your invitation to appear and testify.

Mr. DeVier Pierson stated:

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[85] *Military Cold War Education and Speech Review Policies: Hearings Before the Special Preparedness Subcomm of the Senate Comm on Armed Services*, 87th Cong., 2d Sess. 508–509 (1962).

[86] *Id.* at 513–14.

[87] *Id* at 725.

[88] *Id.* at 2951–57, 3160–61.

> As Associate Special Counsel to the President since March of 1967, I have been one of the "immediate staff assistants" provided to the President by law. (3 U.S.C. 105, 106.) It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government. I must, therefore, respectfully decline the invitation to testify in these hearings.

The Secretary of Defense also asked to be excused from a personal appearance before the Committee, stating that "because of the complexities of the current world situation, my time is fully occupied in meeting my obligations and responsibilities as Secretary of Defense."[89]

25. Nixon Administration

FBI Investigative Files

On November 21, 1970, the Attorney General, with the specific approval of the President, refused to release certain investigative files of the Federal Bureau of Investigation to Rep. L. H. Fountain, Chairman of the Intergovernmental Relations Subcommittee of the House Government Operations Committee. The reports discussed certain scientists nominated by the President to serve on advisory boards of the Department of Health, Education and Welfare.[90]

Military Assistance Plan

On August 30, 1971, President Nixon declined to make available to the Senate Foreign Relations Committee the Five-Year Plan for the Military Assistance Program.[91] In a memorandum to the Secretaries of State and Defense, the President stated:

> The Senate Foreign Relations Committee has requested "direct access to the Executive Branch's basic planning data on Military Assistance" for future years and the several internal staff papers containing such data. The basic planning data and the various

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[89] *Nominations of Abe Fortas and Homer Thornberry: Hearings Before the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 1347, 1348, 1363 (1968).

[90] Memorandum for Honorable William S. Moorhead, Chairman, Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations, from Deputy Assistant Attorney General Mary Lawton (Apr. 25, 1973) (Lawton Memorandum); U.S. Government Information Policies and Practices—The Pentagon Papers, Part 2, House Comm. on Government Operations, 92d Cong., 1st Sess 362–63 (1971).

[91] *Executive Privilege. The Withholding of Information By the Executive: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 45–46 (1971).

internal staff papers requested by the Senate Foreign Relations Committee do not, insofar as they deal with future years, reflect any approved program of this Administration. . . .

I am concerned, as have been my predecessors, that unless privacy of preliminary exchange of views between personnel of the Executive Branch can be maintained, the full frank and healthy expression of opinion which is essential for the successful administration of Government would be muted.

I have determined, therefore, that it would not be in the public interest to provide to the Congress the basic planning data on military assistance as requested by the Chairman. . . .[92]

AID Information Concerning Foreign Assistance to Cambodia

On March 15, 1972, the President directed the Secretary of State to withhold from the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee the Agency for International Development (AID) country field submissions for Cambodian foreign assistance for fiscal year 1973.[93]

USIA Memoranda

On the same date the President instructed the Director of the United States Information Agency (USIA) to decline to provide to the Senate Foreign Relations Committee all USIA country program memoranda.[94]

Watergate

President Nixon, asserting executive privilege during 1973 and 1974, refused to provide to the Senate Select Committee on Presidential Campaign Activities (Watergate Committee) and to the House Judiciary Committee various tape recordings of conversations involving the President, and other materials relating to the involvement of 25 named individuals in criminal activities connected with the 1972 presidential election.[95]

26. Carter Administration

Department of Energy Gas Conservation Fee Documents

In April 1980 the Subcommittee on Environment, Energy and Natural Resources of the House Committee on Government Operations subpoenaed docu-

[92] *Id* at 46.

[93] 118 Cong. Rec 8694 (1972); Lawton Memorandum, *supra*.

[94] *Id*.

[95] *See* J. Hamilton, The Power to Probe 23–26, 65 (1976); Cox, *Executive Privilege*, 122 U. Pa. L Rev 1383, 1420 (1974) Although the tape recordings were eventually turned over to the House Judiciary Committee, the President's refusal to make those same tapes available to the Senate Watergate Committee was unanimously affirmed by the U.S. Court of Appeals for the District of Columbia Circuit *Senate Select Committee* v. *Nixon*, 498 F.2d 725 (1974) (*en banc*) President Nixon's refusal to disclose Watergate-related tapes and documents in response to a subpoena in a criminal case is beyond the scope of this memorandum *See generally United States* v *Nixon*, 418 U.S. 683 (1974)

ments reflecting intra-Executive Branch deliberations concerning the President's decision to impose a conservation fee on imports of crude oil and gasoline.[96] For several weeks representatives of the Executive Branch negotiated with the Subcommittee about releasing the documents. On April 25, 1980, Secretary of Energy Duncan informed the Subcommittee that "the President has instructed me to pursue all reasonable grounds of accommodation. If there are no further reasonable avenues of negotiation, the President has instructed me to assert a privilege with respect to these documents."[97] Ultimately, some but not all of the documents were given to the Subcommittee, which tacitly withdrew its request for documents that reflected deliberations directly involving the Executive Office of the President.[98]

27. Reagan Administration

Secretary Watt's Implementation of the Mineral Lands Leasing Act

On October 2, 1981, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce served a subpoena on Secretary of the Interior James Watt for all documents relative to his determination of Canadian reciprocity under the Mineral Lands Leasing Act, 30 U.S.C. § 181. Among the material covered by the subpoena were a number of Cabinet-level predecisional deliberative documents, while other documents contained classified, diplomatic information. On October 13, 1981, President Reagan directed Secretary Watt not to release 31 particular documents whose disclosure would be inconsistent with the confidential relationship among Cabinet officers and the President, and which would violate the constitutional doctrine of separation of powers. While protecting the confidentiality of these documents, Secretary Watt made repeated efforts to accommodate the Subcommittee's needs through certain limited document disclosures, testimony, and correspondence.

On February 8, 1982, a contempt resolution against Secretary Watt was passed by the Subcommittee; on February 25 the full Committee supported this conclusion by a vote of 23 to 19. By this time, however, Secretary Watt had reached a decision finding Canada to be a "reciprocal" national under the Mineral Lands Leasing Act. Immediately thereafter he informed all members of the Subcommittee that since the deliberative process had concluded, he was "hopeful" that additional documents might be released.

On March 16, 1982, Fred F. Fielding, Counsel to the President, together with members of the Subcommittee, reached an agreement pursuant to which all of the disputed documents were made available for one day at Congress under the

[96] Proclamation No 4744, 16 Weekly Comp. Pres. Doc. 592 (1980).
[97] Memorandum for the Attorney General, from Assistant Attorney General John Harmon, 6 (Jan. 13, 1981).
[98] *Id.* at 8.

custody of a representative from the Office of Counsel to the President. Minimal notetaking, but no photocopying, was permitted; the documents were available for examination by Members Only.[99]

THEODORE B. OLSON
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Office of Legal Counsel

[99] *See generally* H.R. Rep. No. 898, 97th Cong., 2d Sess. 73–84 (1982); *Contempt of Congress. Hearings Before the Subcomm. on Oversight and Investigations of the House Comm on Energy and Commerce*, 97th Cong., 2d Sess. (1982)

History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress

PART II—Invocations of Executive Privilege by Executive Officials

January 27, 1983

MEMORANDUM FOR THE ATTORNEY GENERAL

This memorandum sets forth examples of two separate but related categories of refusals by officials within the Executive Branch to disclose information or produce documents requested by Congress. The first category, addressed in Section I of this memorandum, comprises instances of refusals by Attorneys General, or other officials in the Department of Justice acting under the Attorney General's authority. Included within this category are general statements by Attorneys General regarding the authority of Executive Branch agencies to withhold information from Congress, as well as instances in which other Executive Branch agencies have withheld information pursuant to the Attorney General's express advice. Section II of this memorandum provides examples of a "separate class"[1] of refusals to provide information, specifically, incidents in which officers of the Executive Branch and the independent agencies have declined to provide information to Congress relating to law enforcement, security, or personnel investigations.

The material contained in this and our December 14, 1982, memorandum,[2] when taken together, demonstrates convincingly that throughout this nation's history, the Chief Executive and those who assist him in "tak[ing] care that the laws be faithfully executed," have on certain occasions exercised their constitutional obligation to refrain from sharing with the Legislative Branch information the confidentiality of which was vital to the proper constitutional functioning of the Executive Branch. As Attorney General, and later Supreme Court Justice, Robert Jackson stated in 1941:

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[1] Cox, *Executive Privilege*, 122 U Pa. L. Rev. 1383, 1402 (1974).

[2] This memorandum is a supplement to Memorandum for the Attorney General, "Presidential Invocations of Executive Privilege Vis-a-Vis Congress," from Assistant Attorney General Theodore B. Olson, Office of Legal Counsel (Dec. 14, 1982), hereafter "December 14, 1982, Memorandum." [*See* Part I, p. 751, *supra*.]

> Since the beginning of the Government, the executive branch has from time to time been confronted with the unpleasant duty of declining to furnish to the Congress . . . information which it has acquired and which is necessary to it in the administration of statutes.[3]

This general principle is neither new nor novel, and represents no departure from past practice; to the contrary, the assertion of such responsibility has been a consistent theme throughout our constitutional existence. Moreover, while the Executive's position at times has been resisted by Congress with varying levels of intensity, based partially on partisan political considerations, members of the Legislative Branch have often respected and supported the prerogatives of the Executive in this regard.[4]

Because this memorandum is intended to be read as a supplement to our memorandum entitled "Presidential Invocations of Executive Privilege Vis-a-Vis Congress," *supra,* note 2, it does not include instances of presidential or presidentially authorized withholdings involving the Attorney General or the Department of Justice except when a significant statement by the Attorney General, independent of that made by the President, is involved. Nor does it discuss in detail instances in which law enforcement files were withheld by the President or pursuant to his express direction; such instances are noted, however, with a reference to our December 14, 1982, Memorandum.

While the fundamental principles and rationales underlying the incidents described here are identical to the principles and rationales underlying formal, presidential invocations of executive privilege to protect sensitive information within the Executive Branch, these examples do not represent, in and of them-

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[3] 40 Op. Att'y Gen. 45, 48 (1941)

[4] Members of Congress in both Houses have on various occasions recognized the authority of Executive Branch officers to withhold from Congress sensitive investigative materials. For example, in 1906 the Senate was considering a resolution requesting information from the President concerning the dismissal of three companies of "colored" Army troops from military service During the debate, Senator John Spooner of Wisconsin raised certain objections to the form of the resolution In his remarks on the power of the Executive to withhold information, Senator Spooner gave the following examples of appropriate executive restrictions on disclosures to Congress:

> The Department of Justice would not be expected to transmit to either House the result of its investigations upon which someone had been indicted, and lay bare to the defendant the case of the Government The confidential investigations in various departments of the Government should be, and have always been, treated by both Houses as confidential, and the President is entirely at liberty to permit by the Cabinet officer to whom the inquiry is addressed as much or as little information regarding them as he might see fit.

3 Hinds' Precedents § 1904, at 197 (1907).

Also, in 1948 six Members of the House, all Democrats and including then Minority Whip John W. McCormack of Massachusetts, stated as follows with regard to the Attorney General's refusal to disclose Federal Bureau of Investigation (FBI) investigative files regarding paroles of four federal prisoners, *see generally* pp 790–91 *infra*

> I think the Attorney General is entirely justified in his refusal to make the actual FBI reports available to the subcommittee Investigative reports almost inevitably contain much confidential information relative to the identity of informants They frequently contain material which must in the interest of a successful criminal prosecution be kept confidential until the very moment it is required at the trial. The effectiveness and efficiency of the FBI would be greatly impaired if its reports were to be made available to any congressional committee which asked for them. Nor do I believe that the consent of the Speaker or of the President of the Senate would obviate these difficulties. I may refer in this respect to the authoritative opinion of Attorney General Jackson . . [referring to the Opinion of Robert Jackson cited at n.3, *supra*]

H.R Rep No 1595, 80th Cong , 2d Sess. 11 (1948) (Minority Report).

selves, formal invocations of executive privilege.[5] Rather, they exemplify efforts by executive officers to protect the integrity of their files by communicating their concerns to Congress *before* resorting to a formal, presidential assertion of privilege.

The following examples are not intended to be representative of the day-to-day relationship between the Executive Branch and Congress concerning disclosure of information. Many commentators have observed that, as a rule, Congress receives most of the information it seeks, largely because "the several departments and agencies strive to be on good terms with the committees in charge of their appropriations and their legislative programs."[6] Nor does this enumeration constitute a comprehensive listing of every refusal by an executive officer to disclose confidential material to Congress;[7] the compilation of such a list would be an impossible[8]—and largely useless—task to undertake. This memorandum

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[5] As the doctrine is currently implemented, executive privilege may be formally invoked to prevent disclosures to Congress only by the President personally. Absent such formal invocation, executive officers are obliged to comply with all congressional requests for information in a manner consistent with their duty to execute the law. *See, e.g.*, President Reagan's Memorandum for the Heads of Executive Departments and Agencies. Procedures Governing Responses to Congressional Requests for Information (Nov 4, 1982)

[6] Kramer & Marcuse, *Executive Privilege: A Study of the Period 1953–1960*, 29 Geo. Wash. L Rev. 623, 627 (1961) *See also id.* at 897–98; Bishop, *The Executive's Right of Privacy An Unresolved Constitutional Question*, 66 Yale L.J. 477, 486, 488 (1957); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. Pitt. L Rev. 755, 770 (1959). For example, in response to a congressional inquiry, the Department of Defense revealed that between May 17, 1954 and May 27, 1957 approximately 300,000 requests for information had been received from Congress by the Department and the military services Of those inquiries, only 13 were known by the Department to have been formally denied *Freedom of Information and Secrecy in Government: Hearings on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess 385–87 (1958) [hereinafter cited as *1958 Hearings*] (noting, however, that because no records are maintained by the Department specifically recording denials of congressional requests for information, there may have been additional refusals).

[7] In addition to the Dec 14, 1982, Memorandum, *supra*, there are a number of studies which catalogue both formal invocations of executive privilege by Presidents and refusals by other executive officers to disclose information to Congress. They vary widely in scope, accuracy, and completeness *See, e.g.*, Study Prepared by the Government and General Research Division, Library of Congress, The Present Limits of "Executive Privilege," *reprinted in* 119 Cong Rec. 10079 (1973) (listing examples from the period 1960–1972); American Law Division, Library of Congress, Selected Cases in Which Information Has Been Withheld from Congress by the Executive Department, *reprinted in 1958 Hearings, supra*, at 428–46 (covering the period 1789–1956); Memorandum on the Exercise of Executive Privilege, 1956–72, Response to Congressional Inquiry by Deputy Assistant Attorney General Mary C Lawton (Apr. 25, 1973), *reprinted in Availability of Information to Congress· Hearings on H.R. 4938, H.R. 5983 and H R. 6438 Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong , 1st Sess. 117–20 (1973); Kramer & Marcuse, *supra*, 29 Geo. Wash. L. Rev. 629, 827, Memorandum Reviewing Inquiries by the Legislative Branch During the Period 1948–1953, Concerning the Decisionmaking Process and Documents of the Executive Branch (unpublished, anonymous Department of Justice document) (hereafter Department of Justice Study), Department of Justice study, submitted to the Committee by Deputy Attorney General Rogers, Is a Congressional Committee Entitled to Demand and Receive Information and Papers From the President and the Heads of Departments Which They Deem Confidential, in the Public Interest?, *reprinted in 1958 Hearings, supra*, at 63–146 (hereafter Rogers Memorandum) (covering period from Founders through 1957)

[8] There are countless examples among the boards, agencies, and departments of the Executive Branch wherein congressional staff, Members of Congress, or congressional committees have informally requested information or documents But, as one commentator has noted:

> The actual extent and degree to which the Executive branch responds to [these] congressional requests for information and documents are buried in the files of the several departments, agencies, and congressional committees As a practical matter, it is impossible to sift those records in order to extract from them the portions relating to congressional demands for information and the answers of the Executive pertaining thereto. Only a small part of these inquiries finds its way into the myriad of pages of printed hearings, committee documents and reports, and the Congressional Record. But even here it is virtually impossible to locate them owing to the absence of a proper indexing system.

Kramer & Marcuse, *supra*, at 627.

We know of only one occasion in which a survey has been conducted of the various executive departments'

Continued

instead is designed simply to provide examples of the well-established practice by which executive officers, in carrying out their duty to execute the laws, have declined to provide sensitive material generated within the Executive Branch to Congress.

I. Attorney General and Department of Justice Refusals[9]

1. *1886*

In response to a Senate resolution requesting the Attorney General to transmit to the Senate Committee on the Judiciary copies of all documents and papers filed in the Department of Justice relative to the management and conduct of the Office of the District Attorney (now United States Attorney) for the Southern District of Alabama, Attorney General Garland wrote on January 28, 1886:

> In response to the said resolution the President of the United States directs me to say that the papers which were in this Department relating to the fitness of John D. Burnett, recently nominated to said office, having been already sent to the Judiciary Committee of the Senate, and the papers and documents which are mentioned in the said resolution, and still remaining in the custody of this Department, having exclusive reference to the suspension by the President of George M. Duskin, the late incum-

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compliance with congressional requests for information. On April 2, 1957, Chairman Hennings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary sent letters to the heads of a selected list of executive departments and agencies asking the following questions:

> 1 How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?
>
> 2. If there have been instances when information has been withheld, when did each occur, and what were the circumstances surrounding such occurrences?
>
> 3 On what basis was the information withheld in each instance?

1958 Hearings, supra, at 374. While the answers to Chairman Hennings' letter represent the most complete study concerning the degree to which the Executive Branch as a whole responds to congressional requests for information, the study was limited in scope not only with respect to time—May 1954 through April 1957—but also in terms of the number of agencies polled. In addition, the Hennings study also illustrates the almost insurmountable difficulties in obtaining comprehensive and accurate information on the subject, owing to the inadequacy of records. Typical was the response to Chairman Hennings' letter by Acting Chairman Phillips of the Civil Service Commission:

> The Commission has no way of ascertaining the number of times it has refused information to Congressmen or congressional committees. Our filing system does not lend itself to locating such information. The correspondence file is so voluminous, it would be an insurmountable task to search for such information Inquiries have been made of these [sic] persons in the Commission who would have occasion to entertain a question of refusal, consequently, our answers to your questions are based on memory of such incidents. Undoubtedly, since May 17, 1954, there have been refusals that have escaped the memory of those who were concerned at the time in the determination to furnish the requested information on the specific occasion.

Id. at 378. *See also id.* at 385 (response of the Secretary of Defense) ("no special records are maintained by the Department [of Defense] recording denials of congressional requests for information . . "). *See generally* Kramer & Marcuse, *supra*, at 637 (extensive analysis of Hennings study).

Notwithstanding these limitations, this memorandum has relied heavily upon the Hennings study and other similar compilations in its effort to document typical instances of executive withholding. *See generally* note 7, *supra* These materials do not provide an adequate basis for obtaining comprehensive or statistically representative examples of executive withholding in the various Administrations

[9] Although there may well have been instances of refusals by the Attorney General or Department of Justice officials earlier than 1886, such instances have not been well documented. The lack of records regarding incidents prior to this period can be accounted for, in part, by the fact that earlier demands and refusals were handled directly by the President, *see generally* our Dec. 14, 1982, Memorandum, and the fact that the executive departments, including the Department of Justice, were not, for the most part, established until the 1870s

> bent of the office of district attorney of the United States for the southern district of Alabama, it is not considered that the public interest will be promoted by a compliance with said resolution and the transmission of the papers and documents therein mentioned to the Senate in executive session.[10]

On February 18, 1886, the Committee on the Judiciary reported a resolution condemning the refusal of the Attorney General to transmit the documents. On March 1, 1886, President Cleveland sent a message to the Senate stating that the requested papers were withheld at his direction because they contained information addressed to him and to the Attorney General by private citizens concerning the former District Attorney, and that the documents related to an act (the suspension and removal of an Executive Branch official) which was a function exclusively within the discretion of the Executive.[11]

2. *1904*

On April 27, 1904, Attorney General Knox sent a letter to the Speaker of the House declining to comply with a resolution of the House requesting him, "if not incompatible with the public interest," to inform the House whether any criminal prosecutions had been instituted against individuals involved in the Northern Securities antitrust case, "and to send to the House all papers and documents and other information bearing upon any prosecutions inaugurated or about to be inaugurated in that behalf."[12] The Attorney General responded that no prosecutions had been initiated and that "further than this, I do not deem it compatible with the public interest to comply with the resolution."[13]

3. *1908*

In response to a request to transmit, if not incompatible with the public interest, documents and information in the possession of the Department of Justice concerning the International Paper Co. and other corporations engaged in the manufacture of woodpulp or print paper, Attorney General Bonaparte replied on April 13, 1908, that no evidence had been obtained sufficient to justify the institution of legal proceedings, either civil or criminal, against any alleged combination of woodpulp or print paper manufacturers but that a further investigation was in progress. He added that "[i]t would be inexpedient at the present stage of this investigation to disclose to the public specifically what steps have been taken, or what action is contemplated, by this Department with respect to matters mentioned in the said resolution."[14]

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[10] S. Misc. Doc. 68, 52d Cong., 2d Sess. 236 (1893).

[11] *Id.* at 233, 262–63. *See also* 8 J Richardson, Messages and Papers of the Presidents 375 (1896); December 14, 1982, Memorandum, *supra*, at 23.

[12] 38 Cong. Rec. 5636 (1904). The phrase, "if not incompatible with the public interest," and other, similar phrases have often been embodied in congressional requests for information from the Executive. For a discussion of the origin and use of these congressional formulations, *see generally* Dec. 14, 1982, Memorandum, *supra*, at n.15; 3 Hinds' Precedents, *supra*, §§ 1856, 1896; Cox, *supra*, 122 U. Pa L. Rev. at 1397 and n.55.

[13] H. Doc. No. 704, 58th Cong., 2d Sess. (1904). This refusal was cited by Attorney General Robert Jackson as historical precedent for his opinion at 40 Op. Att'y Gen. 45, 47 (1941), *see infra*, 788–89

[14] H Doc. No. 860, 60th Cong., 1st Sess 1–2 (1908); 42 Cong. Rec. 4512 (1908) *See also* 40 Op. Att'y Gen., *supra*, at 47.

4. *1909*

In response to a January 4, 1909, Senate resolution requesting Attorney General Bonaparte to inform it whether legal proceedings had been instituted against the United States Steel Corporation (U.S. Steel) by reason of its absorption of the Tennessee Coal & Iron Company, and, further, to provide any Attorney General opinions written on the subject, President Roosevelt replied on January 6 that he, as the Chief Executive, was responsible for the matter, and that Attorney General Bonaparte had advised him that there were insufficient grounds for instituting legal action against U.S. Steel, and that he had instructed the Attorney General "not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction . . . because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action."[15] Thereafter, the Senate Committee on the Judiciary subpoenaed the Commissioner of Corporations to produce all papers and documents in his possession regarding U.S. Steel. The Attorney General advised the Commissioner that the discretion to make the documents public was vested in the President, and that he should therefore call the request to the attention of the President, submit to him the relevant documents and obtain his instructions as to what part of the data, if any, was "suitable for publication by disclosure to the subcommittee of the Senate."[16]

5. *1912*

On March 18, 1912, Attorney General Wickersham sent a letter to the Speaker of the House declining to comply with a House resolution directing the Attorney General to furnish to the House information concerning the Department of Justice's investigations of the Smelter Trust.[17]

6. *1912*

On March 19, 1912, in response to a Senate resolution requesting the Attorney General to provide it with all correspondence, information, and reports of the Bureau of Corporations relative to the "Harvester Trust," Attorney General Wickersham responded that he was directed by the President to say that it was "not compatible with the public interests" to provide the information at that time because the matters "pertain[ed] entirely to business which is now pending and uncompleted in this department."[18]

7. *1912*

In response to a House resolution demanding that the Comptroller of the Currency provide the House Committee on Banking and Currency with data relative to the operation of national banks, Attorney General Wickersham sent an

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[15] 43 Cong Rec. 528 (1909).
[16] 27 Op Att'y Gen. 150, 156 (1909). *See also* Dec. 14, 1982, Memorandum, *supra*.
[17] *See* 40 Op Att'y Gen., *supra*, at 47.
[18] S Doc. No. 454, 62d Cong., 2d Sess. 1 (1912)

opinion to the President on November 9, 1912, stating that the President, to whom the Comptroller had referred the request, could provide the Committee with the information if, in his opinion, it was proper to do so. The opinion further stated that:

> Nowhere in the law is there any express provision that the information thus acquired by the Comptroller shall be confidential. While, if in your opinion, the interests of the Government require that this information shall be so treated, you have the right to refuse to divulge it, yet, I am clearly of the view that if, in your opinion, it is proper to give this information to the House committee you have the lawful power to do so.[19]

8. *1914*

On August 28, 1914, Attorney General McReynolds sent a letter to the Secretary to the President stating that it would be incompatible with the public interest to send to the Senate, in response to its resolution, reports made to the Attorney General by his associates regarding violations of law by the Standard Oil Co.[20]

9. *1915*

On February 23, 1915, Attorney General Gregory sent a letter to the President of the Senate declining to comply with a Senate resolution requesting him to report to the Senate his findings and conclusions of the investigations conducted by the Department of Justice "in the matter of illegal combinations in restraint of trade in the smelting industry, commonly called the Smelting Trust," on the ground that to do so would be incompatible with the public interest.[21]

10. *1926*

On June 8, 1926, Attorney General Sargent sent a letter to the Chairman of the House Committee on the Judiciary declining to comply with his request to turn over to the Committee all papers in the Department's files relating to the merger of certain oil companies.[22]

11. *1941*

In response to a request from the House Committee on Naval Affairs to furnish all Federal Bureau of Investigation (FBI) reports since June 1939, and all future reports, memoranda, and correspondence of the FBI or the Department of Justice in connection with investigations arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial

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[19] 29 Op. Att'y Gen. 555, 560 (1912) (citations omitted).
[20] *See* 40 Op. Att'y Gen , *supra*, at 47.
[21] *See* 52 Cong. Rec. 4089, 4908–09 (1915); *see also* 40 Op Att'y Gen., *supra*, at 48.
[22] *See* 40 Op Att'y Gen., *supra*, at 48.

establishments which had naval contracts, Attorney General Robert Jackson declined, writing on April 30, 1941:

> 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.[123]

The Attorney General pointed to the following injurious results which would follow disclosure of the reports: (1) disclosure would seriously prejudice law enforcement; (2) disclosure at that particular time would have prejudiced the national defense; (3) disclosure would seriously prejudice the future usefulness of the Federal Bureau of Investigation, in that the "keeping of faith" with confidential informants was an indispensable condition of future efficiency; (4) disclosure might also result in the grossest kind of injustice to innocent individuals, because the reports included leads and suspicions, sometimes those of malicious or misinformed people, which had not been verified. In addition, he noted that the number of requests alone for FBI records by congressional committees would have made compliance impracticable, particularly since many of the requests were comprehensive in character.

The opinion of the Attorney General was in accord with the conclusions which had been reached by a long line of predecessors, and with the position taken by Presidents since Washington's Administration. He concluded by stating that the exercise of this discretion in the Executive Branch had been upheld and respected by the judiciary.

12. *1944*

The House Select Committee to Investigate the Federal Communications Commission subpoenaed the Director of the Federal Bureau of Investigation to testify concerning fingerprint records, activities at Pearl Harbor, and also to identify a certain document which he was alleged to have received in the course of his duties. The Select Committee had been empowered by a House resolution to investigate whether the Commission had been acting in accordance with law and the public interest.[24] The Director refused to give testimony regarding the letter that he was alleged to have received, or to exhibit a copy of the President's directive requiring him, in the interest of national security, to refrain from testifying or disclosing the contents of the Bureau's files. Attorney General Biddle wrote a letter to the Committee, dated January 22, 1944, informing the Committee that communications between the President and the heads of depart-

[23] *Id.* at 46. *See also* Dec. 14, 1982, Memorandum, *supra*.
[24] *See* Rogers Memorandum, *supra*, at 97

ments were privileged and not subject to inquiry by congressional committees, stating:

> I have carefully considered the request . . . that I produce before your committee a copy of the document that I received from the President directing Mr. Hoover not to testify before your committee about certain transactions between this Department and the Federal Communications Commission.
>
> It is my view that as a matter of law and of long-established constitutional practice, communications between the President and the Attorney General are confidential and privileged and not subject to inquiry by a committee of one of the Houses of Congress. In this instance, it seems to me that the privilege should not be waived; to do so would be to establish an unfortunate precedent, inconsistent with the position taken by my predecessors.
>
> It could, moreover, open the door to detailed inquiries into the confidential and privileged relationship that exists between the President and the Attorney General, heretofore generally recognized by the Congress. I must therefore respectfully decline to produce before your committee the President's communication. Without waiving in any way the privilege, however, I believe that I can inform the committee that the President's direction states that because the transactions relate to the internal security of the country, it would not be in the public interest, at the present time, for Mr. Hoover or any officer of the Department to testify about them or to disclose any correspondence concerning them.
>
> Furthermore, I should like to point out that a number of . . . questions related to the methods and results of investigations carried on by the Federal Bureau of Investigation. The Department of Justice has consistently taken the position, long acquiesced in by the Congress, that it is not in the public interest to have these matters publicly disclosed. Even in the absence of instructions from the President, therefore, I should have directed Mr. Hoover to refuse to answer these questions.[25]

13. *1947*

During the course of an investigation by a subcommittee of the House Committee on Expenditures in the Executive Departments into the operation of the United States Board of Parole in 1947–48, the subcommittee, on September 30, 1947, requested Director Hoover of the Federal Bureau of Investigation, to have a representative of the FBI bring to a hearing the investigative files of four parolees

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[25] *See Study and Investigation of the Federal Communications Commission: Hearings on H. Res 21 Before the House Select Comm. to Investigate the Federal Communications Commission*, 78th Cong , 1st Sess. 2338–39 (1944) *See also* Dec. 14, 1982, Memorandum, *supra*

alleged to be members of the "Capone Mob." Hoover replied that he was forwarding the request to Attorney General Clark to whom the subcommittee reiterated the request.[26] Assistant Attorney General Ford replied on the Attorney General's behalf that the Department would contact the subcommittee after the completion of the FBI investigation. A further reply, by Acting Attorney General Perlman, dated October 15, 1947, stated:

> The substance of your letter is a request that the reports of investigating agencies of the executive departments be made available to your committee. Such reports have long been held to be of a confidential nature.
>
> . . . I feel certain that you can readily see the reasons why we cannot turn over to your committee [the] investigative reports or files you seek . . . .[27]

The subcommittee then sought to reassure the Department that it did not intend at that time to seek "any information as to the confidential sources from which the information was obtained," to which the Department replied that the investigation was not yet complete and referred to the previous letters, again refusing the files. However, the Department did offer summaries of reports and information contained in the file for the subcommittee's confidential use.[28]

14. *1948*

The Investigations Subcommittee of the Committee on Expenditures in the Executive Departments requested Attorney General Clark, by letter of August 2, 1948, to furnish the Subcommittee with "any letters, memoranda, or other written notice which the Department of Justice may have furnished to any other departments, agencies, bureaus, or individuals in Government concerning William W. Remington . . . ." The letter stated that the Subcommittee desired the information in order to determine the extent to which other departments within the Executive Branch had been notified of "the possible espionage activities of Remington" so that the Subcommittee would then "be in a position to inquire as to who was responsible for allowing Remington to hold three important jobs of a highly confidential nature, at the same time [that the Department was] conducting an investigation of him."[29]

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[26] The Seventeenth Intermediate Report of the Committee on Expenditures in the Executive Departments reported on August 6, 1948, that:

> The FBI refused to give the committee any information, assigning as its reason that it was an agency of the Department of Justice and that, acting under instructions from the Department, it could not and would not comply with the request
>
> A request to Tom Clark, head of the Department of Justice, and to the Department of Justice met with a refusal to furnish such information No reason was given other than that the information was confidential and that the refusal was in compliance with an Executive order issued by President Truman, which was based on a long-established policy of the executive departments dating back to the administration of President Washington.

H.R. Rep. No. 2441, 80th Cong., 2d Sess 7 (1948)

[27] *Investigation as to the Manner in Which the United States Board of Parole is Operating and as to Whether There is a Necessity for a Change in Either the Procedure or Basic Law: Hearings Before a Subcomm. of the House Comm. on Expenditures in the Executive Departments*, 80th Cong., 2d Sess 595 (1948).

[28] *Id.* at 594–96. *See also* H.R. Rep No 2441, 80th Cong , 2d Sess 7, 21–23 (1948)

[29] *Export Policy and Loyalty: Hearings on S Res. 189 Before the Investigations Subcomm. of the Senate Comm. on Expenditures in the Executive Departments*, 80th Cong , 2d Sess. 383 (1948).

In his reply of August 5, Attorney General Clark refused to supply the material on the ground that it fell within President Truman's directive of March 13, 1948,[30] and stated that the request had been referred to the Office of the President. A subsequent committee report states that, in addition to the Truman directive, the Attorney General's refusal to supply the information was based on the need to protect . . . information relative to procedures employed by the Department of Justice in the handling of alleged espionage within the Government."[31]

15. *1949*

On June 1, 1949, Attorney General Clark failed to comply with a subpoena served upon him by the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary that directed him to produce the files of the Department of Justice in the cases of 168 persons named in the subpoena. In refusing to comply, the Attorney General stated that the persons listed were, for the most part, officials or employees of the United Nations or of foreign governments; that the treatment of persons in that category implicated both sensitive foreign relations considerations and the maintenance of internal security; and that he had conferred with the Director of the FBI and had concluded "'that it is not in the public interest that [this information] be produced.'" The Attorney General further noted that it had been reported in the press that the Subcommittee Chairman intended to "'release certain confidential information contained in [his] files relating to internal security matters.'" The Attorney General urged that before "'such information is made public the matter be cleared with this Department.'" The letter closed by noting that the President had directed the Attorney General to decline to provide this information.[32]

16. *1950*

On February 22, 1950, the Senate adopted Resolution 231 directing a subcommittee of the Senate Committee on Foreign Relations, chaired by Senator Tydings, to investigate allegations of disloyalty among Department of State employees, and "'to procure, by subpoena, and examine the complete loyalty and employment files and records of all the Government employees in the Department of State and such other agencies against whom charges have been heard.'"[33]

On March 17, 1950, Attorney General McGrath prepared a memorandum prompted by the Department of State's request for permission to reveal to the subcommittee the contents of the investigative files concerning those employees

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[30] *Id.* at 384. The Mar. 13, 1948, directive issued by President Truman provided for the confidentiality of all loyalty files by requiring that all requests for such files from sources outside the Executive Branch be referred to the Office of the President for such responses as the President might determine to be appropriate. 13 Fed Reg. 1359 (1948). *See* The Public Papers of the Presidents, Harry S Truman, 1948, at 228; Dec. 14, 1982, Memorandum.

[31] S Rep. No. 1775, 80th Cong , 2d Sess. 20 (1948).

[32] Department of Justice Study, *supra*, at 12–13.

[33] *See* Department of Justice Study, *supra*, at 16. Although this episode is covered in the December 14, 1982, Memorandum, portions of it are recounted in this memorandum to highlight the roles of the Attorney General and the Director of the FBI

against whom Senator McCarthy had made allegations of disloyalty, advising President Truman that, in light of the President's unquestioned authority to withhold the files, the only question was whether, as a matter of policy, he deemed it advisable to make the files available. Referring to the President's March 13, 1948, directive,[34] Attorney General McGrath advised the President that unless there were special reasons which compelled a different course, the confidential nature of the loyalty files should be preserved, and that to do otherwise would create an unfortunate precedent. Attorney General McGrath did suggest, however, that the President could attempt to accommodate the subcommittee's interests by transmitting the files to the Loyalty Review Board with a request that the Board review the files and report its findings with respect to each person against whom charges had been brought, in the light of the factual evidence which had been adduced, primarily by Senator McCarthy, before the subcommittee.[35]

On March 27, 1950, the Director of the Federal Bureau of Investigation and the Attorney General appeared before the subcommittee to give their respective views. The Director's statement dealt with practical objections, while the Attorney General's statement dealt with the historic objections voiced by past Presidents to the disclosure of investigative files. The Attorney General pointed out that since the Department of State loyalty files chiefly involved investigations that had been conducted by the Federal Bureau of Investigation, the "loyalty files, therefore, are for all practical purposes FBI files."[36] The Director's statement stressed the FBI's obligation to protect not only the rights, lives, and property of American citizens, but also to protect the confidential relationship of citizens who serve their country by providing information essential to the national security:

> FBI reports set forth all details secured from a witness. If those details were disclosed, they could become subject to misinterpretation, they could be quoted out of context, or they could be used to thwart truth, distort half truths, and misrepresent facts. The raw material, the allegations, the details of associations and compilation of information in FBI files must be considered as a whole. They are of value to an investigator in the discharge of his duty. These files were never intended to be used in any other manner and the public interest would not be served by the disclosure of their contents.
>
> In taking this stand, I want to reiterate—a principle is involved. I would take this same stand before the Attorney General, as I already have, or before any other body. The fact that I have great respect, confidence, and a desire to be of assistance to a commit-

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[34] *See* n.30, *supra*.

[35] *Id.* at 13–14.

[36] *Id.* at 15, citing to the Attorney General's statement before the Subcommittee of the Senate Committee on Foreign Relations at 9 (Mar. 27, 1950).

tee of distinguished Senators, however, in no way detracts from a principle. I say this because I do not want any misinterpretation of my remarks, nor do I want it said that this and other committees of Congress do not have my respect and confidence. I would be derelict to my duty, untrue to my conscience, and unworthy of my trust to take any other position.[37]

On March 28, 1950, the subcommittee served subpoenas on the Secretary of State, the Attorney General, and the Chairman of the Civil Service Commission demanding production of the files. After reference of the subpoenas to the President pursuant to the March 13, 1948, directive, President Truman directed the officials not to comply.[38]

President Truman also wrote to Senator Tydings of the subcommittee on March 28 and reiterated Director Hoover's objections to public disclosure of the FBI reports, stating that the single most important factor in an effective and just loyalty program was the preservation of all files in the strictest confidence, from the points of view of informants as well as innocent individuals. The President closed his letter by stating that in order to give the most thorough and complete investigation of the charges that the subcommittee was considering, he had asked the Chairman of the Loyalty Review Board to have the Board arrange for a detailed review of all cases with regard to which charges of disloyalty had been made. The President further stated that he had asked the Board, after such review, to give him a full and complete report on each case.[39]

Following these events, it appeared that the files had already been disclosed. In 1947, prior to the March 13, 1948, Truman directive, the House Committee on Appropriations had conducted an investigation of the Department of State and had been furnished with the files that were presently sought by the Senate Foreign Relations Subcommittee. In light of this newly discovered fact, President Truman, on May 4, 1950, agreed to make the loyalty files available for review by the subcommittee "on the theory that to do so would not establish a precedent for subsequent exceptions in violation of [the] March 13, 1948, directive."[40] The conditions under which the subcommittee was permitted to see the files included the limitations that no individual cases by name would be discussed outside of the room in the White House where the files were to be viewed, no notes were to be taken from the White House, and no technical assistance by career FBI personnel would be provided to assist in the interpretation of notes found in the files.[41]

17. *1952*

On March 4, 1952, Assistant Attorney General Duggan wrote to the Chairman of the Special Subcommittee of the House Committee on the Judiciary, in response to a letter dated February 22, 1952, requesting information from the

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[37] Department of Justice Study, *supra*, at 16.
[38] The Public Papers of the Presidents, Harry S Truman, 1950, at 240
[39] Department of Justice Study, *supra*, at 15.
[40] S. Rep. No. 2108, 81st Cong., 2d Sess. 9 (1950)
[41] Department of Justice Study, *supra*, at 32.

Attorney General "'for the purpose of conducting an inquiry into the administration of the Department of Justice.'" The Subcommittee sought a list of all cases that had been referred to the Department of Justice or United States Attorneys, for either criminal or civil action, by any governmental department or agency within the last six years. The information sought was:

> (a) A list of all cases in which action had been declined by the Department of Justice, including the reasons for refusal to act;
> (b) A statement showing all subsequent actions taken by the Department of Justice in cases in which the Department had returned a case to a government department or agency for further information; and
> (c) A list of cases in which a referral to the Department of Justice had been pending for more than one year, other than the two categories mentioned.[42]

Mr. Duggan responded that the request was outside the scope of the resolution, since it did not seek information based upon specific complaints "supported by credible evidence," and that the request would impose an intolerable burden upon the Department, since it would require an examination of approximately 500,000 cases and thus would effectively paralyze "the Department's efforts to discharge its current duties." Mr. Duggan added that the Department was prepared to honor all reasonable requests with respect to cases in which specific allegations were supported by credible evidence, unless the public interest required otherwise.

On March 5, 1952, Mr. Duggan advised 54 executive agencies, boards, and commissions that he had advised the Subcommittee of his decision not to comply with its request, citing as his reason the fact that "it constitutes what Mr. Justice Holmes has characterized as a 'fishing expedition for the chance that something discreditable might turn up.'"[43]

18. *1952*

On April 22, 1952, Acting Attorney General Perlman wrote the Chief Counsel of the House Subcommittee to Investigate the Department of Justice, in response to five letters sent by the Subcommittee in April 1952 for inspection of Department of Justice files, reiterating the agreement which he and the Subcommittee had reached regarding the production of additional Department of Justice files in aid of the Subcommittee's investigation. That agreement provided for the following:

> 1. Requests involving open cases, either civil or criminal, would not be honored; however, a written or oral status report on the cases would be furnished.

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[42] *See* Department of Justice Study, *supra*, at 44-46, The Public Papers of the Presidents, Harry S Truman, 1952-53, at 199. President Truman's response to this request is reported in the December 14, 1982, Memorandum, *supra*

[43] Department of Justice Study, *supra*, at 46

2. As to closed cases—cases in which the Department had completed prosecution or consideration without suit—the files would be made available.

3. As to all files made available, Mr. Perlman emphasized that the Department would "withhold from inspection all FBI reports and confidential information, reports of any other investigative agencies, and any other documents containing the names of informers or other data, the disclosure of which would be detrimental to the public interest."

4. Personnel files would never be disclosed, except in cases where Senate committees were considering nominations made by the President.[44]

19. *1954*

In response to a request by Republican members of the Special Subcommittee on Investigations of the Senate Committee on Government Operations during the Army-McCarthy hearings for more detailed information about a high-level meeting at the White House to which he had referred in his testimony before the full Subcommittee, the counsel to the Army stated that he had been instructed not to testify as to the interchange of views among the officials present at that meeting. In response to a request to submit written authorization for the position that he had taken, the counsel to the Army submitted the May 17, 1954, Eisenhower letter[45] to which was attached a memorandum from Attorney General Brownell. Attorney General Brownell's memorandum listed historical examples of instances in which Presidents had withheld information from Congress and concluded that:

> Thus, you can see that the Presidents of the United States have withheld information of executive departments or agencies whenever it was found that the information sought was confidential or that its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation. The courts, too, have held that the question whether the production of the papers was contrary to the public interest, was a matter for the Executive to determine.
>
> By keeping the lines which separate and divide the three great branches of our Government clearly defined, no one branch has been able to encroach upon the powers of the other.[46]

20. *1955–1956*

In a letter from Chairman O'Mahoney to Chairman Hennings, whose subcommittee was separately conducting a study of Executive Branch refusals to provide information to Senate committees,[47] Chairman O'Mahoney wrote:

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[44] *Id.* at 46–47

[45] *Reprinted in* Dec 14, 1982, Memorandum.

[46] *Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, et al.: Hearings on S Res. 189 Before the Special Subcomm. on Investigations of the Senate Comm. on Government Operations*, 83d Cong , 2d Sess. 1269–75 (1954).

[47] *See generally 1958 Hearings, supra*

> The Department of Justice has declined to furnish to this [S]ubcommittee [on Antitrust and Monopoly] information in its files which was furnished by companies in connection with its voluntary merger clearance program on the ground that information so supplied is confidential.
>
> The Department of Justice has consistently refused to permit the [S]ubcommittee to examine grand-jury transcript[s] and documents obtained pursuant to grand-jury subpena[es] which have not become matters of public record. In accordance with long-standing policy, the Department has refused to permit examination of Federal Bureau of Investigation reports.[48]

21. *1955*

On June 15, 1955, Attorney General Brownell sent an opinion to the President advising him that the Federal Communications Commission could, in its discretion, provide the Senate Committee on Interstate and Foreign Commerce information that the Commission had received on a confidential basis from television stations and networks.[49] However, the Attorney General advised, the authorization to disclose the information did not constitute a requirement that the Commission divulge to the Committee confidential information, and, that the Commission was free to withhold that information in its discretion.

22. *1955*

Within the context of the July 1955 hearings on the Dixon-Yates Contract before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,[50] Attorney General Brownell advised the Chairman of the Securities and Exchange Commission (SEC) that:

> Any communication within the SEC among Commissioners or the Commissioners and employees is privileged and need not be disclosed outside of the Agency. Likewise, any communication from others of the executive branch to members of the Commission or its employees with respect to administrative matters comes within the purview of the President's letter of May 17, 1954.
>
> You inquired specifically whether when a proceeding is pending before the Commission a request to the Commission for an adjournment by someone in the executive branch outside the Commission is likewise covered. Because such a proceeding is quasi-judicial in nature, it is my opinion that such a request would not be covered by the President's letter . . . . Once the proceeding is no longer pending before the Commission such information

[48] *Id.* at 352.
[49] 41 Op. Att'y Gen. 221 (1955)
[50] *See generally* Kramer & Marcuse, *supra*, 29 Geo. Wash. Rev. at 689, Dec. 14, 1982, Memorandum, *supra*.

should, upon request, be made available by the Commission to an appropriate congressional committee.[51]

However, when subsequently questioned about a telephone conversation that he had had with Presidential Assistant Adams, the Chairman of the SEC testified as to the existence of the conversation but, on the advice of Attorney General Brownell and of Special Counsel to the President Morgan, he refused to divulge the matters discussed during the conversation on the ground that they involved privileged information.[52]

23. *1956*

On May 29, 1956, during the course of its investigations into the Antitrust Consent Decree Program at the Department of Justice, the Antitrust Subcommittee of the House Committee on the Judiciary requested the Department to furnish it with "all files in the Department of Justice relating to the negotiations for, and signing of, a consent decree" in the A.T.&T. case.[53] The Department of Justice replied on July 13, 1956:

> The staff of the Antitrust Division has examined in detail this Department's files relating to the negotiations and formulation of that decree. The bulk of these documents fall[s] in[to] two categories: first, material submitted by defendants regarding their operations; and, second, memoranda by various members of the Antitrust Division concerning negotiation conferences as well as decree provisions.
>
> Documents relating to defendants' operations . . . were produced, not pursuant to interrogatories or court order, but rather in the course of good-faith negotiation of a consent settlement. Some touched on confidential aspects of the defendants' operations. Were they made available to your subcommittee, this Department would violate the confidential nature of settlement negotiations and, in the process, discourage defendants, present and future, from entering into such negotiations.
>
> In any event, . . . Department policy does not permit disclosure of staff memoranda or recommendations. As I indicated, the decision whether or not to settle, and if so on what terms, may involve difficult judgments. Reaching these judgments, I am sure you appreciate that men equally devoted to vigorous antitrust enforcement may well differ. To [ensure that] intelligent final decision[s are made] therefore, full and open discussion is re-

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[51] *1958 Hearings, supra,* at 445–46, *citing* The New York Times, July 15, 1955, at 1

[52] *See 1958 Hearings, supra,* at 446

[53] Kramer & Marcuse, *supra,* 29 Geo. Wash. L Rev. at 887. *See Consent Decree Program of the Department of Justice: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 85th Cong , 1st and 2d Sess., (Pts I & II) (1957–58); Report on H. R. Res 27 of the Antitrust Subcomm. of the House Comm. on the Judiciary, 86th Cong., 1st Sess. (1959)

> quired frequently, not only by all members of the staff but also by the staff with the Assistant Attorney General. This process of interchange may endure over some time. And, as a result of discussion, any participant must feel free to alter his views as the merits of argument dictate. This essential process of full and flexible exchange might be seriously endangered were staff members hampered by the knowledge they might at some later date be forced to explain before Congress intermediate positions taken. The responsibility for explaining such decisions thus rests upon the Assistant Attorney General and ultimately upon the Attorney General.[54]

However, the Subcommittee report indicates that the Subcommittee was able to get much of the information that it had requested voluntarily from A.T.&T., the Department of Defense, and the Federal Communications Commission.[55]

24. *1957*

On April 18, 1957, the Antitrust Subcommittee of the House Committee on the Judiciary, again investigating the Department's enforcement efforts in the Consent Decree Program, sought correspondence between the Department and some of the oil pipelines, departmental drafts, and intradepartmental memoranda, including a factual summary of the results of an FBI investigation into compliance with the oil pipeline consent decree. On April 22, 1957, the Department responded that the documents would not be turned over to the Subcommittee because they

> reflect almost completely either staff recommendations or differences in view. Should we decide some court action is called for, releasing those documents . . . could seriously prejudice any resulting litigation. Immediately clear is the disadvantage that would stem from revealing differences in staff views or investigative reports that could form the basis of any action in court.[56]

On July 12, 1957, the Subcommittee requested copies of all written interpretations, and an explanatory statement of each official oral interpretation that had been made, of the various provisions of the judgment, as well as a statement that would summarize the factual results of the FBI investigations which had been instituted to determine compliance with the consent decree. The Department again declined, taking the position that:

> The Department is currently considering possible enforcement steps which involve these interpretations. Many of these so-called interpretations were little more than expressions of opinions as to

[54] *Id* at 887–88
[55] *Id* at 891.
[56] *Id* at 884.

> the position that the Department might take if and when certain events were to occur. All were confined solely to specific individuals and at times unique problems. And the Department might well urge that these prior interpretations had no bearing on any particular enforcement move—contemplated now or in the future. Accordingly, to disclose such interpretations now, I believe, might complicate enforcement of the above judgment.[57]

The FBI summaries were also refused, on the ground that even the summaries would divulge information given to agents in confidence.

During the subsequent hearings on the same subject, Assistant Attorney General Hansen further explained the Department's refusal to provide the Subcommittee with the requested information, noting that because enforcement proceedings were pending, "we should prejudice the possible interests of the Government by disclosing opinions that might be read out of context" and "that such disclosure . . . would be exceedingly embarrassing."[58] Congressman Keating, a member of the Subcommittee, supported the Assistant Attorney General, agreeing that opponents' counsel would be most interested in learning which points of its case the government considered strong and of which aspects it was less confident.[59]

Chairman Celler then told the Assistant Attorney General that some of the information sought by the Subcommitee had already been made available to it from the files of various defendants. In response, the Assistant Attorney General explained that some letters had been sent to defendants containing staff recommendations but that such information was not intended to be shared among defendants, but rather to be used exclusively by the addressees themselves.[60]

25. *1960*

On December 19, 1960, Attorney General William P. Rogers issued an opinion to the President advising him that a construction of a provision of the Mutual Security Act of 1954 that would require funds for the Office of the Inspector General and Comptroller to be cut off for failure to supply documents upon the request of appropriate congressional committees and subcommittees, notwithstanding a certification by the President that he had forbidden the production of the requested documents for certain specified reasons, would render the proviso unconstitutional as a violation of the separation of powers:

> It is axiomatic that no democratic society can exist unless each of its branches makes every effort to disclose to the citizenry and the other branches of the Government those facts which are relevant to an understanding of the problems the society faces, the steps which have been taken to meet them, and the operations of

[57] *Id.* at 885.
[58] *Id*
[59] *Id.*
[60] *Id.* at 885–86.

the branch involved. Public policy therefore requires disclosure wherever possible. Nevertheless, under certain circumstances disclosure must be withheld in the public interest, and the principles expressed above may be summed up and applied as follows:

First, it is the constitutional duty and right of the President and those officials acting pursuant to his instructions, to withhold information of the executive branch from Congress whenever the President determines that it is not in the public interest to disclose such information.

Second, under the constitutional doctrine of separation of powers Congress may not directly encroach upon this authority confided to the President.

Third, the Constitution does not permit any indirect encroachment by Congress upon this authority of the President through resort to conditions attached to appropriations such as are contended to be contained in section 553A(d) of the act.

In my opinion, this condition on the use of appropriations . . . [would] not only be plainly invalid, but if adopted in this case would also constitute a most dangerous precedent to the Office of the President, and would gravely impair the proper functioning and administration of the executive branch of the Government.[61]

26. *1969*

During a House Committee investigation into the My Lai massacre, Congressman Rivers requested "all reports, affidavits, photographs and all other pertinent documents, and material which may have any probitive value" concerning the Army's ongoing investigation into the incident. Thomas Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, gave the Department of Justice's approval of a proposed letter to Congressman Rivers from Secretary of the Army Resor, which explained why this material could not be disclosed. Mr. Kauper stated as follows:

> Over a number of years, a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress with information from open investigational files. Most important, the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressure will influence the course of the investigation. The My Lai investigations clearly represent such a danger.[62]

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[61] 41 Op. Att'y Gen 507, 529–30 (1960) (footnote omitted).

[62] Memorandum for Honorable Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel (Dec 19, 1969), at 2.

27. *1970*

On November 21, 1970, Attorney General Mitchell, with the specific approval of the President, refused to release certain investigative files of the FBI to the Subcommittee on Intergovernmental Relations of the House Committee on Governmental Relations that contained information regarding certain scientists nominated by the President to serve on advisory boards of the Department of Health, Education and Welfare.[63]

28. *1975*

On January 31, 1976, Chairwoman Abzug of the Subcommittee on Government Information and Individual Rights of the House Committee on Government Operations requested interview statements and investigative reports concerning domestic intelligence matters from the open files of the Federal Bureau of Investigation. On February 26, 1976, Deputy Attorney General Harold R. Tyler, Jr., wrote Chairwoman Abzug, explaining why these documents could not be disclosed to the Subcommittee:

> First, the Executive Branch must make a strong effort to protect innocent individuals. Disclosure of investigative files and reports, which often contain hearsay and inaccurate information, could do irreparable damage to the reputation of innocent individuals.
>
> * * * * *
>
> Second, if the Department changes its policy and discloses investigative information, we could do serious damage to the Department's ability to prosecute prospective defendants and to the FBI's ability to detect and investigate violations of federal criminal laws.
>
> * * * * *
>
> Third, the detection, and investigation of violations of federal criminal laws and the prosecution of individuals alleged to have committed such violations are Executive functions. The Attorney General, serving as the President's chief law enforcement officer, is under the same constitutional duty as the President to "take care [that] the laws be faithfully executed." U.S. Const. Art. II, § 3. That duty encompasses the responsibility to maintain the Separation of Powers so basic to our government.

29. *1979*

In response to a request from Chairman Baucus of the Subcommittee on Limitations of Contracted and Delegated Authority of the Senate Committee on the Judiciary for a substantial number of documents from FBI files and other files

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[63] Memorandum for Chairman Moorhead, Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations, from Deputy Assistant Attorney General Lawton, Office of Legal Counsel (Apr. 25, 1973) *See also* Dec. 14, 1982, Memorandum, *supra*.

located within the Department, to assist the Subcommittee in its oversight investigation into certain sales by the General Services Administration, Deputy Assistant Attorney General Heckman stated:

> The Department has agreed to give the Subcommittee staff limited access to these internal memoranda [2 closed files on titanium and lithium sales proposed by the General Services Administration]. Our policy with regard to providing Congressional Committees with analytical, strategy or deliberative portions of memorandum[s] related to these investigations is to make them available at the Department for review and analysis, including notetaking. The substantive information in these memoranda may be used for Subcommittee purposes. The memoranda themselves, however, will be retained in the Department and copies will not be provided.[64]

The July 27, 1979, letter from Chairman Baucus to Attorney General Civiletti refining the Subcommittee's request for documents indicated that its earlier requests for material from open investigative files on term contractors was denied "because they are directly related to active investigations and prosecutions."[65]

30. *1980*

On March 14, 1980, Chairman Edwards of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary requested from Attorney General Civiletti a copy of the report prepared by the Rowe Task Force concerning the involvement of an FBI informant in the murder of Mrs. Viola Liuzzo in Alabama. On March 31, 1980, Michael Shaheen, Jr., Counsel, Office of Professional Responsibility, Department of Justice, wrote Chairman Edwards as follows:

> The [Rowe] report is still being reviewed within the Department and several issues affecting its release outside the Department are still being studied. Certain promises of confidentiality were necessary before some individuals would cooperate with Task Force members and those promises must be honored. Moreover, the State of Alabama's indictment of Mr. Rowe for the murder of Mrs. Viola Liuzzo is still pending and it is our opinion that any release of the report in its current form could seriously prejudice both Alabama's and Mr. Rowe's right to a fair trial.
>
> For these and other related reasons, it is not possible for the Department to furnish to you a copy of the report in its present form at this time.[66]

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[64] Aug 20, 1979, letter from Deputy Assistant Attorney General Heckman to Chairman Baucus

[65] July 27, 1979, letter from Chairman Baucus to Attorney General Civiletti.

[66] *Cf. Playboy Enterprises, Inc.* v *Dep't of Justice*, 677 F.2d 931 (D C Cir 1982) (upholding the Department's claim of privilege pursuant to a request under the Freedom of Information Act, 5 U S C § 552, for those parts of the Rowe Report which fell within the Act's exemption for "investigatory records compiled for law enforcement purposes," § 552(b)(7), but rejecting the Department's claim that the whole Report was protected from disclosure by Exemption 5's "deliberative process" privilege, § 552(b)(5)).

31. *1982*

On November 5, 1982, Assistant Attorney General Olson advised the General Counsel to the Department of Transportation that a provision of the Tax Equity and Fiscal Responsibility Act of 1982, which requires the Administrator of the Federal Aviation Administration to transmit certain budget information and legislative recommendations to Congress at the same time that they are transmitted to the Secretary of Transportation, the President, or the Office of Management and Budget would, if interpreted literally, violate the constitutional principle of separation of powers.[67]

II.

Refusals by Independent Agencies and Executive Departments Other Than the Department of Justice to Disclose Information to Congress Concerning Law Enforcement, Security, and Personnel Investigations[68]

This Section II lists some of the many instances wherein independent agency heads and sub-presidential executive officers (outside the Department of Justice) have declined to provide sensitive investigative information requested by Congress. This Section does not describe those instances in which Presidents personally have ordered the withholding of investigative information;[69] nor does it discuss those examples of Department of Justice withholdings of investigative information enumerated in Section I of this memorandum.[70]

It should be noted that, like Section I, this Section relies heavily upon published studies which discuss particular executive agencies' responses to congressional requests for information during certain Administrations. Because these studies focus upon congressional–executive relationships at particular times in our history, they cannot be used to develop comprehensive statistics on, or statistically representative examples of, executive withholdings of information generally.[71] It is possible, however, to infer from these studies that similar episodes of withholding of sensitive information have occurred throughout

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[67] On Feb 21, 1977, Assistant Attorney General Harmon, Office of Legal Counsel, advised the Attorney General that a bill that would require inspectors general in the executive departments to report directly to Congress information regarding their investigations without prior clearance or approval by the head of the department involved would be unconstitutional. That memorandum stated. "The constitutional principle of executive privilege must be preserved. The provision in the bill requiring reports to Congress of all 'flagrant abuses or deficiencies' within 7 days after discovery would risk jeopardizing ongoing investigations by the agency and the Justice Department, many of which would be subject to a claim of privilege." 1 Op. O.L.C 16, 18–19 (1977).

[68] Congressional requests for information from sub-presidential executive officers have a long history. A number of such requests occurring in the 19th century are discussed in 3 Hinds' Precedents, *supra*, §§ 1856–1910. *See, e.g.*, H.R Rep. No. 194, 24th Cong , 2d Sess. 4, 6–7 (1837), House Journal, 16th Cong , 2d Sess. 67, 70 (1820), House Journal, 14th Cong., 1st Sess. 92, 201, 206, 262 (1815); House Journal, 9th Cong., 2d Sess. 533–36 (1807); House Journal, 4th Cong , 2d Sess. 634 (1796). *See also* Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat 65 (Secretary of Treasury must provide certain information to Congress upon request). It is unclear from these sources, however, how frequently such officers declined to comply with congressional requests.

[69] *See, e.g* , Dec. 14, 1982, Memorandum, *supra*, at paras. 4 (President Monroe); 5 (President Jackson); 6 (President Tyler); 9 (President Buchanan); 10 (President Lincoln); 11 (President Johnson); 13 (President Cleveland); 17 (President Theodore Roosevelt); 18 (President Coolidge); 20 (President Franklin Roosevelt); 21, C (President Truman), 25 (President Nixon).

[70] *See, e.g.*, Section I, paras. 1 (also discussed in December 14, 1982, Memorandum, *supra*, at para 13); 2–6, 8–16, 18, 20, 23, 24, 26–30

[71] *See* notes 6–8, *supra*.

American history. The following incidents have been selected only to provide some illustration of the well-established practice wherein Executive officers have protected their sensitive investigative files from disclosure to Congress.

1. *1846–47*

On December 8, 1846, the House of Representatives by resolution directed the Secretary of the Treasury to supply it with information concerning secret inspectors who had been hired by the Department of the Treasury for customs enforcement. On February 8, 1847, the Secretary declined to reveal the names of the secret agents and inspectors, deeming it "inexpedient" to do so.[72] During a subsequent House debate on a further resolution to require the information from the Secretary, it was pointed out by Rep. Bayly that "[t]he intention in employing [the agents] is to prevent smuggling; but if their names were made public, the very design of their employment would be frustrated."[73] The debate concluded with no further attempt to obtain the information.

2. *1861*

On December 2, 1861, the House adopted a resolution requesting the Secretary of War, "if not incompatible with the public interest," to report to the House what measures were taken to investigate "who is responsible for the disastrous movement of our troops at Balls Bluff."[74] The Secretary of War declined to comply in a letter dated December 12, 1861.[75] On January 6, 1862, the House responded with a resolution "that the [Secretary's] answer is not responsive nor satisfactory to the House, and that the Secretary be directed to return a further answer."[76]

On January 10, 1862, the Secretary responded to the second resolution of the House, stating, "measures have been taken to ascertain who is responsible for the disastrous movement of our troops at Balls Bluff, but . . . it is not deemed compatible with the public interest to make known those measures at the present time."[77]

3. *1932*

In responding to a request from the House of Representatives for all documents pertaining to an investigation of the importation of ammonium sulfate, the Secretary of the Treasury stated:

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[72] 17 Cong. Globe, 29th Cong., 2d Sess. 400 (1847); *see id.* at 355.

[73] *Id.* at 401.

[74] 3 Hinds' Precedents, *supra*, at § 1886. Although the Battle of Balls Bluff on Oct. 21, 1861, represented a militarily inconsequential defeat for Union troops early in the Civil War, it aroused Radical Republicans in Congress against General-in-Chief George B. McClellan, a Democrat. McClellan subsequently arrested General C.P. Stone for responsibility in the defeat, but no formal charges were filed against him, and General Stone was released within six months The Battle's chief military effect was to delay Union Army movements against Richmond, Virginia. *See generally* 1 *Dictionary of American History* 150 (J. Adams ed. 1940).

[75] 3 Hinds' Precedents, *supra*, at § 1891

[76] *Id.* at § 1886.

[77] *Id*

> In passing the antidumping act the Congress decided to provide that the initial decisions as to the existence of dumping should be made by the Secretary of the Treasury in accordance with administrative procedure. It has been the practice of the department in acting under this statute to treat all information furnished by interested persons as confidential and not to disclose it unless such persons consent to the disclosure. This practice is founded upon the necessity for the department to obtain complete information concerning manufacturers' and importers' business transactions which it would be practically impossible to obtain if those furnishing the information did not understand it would be treated as confidential and not divulged without their consent.
>
> As consent has not been given to the disclosure of the information contained in the record before the Treasury Department, I am of the opinion that it would be incompatible with the public interest to comply with the request contained in the resolution.[78]

4. *1948*

A subpoena issued by the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary directed Assistant Secretary of State Peurifoy to provide investigative files of the Department of State concerning over 160 persons named in the subpoena. In response, the Acting Secretary of State wrote the Committee that disclosure of the materials would be contrary to the public interest and detrimental to the conduct of the foreign relations of the United States. Disclosure of the material, the letter stated, would hamper future work of our diplomatic and consular missions abroad and place many sources "in personal jeopardy." The Acting Secretary referred, *inter alia,* to the April 1941 Opinion of Attorney General Robert Jackson[79] as authority for his refusal, and stated in closing that the President had given specific approval for the denial.[80]

5. *1955*

On October 18, 1955, the Subcommittee on Securities of the Senate Committee on Banking and Currency requested the Securities and Exchange Commission to make available to the Subcommittee the investigative files on two separate matters. On November 10, Chairman Armstrong responded by stating, with regard to the first matter,

> this investigation is still open and in progress. It has been the consistent policy of the Commission not to release its pending investigation files. It has been our belief that such release might impair the integrity of the Commission's investigative process and

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[78] 75 Cong. Rec. 11669 (1932). *See generally* Wolkinson, *Demands of Congressional Committees for Executive Papers,* 10 Fed. Bar J. 103, 133–34 (1949)

[79] 40 Op. Att'y Gen. 45 (1941).

[80] Department of Justice Study, *supra,* at 11–12

> seriously interfere with the Commission's responsibility of appropriate enforcement action, in case this becomes necessary . . . . We do not at present know what information [the Committee staff] would desire on this subject but it may well be that we can provide . . . sufficient material in the form of summaries or otherwise to meet [their] needs. A similar procedure was followed this spring in connection with information about certain investigations which was desired by your Committee in connection with certain phases of the stock market study with mutually satisfactory results.[81]

With respect to the second investigation, the Chairman wrote,

> [s]ince this matter is still in litigation, it is the Commission's view, with which I am sure you will agree, that it would be inappropriate to disclose those files or discuss this case outside the court. Immediately upon the termination of the litigation, we will, of course, welcome your Committee's review of our files.[82]

6. *1955*

The General Services Administration (GSA) had turned over to the Department of Justice certain copies of insurance files of the Snare-Merritt Corporation, a government contractor, for investigation. The GSA subsequently declined to make these documents available to the Special Government Activities Subcommittee of the House Committee on Government Operations on the ground that once copies of the documents had been transferred to the Department of Justice for investigation, those files became subject to the control of the latter Department.[83] A similar demand for these documents was also made upon the Department of Justice, which refused to disclose them, apparently on the ground that they referred to a pending investigation.[84] Subsequently, however, the material became available to the House through an undisclosed source, and this apparently mooted the controversy.[85]

7. *1955*

Rep. Bennett, of the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, requested information from the current investigative files of the Securities and Exchange Commission regarding "spectacular" examples of fraud, together with the names of companies and principals involved, which the Subcommittee could "expose" at its hearings. On November 4, 1955, SEC Chairman Armstrong advised Rep. Bennett as follows:

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[81] *1958 Hearings, supra,* at 297.

[82] *Id.* at 298.

[83] *See* H.R Rep. No 2390, 84th Cong , 2d Sess. 16 (1956).

[84] *Id.* at 17 (the House Report states, "[t]he Justice Department has furnished no reasonable explanation for denying the subcommittee access to [this information]")

[85] The New York Times, Oct 19, 1956, at 17, col. 3. *See generally* Kramer & Marcuse, *supra,* at 643–44

> The requested information concerns material contained in the pending investigation files of the Commission. These are not public at the present time. For the Commission to release such information in our pending investigation files for use in a public hearing of a congressional committee before our investigation has been completed might prejudice the prosecution of the matters in the event that the cases might later be referred to the Department of Justice for a criminal prosecution, and might destroy the value of any civil or administrative remedies that might be instituted by the Commission and the parties in the particular cases. Also, if testimony and statements elicted [sic] from witnesses on the understanding that the Commission would treat the information as confidential, were made public, the ability of the Commission to obtain the cooperation of the public in our investigations of violations of the Securities Acts would have the opposite effect which you so correctly say is the joint objective of your committee . . . and our Commission . . . .[86]

8. *1955*

During an investigation by the Senate Committee on Post Office and Civil Service concerning the administration of the Federal Employees' Security Program, a subpoena was issued to the Chairman of the Civil Service Commission requesting him to produce, on July 28, 1955, "all files, correspondence, documents, records, etc., in the possession of the Civil Service Commission" relating to three named individuals. The Chairman provided the Committee with certain material relating to the persons mentioned in the subpoena, but withheld portions of the files which concerned investigative matters, as well as internal advice and communications on official matters on the ground that such material was covered under President Eisenhower's letter of May 17, 1954.[87]

9. *1955*

On March 22, 1955, a Senator requested information in the files of the Civil Service Commission concerning certain named former federal employees. The Senator asked specifically "whether or not there is anything in the files of the following individuals which would be interpreted as of sufficient detrimental nature to prohibit their reemployment by the United States Government." The Commission declined to make this information available, stating: "The Commission cannot prejudice the material in a file of an individual who is not now before it for a determination as to eligibility for employment. If and when any of the persons mentioned in your letter again apply for Federal employment, the then existing applicable rules and determination as to eligibility will be adhered to and a determination made accordingly."[88]

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[86] *1958 Hearings, supra,* at 416.

[87] *1958 Hearings, supra,* at 378; Kramer & Marcuse, *supra,* at 652 The President's instruction is discussed in the December 14, 1982, Memorandum.

[88] *1958 Hearings, supra,* at 378.

10. *1955*

On October 13, 1955, the Chief Clerk of the House Committee on Un-American Activities requested that he, or an investigator of the Committee, be allowed to examine the Commission's confidential files. The Commission denied the request "because in many instances the files contain information of a confidential and investigative nature that can be made available only to those officials in the executive branch of the government who have need for the information in the performance of their official duties."[89]

11. through 18. *1955–1957*

In response to Chairman Hennings' request for an enumeration of refusals to supply Congress with information, *see* note 8, *supra*, the Department of Defense listed, *inter alia*, the following eight instances that concerned its investigative files:[90]

February 8, 1955: Upon the request of Senator McClellan, Chairman, Senate Permanent Investigations Subcommittee, for an inspector general's report on Irving Peress, the Army submitted a detailed summary of all actions taken by the Army in the Peress case. The inspector general's report itself was withheld, pursuant to the Department's responsibility to safeguard (1) information revealing investigative techniques, (2) information as to the identity of confidential informants and information furnished by them in confidence, (3) incomplete information which might unjustly discredit an innocent person, and (4) intra-departmental communications of an advisory and preliminary nature.[91]

September 2–6, 1955: The Army denied the requests of the House Appropriations Committee for inspector general's reports and auditor general's reports pursuant to the Department's responsibility to safeguard information in investigative reports for the reasons stated above. In lieu of the investigative reports, the Army furnished, as requested, detailed summaries of all actions taken in connection with the contracts under investigation.

September 16, 1955: The Air Force denied the request of Senator Johnson, Chairman, Senate Preparedness Investigating Subcommittee, for material derived from an inspector general's report, pursuant to the Department's responsibility to safeguard information in investigative reports.

January 17, 1956: The Air Force denied the request of Senator Magnuson, Chairman, Senate Committee on Interstate and Foreign Commerce, for information concerning the discharge of a serviceman, pursuant to the Department's responsibility not to release an individual's personnel records without his consent so as not to unjustly or unnecessarily discredit him or disclose information received in confidence.

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[89] *Id.* at 379.

[90] *Id.* at 385–87.

[91] Background concerning the congressional investigation of the promotion and discharge of Major Irving Peress may be found in *Army Personnel Actions Relating to Irving Peress: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 84th Cong., 1st Sess. (1955), Kramer & Marcuse, *supra*, at 687–89.

February 2, 1956: The Air Force denied the request of the House Appropria tions Committee for inspector general's reports and auditor general's reports pursuant to the Department's responsibility to safeguard information contained in investigative reports.

* * * * *

January 12, 1957: The Army denied the request of Congressman Moss, Chairman, House Subcommittee on Public Information, for an investigative file compiled in connection with charges of disloyalty and subversion at the Signal Corps Intelligence Agency, pursuant to the Department's responsibility to safeguard investigative reports.

January 25, 1957: The Air Force denied the request of Congressman Murray, Chairman, House Committee on Post Office and Civil Service, for an inspector general report concerning employment conditions at Okinawa, pursuant to the Department's responsibility to safeguard investigative reports. However, the Subcommittee was furnished a summary of the findings contained in the report.

* * * * *

April 13, 1957: The Defense Department denied the request of Congressman Moss, Chairman, House Subcommittee on Public Information, for investigative memoranda and a report of conversations between the Department and newsmen, pursuant to the Department's responsibility to safeguard investigative reports and information received in confidence.

19. *1956*

An individual congressman (not a committee chairman) requested material from the files of the Housing and Home Finance Agency concerning certain housing project contracts which were related to a private bill he had introduced. On March 28, 1956, the Agency advised the congressman that it would not disclose the information because there was a pending lawsuit in the Court of Claims seeking judicially the same relief as that covered by the congressman's bill. Since the litigation was being conducted by the Department of Justice, the Agency deemed it "inappropriate" to provide the requested information.[92]

20. *1962*

On May 2, 1962, Chairman Fountain of the House Government Operations Subcommittee requested access to the investigative files of the Food and Drug Administration concerning the drugs MER-29 and Flexin. Commissioner Larrich declined to make the files available, stating that his agency had "uniformly declined to make files on new drugs available" to Congress, in order to encourage manufacturers to make as complete a disclosure as possible when they file new drug applications.[93]

21. *1971*

During an investigation by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee concerning information gathering by the military

[92] *1958 Hearings, supra*, at 403–04.

[93] The New York Times, June 21, 1962, at 17, col. 1.

with regard to possible civil disturbances, Chairman Ervin requested access to an Army investigative report on the 113th Intelligence Group. In response, on April 19, 1971, Secretary of Defense Laird wrote the Chairman as follows:

> it is the policy of the Executive Branch not to divulge the contents of investigations while an investigation is still open and prior to final action being taken. As the testimony taken . . . may possibly provide the basis for disciplinary action, it would be inappropriate to authorize the release of these documents. To do so might jeopardize the rights of the people involved and prevent them from being afforded a fair hearing.[94]

22. *1972*

On August 15, 1972, Senator Kennedy, Chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, requested from the Securities and Exchange Commission "documents, statements, and other materials" relating to the Commission's stock trading investigation of the International Telephone and Telegraph Corporation (ITT). On August 31, 1972, Chairman Casey of the Commission wrote Senator Kennedy as follows:

> The Commission has, as your letter points out, initiated and settled civil actions involving some of the transactions under investigation. However, the staff informs me that it is still investigating other collateral matters which might lead to further appropriate proceedings.
>
> In such investigations the Commission has been likened to a grand jury and like a grand jury it is the Commission's policy to conduct its investigations on a confidential basis. Accordingly, in order to protect the contents of its investigatory files and the integrity of its investigative procedures, the Commission refrains from giving out material from its pending investigations. Pursuant to this established procedure, it is the Commission's decision to respectfully refuse your request.[95]

On September 21, 1972, Chairman Staggers of the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce made a similar request for Commission documents concerning its investigation of ITT. On September 26, 1972, Chairman Casey responded:

> It is the general policy of this Commission not to make public or deliver to any other party, materials, records and documents,

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[94] *Executive Privilege. The Withholding of Information by the Executive: Hearing on S 1125 Before the Subcomm. on Separation of Powers of the Senate Comm on the Judiciary*, 92d Cong., 1st Sess. 403 (1971).

[95] *Legislative Oversight of SEC: Inquiry into Withholding and Transfer of Agency Files Pertaining to ITT: Hearing Before the Special Subcomm. on Investigations of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess 29–30 (1972).

during the course of this kind of an investigation and for a very good reason. Any investigation might lead to referral by the Commission of its investigative files to the Department of Justice with a recommendation for criminal prosecution. In such cases, the Commission has the same obligation as a grand jury to protect possible defendants from being unfairly injured by the possibility of a damaging but not fully substantiated charge. As you know, the Courts have strictly construed the right of a defendant to be free from pre-trial publicity. We do not want to take the chance that our release of any material obtained pursuant to our subpoena issued for the purpose of enforcing securities law would impair the rights of possible defendants or render ineffective any action taken to enforce the law. I am sure that you can understand our need to keep this file inviolate at this time.[96]

Chairman Staggers reiterated his demand for access to the ITT investigative file in a letter to Chairman Casey on September 28, 1972, in which he stated, "the Commission's sudden refusal . . . is most strange and unprecedented."[97] On October 6, 1972, Chairman Casey wrote Chairman Staggers as follows:

I must . . . correct [your] statement that the Commission's position on this matter is unprecedented. Our basic policy was clearly set forth in the December 17, 1969 letter which former [SEC] Chairman Budge sent to the [House] Committee on Government Operations. Chairman Budge expressed the Commission's position on the availability of data from pending investigations in the following language:

"The Commission has consistently taken the position, however, and has generally persuaded interested Congressional committees that, barring exceptional circumstances, it is inappropriate for Congressional committees to be furnished nonpublic information pertaining to a pending investigation or Commission adjudication. The Commission has adopted this position . . . to maintain the appearance as well as the fact of agency impartiality in its adjudicatory functions and to avoid any impediment to its investigatory and enforcement function."

* * * * *

The considerations which Chairman Budge stressed are particularly vital in a matter [like this one] which can attract wide publicity and speculation. . . . I believe it to be a misuse of our subpoena power to permit access to documents except for the enforcement purposes for which it was authorized, a failure in our obligation to avoid anything which could jeopardize an enforce-

[96] *Id.* at 6.
[97] *Id.* at 7.

ment action, and an impropriety in disposing of documents, which may be used as evidence in a prosecution, in any matter which could cut off any rights a possible defendant might want to assert with respect to them in relation to any party other than the Commission.[98]

23. *1973*

On November 28, 1972, Chairman Magnuson of the Senate Committee on Commerce requested access to files of the Securities and Exchange Commission relating to certain unspecified investigations disclosed in a "computer name and relation" printout previously supplied by the Commission to the Committee, which was investigating the effects of organized criminal activity on legitimate commerce. On January 10, 1973, Chairman Casey of the Commission responded to Senator Magnuson as follows:

> [T]he Commission has directed the staff to make available to your Committee for inspection at our offices any Commission files you request as long as to do so would not violate the policies established to meet our law enforcement responsibilities. As you recognize in your letter, this would mean excluding all current investigative files. It would also exclude those files relating to cases referred to the Department of Justice for criminal prosecution. We must also exclude any reference to or information received from confidential sources.[99]

The long and consistent history reflected in this and our December 14, 1982, Memorandum of actions by Executive Branch and independent agency officials to protect the integrity of confidential information from unwarranted disclosures to Congress, places in perspective similar necessary actions taken during this Administration. The separation of powers principle which underlies the structure of our government has brought virtually every Administration to the same conclusion: that some information at certain times not only may, but must, be withheld from the Legislative Branch in order that the laws may be faithfully executed.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[98] *Id.* at 8.
[99] *Id.* at 108

Continuing Obligations Under Congressional Subpoenas After the Adjournment of Congress

While congressional committees' subpoenas are no longer effective after Congress' adjournment *sine die*, the Administrator of the Environmental Protection Agency should, in the interest of comity and accommodation to the Legislative Branch, continue to be as responsive as possible to those committees' requests for documents and other information.

The Administrator's obligations under one of the subpoenas may be construed in light of the subcommittee chairman's subsequent modification on the record of its terms. Compliance with the subpoena as so modified cannot form the basis of the "willful default" that is necessary for prosecution under the relevant criminal contempt statutes, 2 U.S.C. §§ 192, 194.

December 23, 1982

MEMORANDUM OPINION FOR THE ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

This responds to your request for guidance in defining your outstanding obligations, if any, under the subpoenas served on you on October 21, 1982, by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (Energy and Commerce Subcommittee subpoena), and on November 22, 1982, by the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation (Public Works Subcommittee subpoena).

The Energy and Commerce Subcommittee subpoena requires you to produce

> copies of all books, records, correspondence, legal and other memoranda, papers and documents relative to the Tar Creek, Oklahoma; Stringfellow Acid Pits, California; and Berlin and Farro, Michigan, hazardous waste sites, excepting shipping records, contractor reports and other technical documents.[1]

The Public Works Subcommittee subpoena dated November 16, 1982, requires production of

> all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including dupli-

[1] Attachment to the Energy and Commerce Subcommittee subpoena, issued Oct 14, 1982.

cates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96–510, the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980."

The Office of Legal Counsel has taken the view that the adjournment *sine die* at the conclusion of a particular Congress (in this case, the 97th Congress) causes a lapse in the effectiveness of subpoenas issued by committees and subcommittees of that Congress as far as imposing any continuing legal obligations to produce documents pursuant thereto.* Accordingly, we believe that the adjournment *sine die* of the 97th Congress, coupled with the convening of the 98th Congress, will terminate your legal responsibilities under both subpoenas. However, since both Subcommittees appear to have continuing interests in the documents embraced by the subpoenas, and in the interest of comity and accommodation to the needs of the Legislative Branch, we urge that you nevertheless continue to be as responsive as possible, within the bounds set forth in the President's November 30th memorandum to you,[2] to the requests of the Energy and Commerce and Public Works and Transportation Subcommittees.

With respect to the Energy and Commerce Subcommittee subpoena, we understand that the Environmental Protection Agency (EPA) has provided to the Subcommittee staff at the Subcommittee staff offices copies of all documents which are encompassed by the subpoena, except those which have been determined to be enforcement sensitive and which are therefore being withheld pursuant to the President's November 30, 1982, instruction to you. The withheld documents were identified by you to the Subcommittee at its hearing on December 14, 1982. For all documents which are being withheld, you have provided the Subcommittee with a detailed list describing the contents of each document, and giving the title, date, the author and addressee, and the bases upon which the document was determined to be enforcement sensitive. We understand that, at this time, all documents responsive to the Energy and Commerce subpoena which have been discovered in the three regional offices involved or anywhere else within EPA have been forwarded to Washington for review, and that all but 42 have been turned over to the Subcommittee. The likelihood that any further discoveries of documents which might have been inadvertently overlooked in the regional offices is apparently slight and if any are discovered, it would probably involve a very small number of documents. We recommend that you continue to forward any newly discovered nonsensitive documents to the Subcommittee, or, if the document must be withheld pursuant to the President's instructions, that you furnish to the Subcommittee a complete description of the document, including the basis for its nondisclosure in the same

* NOTE: *See* memorandum opinion for the Attorney General, Dec. 14, 1982 (Continuing Effect of a Congressional Subpoena Following the Adjournment of Congress), reprinted in this volume at p. 744, *supra*. Ed

[2] *See also* President Reagan's Nov. 4, 1982, Memorandum for the Heads of Executive Departments and Agencies re Procedures Governing Responses to Congressional Requests for Information.

form utilized with respect to the other withheld documents. We suggest that the transmittal letter also explain why the documents were not discovered prior to the return date of the subpoena.

With respect to the Public Works Subcommittee subpoena, Chairman Levitas, as you know, modified the terms of your compliance with the subpoena at the December 2, 1982, hearing on hazardous waste contamination at which you testified. He did so explicitly, stating that

> there is absolutely no need for the Environmental Protection Agency to reproduce any documents which are otherwise available to the subcommittee staff.[3]
>
> * * * * *
>
> As far as the documents that you have brought with you today, insofar as the committee is concerned they are not fully responsive to the subpoena of the committee. Under the circumstances I would suggest that they be held in abeyance until the matter is resolved one way or the other, and that they be maintained in your custody until that time.[4]

Chairman Levitas' statement was made in response to your testimony that the actual, physical production of all documents encompassed by the subpoena in the Subcommittee's offices "would require the location, segregation, duplication, photocopying and shipping of more than 787,000 pages of documents . . .,"[5] "could [not] be completed [until] between February 15th and March 1st, and would cost approximately $245,000."[6] In addition, you pointed out that producing all of these documents on a "rush" basis would require "the virtual halt of some segments of [EPA's] enforcement programs for several weeks."[7]

Notwithstanding the various deficiencies in the Public Works Subcommittee subpoena, without suggesting that it would have any continuing validity after the 98th Congress convenes, and without suggesting that the arguably relevant criminal contempt statutes, 2 U.S.C. §§ 192, 194, are applicable to the current situation, you have asked whether, absent those and other potential defenses, you could be held responsible for compliance with its literal demands in light of Chairman Levitas' apparent modification of his expectations regarding the subpoena.

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[3] Transcript, Hearing on Hazardous Waste Contamination of Water Resources Before the Subcomm. on Investigations and Oversight of the House Committee on Public Works and Transportation, Dec 2, 1982, p. 123, lines 2902–04.

In addition, several other members of the Subcommittee also indicated that they were not interested in your producing copies of documents which they already have available to them in the regional and headquarters offices. *See, e g.*, Transcript, at p. 67, lines 1573–82; p. 77, lines 1821–25; p 97, lines 2281–86; p. 99, lines 2334–39; p. 119, lines 2801–03.

[4] *Id.* at 135, lines 3192–98.

[5] *Id.* at 55–56, lines 1301–03.

[6] *Id.* at lines 1316–18. These figures reflect computations based on work performed on a "rush" basis, with the use of contractors, overtime, and the reassignment of resources and personnel within the Agency. Performance of the work on a non-"rush" basis would take more than 10,000 hours of staff time, cost roughly $145,000, and could probably be completed between May 15th and June 15th.

[7] *Id.* at lines 1318–19.

Decisions of the Supreme Court and the courts of appeals construing 2 U.S.C. § 192[8] have uniformly held that a congressional request for testimony or the production of documents by a witness which is suspended, delayed, or abandoned by a Subcommittee member in colloquy with the witness, and is not later renewed by the Subcommittee, cannot form the basis of the "willful default" that is necessary for a lawful prosecution under § 192. *See Flaxer* v. *United States*, 358 U.S. 147 (1958).[9] *See also Emspak* v. *United States*, 349 U.S. 190 (1955); *Quinn* v. *United States*, 349 U.S. 155 (1955); *Miller* v. *United States*, 259 F.2d 187 (D.C. Cir. 1958).

We conclude that, when considered in light of the facts that the Subcommittee apparently was not interested in any of the documents if it was not to receive all of them,[10] the provision of the statute which requires a violation to be willful, and in light of the cases discussed above, Chairman Levitas' modification on the record of the terms of your compliance with the subpoena issued by his Subcommittee is sufficient to support a construction of your obligation that, without taking into account other defenses, requires only that you make the requested documents available in the EPA offices where the documents generally are maintained. However, in keeping with the three-tiered screening procedure that you have developed to ensure that career and policy level attorneys in the Environmental Protection Agency, the Land and Natural Resources Division of the Department of Justice and the Office of Legal Counsel of the Department of Justice review all documents which are withheld as enforcement sensitive, we would recommend

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[8] 2 U.S.C. § 192 provides.

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months

[9] The facts of *Flaxer* v *United States, supra*, are very similar to the circumstances raised by Chairman Levitas' modification of the Public Works Subcommittee's subpoena. In *Flaxer, supra*, the president of a labor union was subpoenaed to appear before a Senate subcommittee on October 5, 1951, and to bring with him certain documents He appeared, but did not bring all of the requested documents, apparently because of insufficient time to gather them all The Senator who chaired the hearing, after colloquy with the witness, said, "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date." 358 U.S at 149–50. The Court held that the witness could not thereafter be prosecuted under 2 U.S C. § 192 for willful default because he was not clearly apprised that the subcommittee continued to require the documents on the return date of the subpoena rather than at the later date. The Court stated.

> In the present case, the position of the Committee was clear in one respect: it was plain it wanted the [documents] But, to say the least, there was ambiguity in its ruling on the time of performance. The witness could well conclude, we think, that he had 10 days more to consider the matter, 10 days to face the alternative of compliance as against contempt. Certainly we cannot say that petitioner could tell with a reasonable degree of certainty that the Committee demanded the [documents] this very day, not 10 days hence.

Id. at 151. The Court then reiterated its language in *Quinn* v. *United States*, 349 U.S. at 170:

> Giving a witness a fair apprisal of the committee's ruling on an objection recognizes the legitimate interests of both the witness and the committee Just as the witness need not use any particular form of words to present his objection, so also the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee's ruling, he has no cause to complain. And adherence to this traditional practice can neither inflict hardship upon the committee nor abridge the proper scope of legislative investigation

358 U.S at 151–52.

[10] Transcript, at 135, lines 3192–98

that you continue your policy of having copies of documents which are determined by your regional staff potentially to be in the enforcement sensitive category shipped from the regional offices to Washington so that further review may take place. Once a determination has been made to withhold any documents pursuant to the President's instruction, you should continue to provide the Subcommittee, as you have in the past, with a list of such documents, describing their contents and explaining the bases for nondisclosure.

In order to avoid any misunderstanding relative to your further obligations under the Public Works Subcommittee subpoena, and to confirm our interpretation of your remaining responsibilities, I suggest that you send letters in the attached form to Chairmen Levitas and Dingell. This will give each of them an opportunity to ascertain your intentions with respect to the documents sought by the subpoenas and to make any further comments they may deem appropriate.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Attachment

Honorable John Dingell
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

DEAR CHAIRMAN DINGELL:

In an effort to cooperate as fully as possible with your Subcommittee in connection with the subpoena served on me by your Subcommittee on October 21, 1982, and with due regard for my responsibility to carry out the President's November 30 instruction to me "not to furnish copies of [sensitive documents found in open law enforcement files] to the Subcommittee[ ]" but to "remain willing to meet with [the] Subcommittee to provide such information as [I] can," and notwithstanding your Subcommittee's vote on December 14, 1982, to find me in contempt of Congress for complying with the President's instructions, I wish to set forth the intentions of the Environmental Protection Agency with respect to the documents sought by your Subcommittee under the October 21 subpoena, and to provide you with an opportunity to clarify, if you deem it appropriate to do so, the position of your Subcommittee in this regard.

I believe at this time that we have furnished all documents relating to the Stringfellow Acid Pits, Tar Creek, and Berlin and Farro sites which are responsive to your subpoena, except for the 42 documents which, having been determined to be enforcement sensitive in the manner described to you on December 14, 1982, are being withheld pursuant to the President's November 30, 1982, instructions to me. For those documents withheld from your review, we have provided you with a description of the contents of the documents, the name and title of the author and the addressee, the date, the number of pages, and an explanation of why we believe that the document is enforcement sensitive.

Should any further documents relating to the three sites encompassed by your subpoena be found in our headquarters or regional office files, we will forward the documents to you, or, upon a determination that the documents are enforcement sensitive, we will forward to you a description of the document and an explanation of the basis for its nondisclosure.

We remain willing to provide you, your Subcommittee, or your Subcommittee's staff with any information of a factual, technical, or policy nature regarding the three specified hazardous waste sites to the extent not inconsistent with the President's instructions.

Sincerely,

Anne M. Gorsuch
Administrator
Environmental Protection Agency

Proposed Changes in Operation of the Witness Protection Program

The Attorney General has broad discretion in administering the Witness Protection Program established under Title V of the Organized Crime Control Act of 1970, and his decisions in this connection are not subject to judicial review under the statute.

Two proposed changes in the administration of the Program, dealing with the settlement of existing debts by persons entering the Program and with the custody of children brought into the Program, are generally within the Attorney General's authority. However, certain modifications should be made to protect fully the due process rights of persons entitled to litigate or enforce custody and visitation rights against a participant in the Program. Whether the proposed changes provide constitutionally adequate protection for either creditors unable to satisfy their claims because of the government's refusal to disclose the identity of persons in the Program, or for persons within the Program whose identity is disclosed to creditors, may depend on the facts of each case.

The proposed changes would not subject the government to liability under the Federal Tort Claims Act, because they come within an exception to the waiver of sovereign immunity in that Act. Nor would they subject the government to liability for contract damages under the Tucker Act.

December 29, 1982

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This memorandum responds to your request for our opinion concerning proposed changes in the operation of the Witness Protection Program (the Program). For the reasons outlined in detail in this memorandum, we conclude that all of the proposed changes are legally permissible, although we recommend certain additional modifications in the handling of child custody litigation to alleviate certain constitutional concerns present in the Program even after adoption of the proposed changes.

I. Description of Program and Proposed Changes

Under the Program, which was established under Title V of the Organized Crime Control Act of 1970, Pub. L. No. 91–452, §§ 501–504, 84 Stat. 922, 933–34 *reprinted in* notes prec. 18 U.S.C. § 3481 (1976) (Crime Control Act), the Attorney General is authorized to protect witnesses and families of witnesses whose lives might be placed in danger as a result of their testimony against organized crime figures. The Attorney General has delegated the authority to provide this protection to the United States Marshals Service (the Marshals

Service). *See* 28 C.F.R. § 0.111(c) (1982). In discharging these duties, the Marshals Service ordinarily assigns marshals to guard participants or relocates them with new identities in a new area of the country. The Service generally assures the continued security of participants who have been relocated by refusing to disclose their new identity to members of the public.[1] However, this policy of concealing the new identities of relocated participants has led to two general problems.

The first arises when witnesses have accumulated large debts before entering the Program. When a witness enters the Program, he signs a form agreement, called a Memorandum of Understanding, in which he agrees to "settle" all of his debts with creditors.[2] Frequently, however, witnesses do not fulfill this pledge, and creditors attempting to sue on claims against a witness in the Program are unable to enforce any judgment against the witness because they cannot learn his new location and identity. Currently, the Marshals Service will assist a creditor only by forwarding his mail and legal process to the witness. If the witness refuses to appear at any judicial proceeding or to satisfy any judgment, the creditor lacks any avenue for securing relief.

The second problem arises when a participant is sued by an ex-spouse or other person outside the Program seeking to obtain custody of a child who was brought into the Program.[3] In some cases, the witness or his spouse has legal custody of the child when they enter the Program, but the ex-spouse sues to modify the prior order granting one of them custody. In other cases, children have been brought into the Program in violation of a court order granting the ex-spouse custody. The Memorandum of Understanding signed by the witness specifically states that the Marshals Service will not permit the witness to bring children into the Program in violation of a court order,[4] but witnesses and/or their spouses have defied this prohibition without the knowledge of the Marshals Service or government attorneys.[5] The Marshals Service facilitates child custody litigation by transmitting mail and legal process to the witness and spouse, by assuring the security of any legal proceedings, and by paying the counsel fees of impecunious witnesses and spouses. It does not currently disclose the new identity of a witness or his spouse, however, even though the witness may refuse to participate in any judicial proceeding or to conform to any judgment.

Any solution to these recurrent problems must reconcile the needs of the government, witnesses, and the spouses of witnesses to conceal the participants' new identities with the right of creditors and ex-spouses to satisfy their legitimate

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[1] The Marshals Service will disclose a participant's new identity to a law enforcement official seeking to arrest the participant for a felony committed before his entrance into the Program.

[2] Memorandum of Understanding at 5 (supplied with opinion request)

[3] We generally will use the term "ex-spouse" throughout this memorandum We assume, however, that custody suits may also be brought by persons who are not ex-spouses but who nevertheless have legal custody or visitation rights. In addition, for the sake of convenience, we will refer to the ex-spouse as female and the witness as male, although the opposite could just as well be true.

[4] *See* Memorandum of Understanding at 5.

[5] *See, e.g., Salmeron v Gover,* No. 81-047 (D.D.C 1981) (Marshals Service and ex-spouse of witness agreed in a consent decree approved by the court to return child brought into Program by witness in violation of a state custody order)

legal claims. Accordingly, it has been proposed that the Marshals Service adopt the following policy. First, in cases where creditors bring suit against a witness, or where ex-spouses bring suit against a witness or his spouse, the Marshals Service would arrange for a secure courtroom, service of process on the defendant, and reimbursement of counsel fees of an indigent defendant. Second, in the situation where an ex-spouse obtains "legal custody" of a child, the Marshals Service would accept service of the relevant court order, arrange for the order to be sealed and validated for the ex-spouse in the jurisdiction where the child resides, and permit the local sheriff to execute the order. The Marshals Service would not disclose to the ex-spouse the new identity or the location of the child. It would also not inform the sheriff that he was seizing a child who was living with a witness and/or his spouse. If the security of the witness or his spouse were threatened by the return of an older child who knew their new identities, they apparently would be relocated. Finally, in the circumstance where a creditor secures a "money judgment" against the witness which the witness refuses to satisfy, officials of the Department of Justice would assume the authority, when justice and fairness requires, to disclose the identity and location of the witness to the creditor.[6] Their decision would be based on a weighing of the following factors: "the size of the judgment, the circumstances of the particular swindle or other act, the witnesses' continued need to law enforcement, as well as other factors in the particular case," which we assume would include the financial ability of the witness to satisfy the legal claims.[7]

You have asked us to examine whether any of the proposed changes would violate the Memorandum of Understanding or any other provision of law. The following five legal issues which are raised by the proposal and the operation of the Program are discussed in detail in this memorandum.

First, does the Crime Control Act authorize the Attorney General to adopt the proposed changes? For reasons outlined below, we conclude that the Attorney General has the statutory authority to adopt these procedures.

Second, would the proposed changes subject the government to liability under the Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680, for any injury that a participant might sustain as a result of the disclosure of his identity? Under the Tort Claims Act, the federal government has waived its immunity from suit in certain circumstances for the violation of state tort law by its employees. In our view, however, the proposed changes would not subject the government to tort liability because they come within an exception to the waiver of sovereign immunity in the Tort Claims Act.

Third, would the proposed changes subject the government to liability under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, which waives the federal government's immunity from damages for its violation of the terms of certain of

[6] For obvious reasons, we recommend that any regulation which is ultimately adopted for the Program provide that these decisions be made by persons holding particular offices, rather than providing that specific individuals make these decisions.

[7] The proposal does not consider the hypothetical situation in which a creditor only sues a non-witness participant. Because a non-witness participant is normally a family member of the witness, and the witness might be responsible for his debts under state law, these suits may well become suits against the witness himself.

its contracts? If the Memorandum of Understanding is an enforceable contract and precludes any of the proposed changes, the government could be liable for damages under the Act. We conclude, however, that even assuming the Memorandum of Understanding is an enforceable agreement, the proposed changes would not subject the government to contract damages because they would not violate the terms of the Memorandum of Understanding.

Fourth, would the proposed changes in the treatment of custody cases, although not themselves illegal, go far enough in protecting the constitutional rights of ex-spouses in their relationship with their children in the Program? In our view, while the proposed changes alleviate many of the constitutional problems in the operation of the Program, they do not adequately protect the constitutional rights of ex-spouses when the government's hiding of a witness precludes the ex-spouse from litigating her custody and visitation rights to a child. Accordingly, we recommend that, in addition to the proposed procedures, the Marshals Service consider disclosing the participant's new identity in certain circumstances.

Finally, would the Program, along with the proposed modifications, adequately protect the constitutional rights of creditors who are unable to satisfy their claims because the Marshals Service will not disclose the identity of the debtor/witness in their cases? As we have said, under the proposed modifications, the Marshals Service would disclose witnesses' identities to creditors in some egregious cases, but not in all cases. Since resolution of this legal question is dependent on the factual circumstances in which such claims arise, we are not in a position to state a categorical general conclusion to this class of questions. This issue should be reexamined after the proposed changes have been adopted and the courts have had occasion to examine this question in concrete factual situations arising under the Program. We cannot say at this time, however, that the proposed modifications would not adequately protect the constitutional rights of creditors.

II. Authority to Adopt the Proposed Procedures Under the Crime Control Act

In authorizing the Attorney General to establish and administer the Program, the Crime Control Act states in pertinent part:

> Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.
>
> Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons

> intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

Reprinted in notes prec. 18 U.S.C. § 3481. Under these provisions, the administration of the Program is left largely to the "judgment" and "determin[ation]" of the Attorney General. He is not required to protect any witness. He may "offer" to protect a witness and his family "whenever, in his judgment," the witness' testimony would place "his life or person, or the life or person of a member of his family or household, in jeopardy." Once a person has accepted an "offer" of protection, the person "may" only continue to use government "facilities for as long as the Attorney General determines the jeopardy to his life or person continues." As the House Report on this provision observed, Congress intended to "give[ ] the Attorney General broad authority to determine the particular facilities to be afforded and the length of time the facilities should be available." H.R. Rep. No. 1549, 91st Cong., 2d Sess. 48 (1970). *See also* S. Rep. No. 617, 91st Cong., 1st Sess. 59–60 (1969).

This broad discretion of the Attorney General in administering the Program is underscored by Congress' failure to provide for witnesses or their families to bring suit to be accepted into the Program, to receive any particular type of protection, or to prevent termination from the Program. Moreover, no such intent is implicit from the structure and language of the statute.[8] Thus, the Act does not

[8] In *Cort* v. *Ash*, 422 U S. 66 (1975), the Supreme Court identified four factors in determining whether Congress had implicitly intended to create a private right of action under a statute. Three of these factors militate against finding an implied private cause of action under the Crime Control Act.

The first factor is whether the plaintiff is " 'one of the class for whose *especial* benefit the statute was enacted' —that is, does the statute create a federal right in favor of the plaintiff?" *Id.* at 78 (Emphasis in original.) The Crime Control Act does not give any "especial" class of persons a right to protection; it merely *authorizes* the Attorney General to offer protection if he believes the witness' testimony might place the witness or his family in jeopardy. Once a witness has been selected for the Program, he "may" continue to use its "facilities" for as long as the Attorney General determines his life is still in jeopardy. But this does not create a "right" to protection in specific "right or duty creating language [which] has generally been the most accurate indicator of the propriety of implication of a cause of action." *Cannon* v. *University of Chicago*, 441 U S. 677, 690 n 13 (1979). Rather than declaring that the witness "shall have a right" to protection in the specified circumstances, as Congress has provided in other cases where the Supreme Court has found an implied cause of action, *see id.*, the Act merely states that he "may" receive protection when, according to the *subjective* judgment of the Attorney General, the witness' life or person continues to be in jeopardy In this context, we do not believe that the statute can be said to "create a federal right in the favor of the plaintiff." *Cort* v. *Ash*, 422 U.S at 78 *Cf. Universities Research Assn* v *Coutu*, 450 U S. 754, 772 (1981) (" 'far less reason' " to imply cause of action "where Congress, rather than drafting the legislation 'with an unmistakeable focus on the benefited class,' instead has framed the statute simply as a general prohibition or a command to a federal agency") (quoting *Cannon* v. *University of Chicago*, 441 U S. at 690–92).

The second and third factors can be analyzed together They are whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one;" and whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." *Cort* v. *Ash*, 422 U.S. at 78. As discussed *supra*, the language and the legislative history of the Crime Control Act reveal that Congress intended to grant the Attorney General broad discretion in administering the program. Moreover, the substantive standard

Continued

make decisions of the Attorney General in administering the Program subject to judicial review under the statute. *See Garcia* v. *United States*, 666 F.2d at 963; *Melo-Tone Vending* v. *United States*, 666 F.2d at 690; *Leonhard* v. *United States*, 633 F.2d at 623. *Cf. Doe* v. *United States*, 224 Ct. Cl. 632 (1980).[9]

In determining whether this broad grant of authority permits adoption of all of the proposed changes, two types of decisions in the operation of the Program must be separately considered.

A. Selection of Witnesses and Coordination of Their Protection

The first type of decision relates generally to the Attorney General's selection of persons to participate in the Program and the coordination of their protection once they have been selected. There appears to be little doubt that the Crime Control Act gives the Attorney General the widest authority to adopt those proposals that directly involve only these issues. Thus, the Attorney General's delegee in the exercise of this authority—the Marshals Service—would clearly be permitted to arrange for service of process on participants and to provide secure courtrooms for participants to litigate their cases. The Crime Control Act would also authorize the payment of attorney fees of impecunious participants in the circumstances which have been recommended, although this conclusion requires a somewhat more detailed explanation.

The Act grants the Marshals Service the authority to provide for the "health, safety, and welfare" of witnesses. Under this authority, the Service currently

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which the Attorney General is to apply in making his decisions—jeopardy to the witness' life or person—is not easily amenable to judicial scrutiny. Both of these facts suggest that Congress did not intend the Attorney General's decisions to be subjected to judicial review. The final factor—whether this is a cause of action "traditionally relegated to state law," *id.*—is inapplicable to this case.

Because three of the four factors cited by the Court in *Cort* v. *Ash* weigh decidedly against finding a private right of action under the Program, we believe, as the First, Second and Fifth Circuits held in *Melo-Tone Vending* v. *United States*, 666 F.2d 687, 690 (1st Cir. 1981); *Leonhard* v. *United States*, 633 F.2d 599, 623 (2d Cir. 1980), *cert. denied* 451 U.S. 908 (1981); and *Garcia* v. *United States*, 666 F.2d 960, 963 (5th Cir. 1982), that neither a creditor, ex-spouse, or a witness, respectively, can bring suit under the Act.

[9] Two panels in the Second Circuit have suggested an alternative reason why the federal government may not be sued under the Crime Control Act. Congress, in their view, has not waived the government's sovereign immunity to suit under the Act. *See Doe* v. *Civiletti*, 635 F.2d 88, 94 (2d Cir. 1980); *Leonhard* v. *United States*, 633 F.2d at 623. While resolution of the sovereign immunity issue would not affect the government's liability because we believe there is no private right of action under the Act, *see Sea-Land Service* v. *Alaska Railroad*, 659 F.2d 243, 245 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982); *Hill* v. *United States*, 571 F.2d 1098, 1102–03 (9th Cir. 1978), there is reason to doubt that courts outside the Second Circuit would find the government immune from suit in these circumstances. The courts in *Doe* and *Leonhard* reasoned that the Crime Control Act does not waive sovereign immunity for suits brought against the government under the Act, and that the general waiver of sovereign immunity for injunctive relief in the 1976 amendment to § 702 of the Administrative Procedures Act does not waive immunity in cases, such as those brought under the Crime Control Act, where jurisdiction arises under 28 U.S.C § 1331, the general federal question provision. *See also Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978) (interpreting waiver of immunity under § 702 not to apply to cases arising under § 1331). Numerous courts outside the Second Circuit, however, have rejected this narrow interpretation of the 1976 amendment and have held that it waives sovereign immunity to injunctive relief for all suits brought against the federal government. *See Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Sea-Land Service* v. *Alaska Railroad*, 659 F.2d at 245 n.2; *Newsom* v. *Vanderbilt University*, 653 F.2d 1100 (6th Cir. 1981); *Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Sheehan* v. *Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728, 733 n.3 (1982); *Jaffee* v. *United States*, 592 F.2d 712, 718–19 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *Hill* v. *United States*, 571 F.2d at 1102. Thus, it is probable that at least these courts would find that the federal government has waived its sovereign immunity to injunctive relief under the Crime Control Act.

makes subsistence payments to some participants when they are first relocated. The hiring of an attorney appears to be permissible under this same authority. More importantly, however, the hiring of an attorney is frequently compelled, in our view, by the witness' cooperation with the government and is thus related to the Attorney General's statutorily authorized goal of protecting the participant's new identity. Very likely, for example, some custody disputes occur because relocation of a participant effectively extinguishes the visitation rights of the non-custodial parent. The participant's financial situation may deteriorate as a result of his rapid liquidation of assets and relocation. Once a suit has been brought in these cases, moreover, the safety of the participant may require him to hire an outside attorney, rather than to interview potential witnesses or present his case himself. Finally, the resolution of custody and debtor disputes may be more important because of the participant's entry into the Program. A participant who loses custody of a child may be effectively foreclosed from ever seeing his child again. On the other hand, a participant's loss of a suit to a creditor could lead the Marshals Service to disclose his new identity under the proposed procedures. In all of these cases, therefore, the participant's need to hire an attorney may result directly or indirectly from the danger to his life resulting from his cooperation with the government. Accordingly, we believe that the Crime Control Act authorizes but does not require the Attorney General to pay the attorneys' fees of impecunious participants under the circumstances you have described.

Although several statutes restrict the employment of private attorneys by the federal government, we do not believe they would prohibit the payment of private attorneys' fees under these circumstances. These provisions require that, except as authorized by law, officers of the Department of Justice must conduct all litigation "in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor. . . ." 28 U.S.C. § 516. *See also* 28 U.S.C. § 519.[10] In the custody and debtor disputes which are described in the proposal, however, neither the United States, an agency, or an employee would be a party or an interested person.

B. Termination of Witnesses from the Program

The second type of proposed change in the operation of the Program concerns the termination of witnesses or members of their families from the Program, such as when a witness' identity is disclosed to a creditor or a child is returned to an ex-spouse. These actions raise different legal issues because the Act specifically provides that a person who has entered the Program "may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues." *Reprinted in* notes prec. 18 U.S.C. § 3481. This clause does not restrict the Attorney General's authority to oversee the "facilities" provided the witness and his family—that is, to determine the nature and extent of their

[10] The Department of Justice has recognized a narrow exception to this prohibition where a conflict of interest requires the employment of outside counsel *See* 28 C F.R. §§ 50.15(a)(5) & (a)(6), 50 16 (1982)

protection. An argument could perhaps be made, however, that it restricts the Attorney General's right to terminate a witness and his family from the Program by requiring the Attorney General to determine that their lives or persons are no longer in jeopardy. While the distinction between terminating a witness' participation and changing the nature of his protection is not always clear, disclosing a participant's new identity or arranging the return of a child would normally constitute termination from the Program, assuming no further provision was made for their protection after disclosure.

Despite the ambiguity of the language in the statute, for two reasons we believe that the Attorney General is clearly authorized to terminate witnesses from the Program in the circumstances that have been proposed.

First, the section itself only provides that the witness "may" use the facilities so long as the Attorney General believes his life remains in danger. By using the word "may," Congress appears to have intended only that protection of a witness *could* continue after any trial for as long as the witness' life remained in danger, not that the Attorney General was required to provide such protection. *See* 116 Cong. Rec. 35292 (1970) (remarks of Rep. Poff). The only court to consider this question, *Garcia* v. *United States*, 666 F.2d at 963–64, has found that this sentence does *not* limit the Attorney General's otherwise broad discretion to decide when to terminate participants from the Program. We agree with this decision, although it is possible that other courts could reach an opposite conclusion if the government were to terminate a witness on patently unreasonable grounds.[11]

Second, even if the Attorney General's authority to terminate a witness' participation were interpreted to be limited by this language, we do not believe the clause prohibits the Attorney General from disclosing a participant's identity or arranging for the return of a child under the circumstances which have been proposed. With respect to the witness, the Attorney General's authority to disclose his new identity to a creditor follows implicitly from the Attorney General's power to impose and enforce regulations in the administration of the Program. For example, the Attorney General can clearly condition a witness' acceptance into the Program, as he currently does through the Memorandum of Understanding, on the witness' pledge to settle all prior debts. Once the Attorney General has accepted a witness into the Program, he may insist that previously unsettled debts be satisfied. Such a restriction is not qualitatively different from many others imposed by the Marshals Office, such as prohibiting a participant from returning to his old address, or using his new identity to commit fraud. In light of the Attorney General's authority to impose these requirements, it follows logically that he should be able to take reasonable actions to enforce them. This would necessarily include the right to disclose the identity of a witness in those

[11] The witness in *Garcia* had repeatedly and flagrantly violated the terms of his protection by giving numerous press interviews revealing his new identity and location. *See* 666 F.2d at 962. He was discharged and readmitted into the Program three times. Because the language of the statute and the legislative history are somewhat ambiguous, we cannot exclude the possibility that another court confronted with a more compelling factual circumstance would find the Attorney General's authority more restricted.

egregious cases where the witness is using the Program as a shield against a legitimate creditor and where there is no reasonable alternative for satisfying the claim.[12]

The Attorney General would also have the authority to arrange for the return of a child to an ex-spouse with lawful custody, although for somewhat different reasons.[13] If a state court has granted the ex-spouse custody, and that decision is legally enforceable against the participant, the Attorney General is not terminating the child from the Program by arranging his return. Rather, the child, whose legal interests are protected by the state court and the parent with custody, is in effect withdrawing from the Program. As a matter of policy, we would of course strongly advise that the Attorney General inform the state court of any possible danger to the child, especially where the custody decision was rendered before the child entered the Program. The Crime Control Act, however, would not prohibit the Attorney General from complying with any resulting decision that the ex-spouse had custody. Accordingly, the return of the child, like the disclosure of a witness' new identity to a creditor, would not be prohibited by the Crime Control Act, whether or not the provision described above is interpreted to place a specific limitation on the Attorney General's authority to terminate a participant from the Program.

III. Potential Government Liability to a Participant Under the Federal Tort Claims Act

Assuming the Crime Control Act *authorizes* the Attorney General to adopt the proposed procedures, the important question remains whether the Program, along with the proposed changes, violates any other statute or constitutional provision. We begin this examination with the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–80.

The Federal Tort Claims Act generally waives the federal government's immunity for tort claims "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Several states have recognized that the government can be held liable in tort for failing to provide adequate protection for a government informant whom officials had reason to believe was in danger because of the assistance he provided to the government. *See, e.g., Gardner* v. *Village of Chicago Ridge*, 219 N.E.2d 147 (Ill. 1966); *Schuster* v. *City of New York*, 154 N.E.2d 534 (N.Y. 1958); *Chapman* v. *City of Philadelphia*, 434 A.2d 753 (Pa. Super. 1981). Federal courts have recognized the federal government might be held liable under the Federal Tort Claims Act for failing to protect an informant under the same theory. *See Miller* v. *United States*, 530 F. Supp. 611,

[12] We presume that in the circumstances you have described there would be no other reasonable means for enforcing the money judgment against the witness without disclosing his new identity

[13] The Attorney General's authority to discipline those who ignore his regulations on child custody does not appear independently to justify returning a child to an ex-spouse insofar as the child's rights are concerned. The child has not violated any of the Program's requirements. Nor can the child avoid any sanctions, as the participant can, simply by complying with the directions of the Marshals Service

615 (E.D. Pa. 1982); *Crain* v. *Krehbiel*, 443 F. Supp. 202, 214 (N.D. Cal. 1977); *Swanner* v. *United States*, 309 F. Supp. 1183, 1187–88 (M.D. Ala. 1970). *Cf. Leonhard* v. *United States*, 633 F.2d at 625 n.39. Thus, any of the proposed procedures which subjected the participant to increased danger, such as disclosure of his new identity to a creditor, might give rise to a cause of action under state tort law if the participant were subsequently harmed.[14]

The *proposed procedures* would not themselves subject the government to liability, however, because they come within a specific exception to the waiver of sovereign immunity under the Federal Tort Claims Act. Section 2680(a) states that the waiver of immunity does not apply to

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, *in the execution of a statute or regulation, whether or not such statute or regulation be valid*, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(Emphasis added.) Under this provision, the federal government is immune from tort liability for its adoption of regulations, or the execution of regulations by officials exercising due care. *See Dalehite* v. *United States*, 346 U.S. 15, 33 (1953); *Miller* v. *United States*, 583 F.2d 857, 868 (6th Cir. 1978); *Powell* v. *United States*, 233 F.2d, 851, 854 (10th Cir. 1956). By including this exemption, Congress intended that "the legality of a rule or regulation should [not] be tested through the medium of a damage suit for tort." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). Thus, assuming the proposed changes are adopted as regulations, as we presume they would be,[15] they would not independently subject the federal government to tort liability.[16] Only the failure of Department officials to exercise due care in implementing the regulations of the Witness Protection Program could subject the government to tort liability, *see Hatahley* v. *United States*, 351 U.S. 173, 181 (1956), and we see no basis for refusing to adopt an otherwise valid regulation providing for disclosure under the circumstances discussed here.

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[14] Alternatively, an ex-spouse or witness might bring suit for tortious interference with his or her relationship with a child admitted or terminated from the Program. *See Ruffalo* v. *Civiletti*, 539 F Supp 949, 953 (W D. Mo 1982).

[15] We caution that the adoption of new procedures for the Program should be undertaken only after notice and comment. *See* 5 U S.C. § 553

[16] Because we assume the proposed procedures will be adopted as regulations, we need not address whether they would fall within the other exception in § 2680(a)—the "discretionary function" exception Under this exception the federal government is immune from liability for the decisions of officials performing a "discretionary function or duty" or carrying out directions or policies that were formulated in the exercise of such discretion. *See Dalehite* v. *United States*, 346 U S. at 34–36. We note, however, that two courts have found that at least certain types of decisions made in the operation of the Program may not be protected by this exception *See Ruffalo* v. *Civiletti*, 539 F. Supp. at 953 (allegedly negligent decision to include child of witness in Program); *Miller* v. *United States*, 530 F. Supp. at 615 (allegedly negligent protection of a witness) *But cf. Bergmann* v. *United States*, 689 F.2d 789 (8th Cir. 1982) (government's negligent selection and supervision of protected witness in the Program held to be within discretionary function exception), *Leonhard* v. *United States*, 633 F 2d at 625 (decision not to give continued support to or supervise persons in Program within discretionary function exception)

IV. Potential Government Liability to a Participant Under the Tucker Act: the Memorandum of Understanding

The other basis upon which the proposed procedures might subject the government to statutory liability is the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491. Under the Tucker Act, the federal government has generally waived its sovereign immunity for money damages for breach of contract. *See Hatzlachh Supply* v. *United States*, 444 U.S. 460, 463, 465 n.5, 466 (1980). Thus, the form Memorandum of Understanding, signed by a representative of the Marshals Service and the witness, could arguably subject the government to liability for money damages if it is a binding contract and if it prohibits the Marshals Service from disclosing the witness' identity in the circumstances which it has been proposed to disclose his identity.

A review of the terms of the Memorandum of Understanding currently used by the Marshals Service, however, reveals that it would not prohibit disclosure under the proposed procedures, even if it were a binding agreement, an issue we need not decide. The only proposed procedures that the Memorandum of Understanding might affect are those that could place a witness in danger, namely, disclosure of his identity to a creditor or return of a child to an ex-spouse. Yet, the Memorandum specifically provides that the government will not shield a witness from the claims of his creditors or from ex-spouses seeking custody of children. The introduction states that the Marshals Service "will not shield the witness from civil or criminal litigation initiated prior to or subsequent to entry into the Program" (p. 2). The section on "Debts and Related Legal Matters" provides that the failure to settle all debts before entering the Program "will jeopardize the witness' participation in the Witness Protection Program since the Marshals Service will not shield witnesses from legitimate creditors" (p. 5). Similarly, in the same section, the Memorandum states that "[c]ourt orders which grant custody of minor children to persons other than the witness who is being relocated will be honored and said MINOR CHILDREN WILL NOT be relocated in violation of the court order" (p. 5) (emphasis in original). Finally, the Attorney General retains the right under the Memorandum to terminate any witness' participation in the Program for reasons he deems "appropriate" (p. 1). This would presumably include the authority to disclose the witness' location to a creditor or his child's location to a sheriff seeking to enforce a child custody decree. In light of all of these provisions, the Memorandum of Understanding, in our view, would not subject the Marshals Service to liability for taking the actions discussed in your proposed procedures.

Despite this conclusion, we recommend that the Marshals Service amend the Memorandum of Understanding to set forth in detail the broad powers of the Attorney General to terminate participants from the Program, including, but not limited to, those situations covered in the proposed changes. All new entrants to the Program should be required to sign this form, and the Marshals Service should also attempt to have persons who are already participating in the Program to sign such an amended form. This would assure that all participants have the

clearest notice possible of the obligations of their participation in the Program, that they would be cognizant of the need to comply with the restrictions of the Program, and that they would be less likely to engage in protracted and costly litigation over the operation of the Program.

V. Constitutional Limitation on Operation of Program: Protection of an Ex-Spouse's Relationship with a Child

Having determined that there is no statutory impediment to the adoption of the proposed procedures, various constitutional issues raised by the proposal remain to be considered. We begin with the issue of whether the proposed procedures adequately protect the constitutionally protected relationship between the ex-spouse and her child in the Program. In our view, the proposed changes which provide for enforcement of valid custody decrees make important improvements in protecting this interest, but ultimately may not go far enough in assuring that the ex-spouse's constitutional rights are not violated. To explain this conclusion, we consider in some detail the constitutional protection for the ex-spouse's relationship with her child and the extent to which the proposed procedures protect this interest.

A. Constitutional Interests

According to various court decisions, the ex-spouse's relationship with her child, which is regulated by state law, is deserving of constitutional protection in these circumstances for two reasons—one substantive and the other jurisdictional.

The substantive reason is that courts have held that the relationship between the ex-spouse and the child represents a "fundamental liberty interest" deserving of substantive and procedural protection under the Due Process Clause of the Fifth and Fourteenth Amendments. *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982). As the Supreme Court has observed, the Court's "decisions have by now made plain . . . that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 27 (1981) (quoting *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972)). *See also Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin* v. *Yoder*, 406 U.S. 205, 231–33 (1972); *Stanley* v. *Illinois*, 405 U.S. 645, 651–52 (1972); *Meyer* v. *Nebraska*, 262 U.S. 390, 399–400 (1923).[17] This constitutional protection, moreover, has a procedural

[17] Although the Supreme Court's decisions in this area have primarily examined limitations on the government's authority to terminate a child's relationship with his family, rather than to mediate between parents in a child custody dispute, *see Caban* v *Mohammed*, 441 U S. 380, 414 n 27 (1979) (Stevens, J , dissenting), the language and logic of the Court's decisions would clearly extend some constitutional scrutiny to the termination of a parent's relationship with his child in the context of a child custody dispute. *Cf. Quilloin* v. *Walcott*, 434 U S. at 255 Lower courts have extended constitutional scrutiny in similar types of situations. *See, e.g., Morrison* v. *Jones*, 607 F 2d 1269, 1275 (9th Cir. 1979), *cert denied*, 445 U.S. 962 (1980), *Ruffalo* v *Civiletti*, 539 F. Supp. at 952 (1982); *Roe* v *Conn* , 417 F Supp 769, 777 (M D Ala 1976) (three judge court) *But cf Leonhard* v *Mitchell*, 473 F 2d 709 (2d Cir. 1973) (discussed in detail below)

aspect: even where the state has a sufficiently compelling justification for terminating the ex-spouse's interests, its actions "must be accomplished by procedures meeting the requisites of the Due Process Clause." *Santosky* v. *Kramer*, 455 U.S. at 753 (quoting *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 37 (1981)). *See also Stanley* v. *Illinois*, 405 U.S. at 658. Thus, serious constitutional problems could be raised if the operation of the Program substantially infringes upon the ex-spouse's relationship with the child without "a strong countervailing interest" of the federal government or without affording the ex-spouse procedural due process.

The relationship of the ex-spouse with the child is also deserving of protection from federal intrusion because the Marshals Service has no authority to make child custody and visitation decisions. Obviously, nothing in the Crime Control Act or its legislative history suggests that Congress intended to federalize child custody law or to authorize Marshals Service officials to make legally binding child custody decisions. Moreover, even if it had, such a grant of authority could raise serious Tenth Amendment problems. *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976). "The whole subject of the domestic relations of husband and wife, parent and child," as the Supreme Court has noted, "belongs to the laws of the States and not to the laws of the United States." *In Re Burrus*, 136 U.S. 586, 593–94 (1890). *See also Lehman* v. *Lycoming*, 458 U.S. 502, 511–12 (1982); *United States* v. *Yazell*, 382 U.S. 341, 352 (1966); *Wise* v. *Bravo*, 666 F.2d 1328, 1332 (10th Cir. 1981). Thus, absent a compelling countervailing government interest in a particular case, the operation of the Program should, in our view, generally assure that the ex-spouse's constitutionally protected and state defined custodial interest in the child is not effectively terminated as a result of the federal government's hiding of the child.

B. Protection of an Ex-Spouse's Custodial Rights Under the Program

The proposed changes in the operation of the Program go a long way toward satisfying this requirement, and thus we strongly recommend their adoption. Unfortunately, as a detailed description of these procedures reveals, they may not protect the ex-spouse's custodial interests adequately in every situation.

Under the proposed procedures, the Marshals Service would arrange for the enforcement of a valid and enforceable state judicial decision granting custody of the child to the ex-spouse. Although not discussed in the proposal, the following constitutional and statutory requirements would have to be fulfilled for the decision to be legally binding against the participant and therefore for the government to arrange for its enforcement. First, the court must have satisfied the constitutional requirement of notice, that is, the participant must have received "'notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections.'" *Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965) (quoting *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)). Second, the court must have "personal jurisdiction" over the participant so as to satisfy the Due

Process Clause of the Fourteenth Amendment. Under this standard, there must be "sufficient connection between the [participant] and the forum State to make it fair to require defense of the action in the forum." *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978). *See International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). Third, as a matter of state law, the decision must be legally enforceable against the participant in the state in which it was rendered and in the state in which the child and participant currently reside.[18]

The policy of enforcing custody decisions that meet these requirements would normally satisfy ex-spouses' custodial rights because most ex-spouses should be able to find a state forum that could meet these requirements, and litigate their claims. By agreeing to forward process through the mail, for example, the Marshals Service assures that the participant has been provided notice and an opportunity to be heard. Therefore, any subsequent judgment would not be invalid for lack of adequate notice. *Stanley* v. *Illinois*, 405 U.S. at 657 n.9.[19] Moreover, under the Uniform Child Custody Jurisdiction Act, which has been adopted by at least 46 states,[20] one state always has jurisdiction over custody disputes. *See* § 3(a)(4). All states which have adopted the Act recognize a decision rendered by another state in conformity with the dictates of the Act. *See* § 13. Finally, we assume that, in most of these cases, the defendant would have had sufficient personal contacts with at least one state before he entered the Program to satisfy the personal jurisdiction requirements of the Due Process Clause. Thus, because the ex-spouse probably would not need to learn the new identity of the participant in order to litigate any claim or to enforce any subsequent custody decision, we doubt that the Marshals Service's proposed policy would often create constitutional problems.

Nevertheless, there may be cases where an ex-spouse is unable to litigate her claims because the witness has not had sufficient contacts with any state before he entered the Program, and thus the ex-spouse is unable to obtain personal jurisdiction. In our view, under the general reasoning of the Supreme Court decisions cited above, the Marshals Service normally would be constitutionally required to disclose the participant's identity in these rare circumstances, so long as the witness otherwise had an opportunity to litigate the case in a secure

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[18] The Supreme Court has held that a state is not constitutionally required to give full faith and credit to a custody decree of another state if the state court finds that there are changed circumstances to justify a change in custody *See Halvey* v. *Halvey*, 330 U.S. 610 (1947), *Kovacs* v. *Brewer*, 356 U S. 604 (1958). Because a state court can always find changed circumstances, there is, in practice, no absolute constitutional requirement that a state court enforce an out-of-state custody decree. Of course, it may do so, as a matter of comity, under its own laws

[19] We believe it is also important, as you have proposed, to provide a secure environment where the witness can litigate his claims. Although the due process requirements of an "opportunity to be heard" do not obligate the government to provide all persons with a secure courtroom if they believe their lives are threatened, the operation of the Program might nevertheless create practical, if not constitutional, problems if witnesses under government protection are forced to choose between risking their lives or not litigating claims to child custody Because the proposed changes would avoid these problems, we need not decide whether it would be unconstitutional in this specific and unusual context not to provide the witness with a secure environment to litigate these claims. *Cf Little* v. *Streater*, 452 U.S. 1 (1981) (state constitutionally obligated to pay for blood tests for indigent defendants in paternity suit); *Lassiter* v. *Dept. of Social Services*, 452 U S. 18 (1981) (state obligated to provide counsel for indigent parents in certain parental termination hearings); *Mathews* v *Eldridge*, 424 U S. 319 (1976).

[20] *See* S. Katz, Child Snatching. The Legal Response to the Abduction of Children, 155–62 (1981). Children, pp. 155–62 (1981).

environment and to waive objections to personal jurisdiction.[21] In some of these cases the ex-spouse will never have litigated the question of custody before the participant had entered the Program. Thus, failure to disclose the participant's new identity would absolutely deprive the ex-spouse of the opportunity to litigate her constitutionally protected claim to custody of the child. Even where the issue of custody had previously been litigated, and the participant had been awarded custody before he entered the Program, the failure to disclose his identity would preclude the ex-spouse from relitigating the custody issue in light of the child's participation in the Program and the extinction of the ex-spouse's visitation rights. The ex-spouse's claim to learn the participant's new identity in all of these cases would be especially weighty because the participant could avoid the constitutional problem by waiving objections to personal jurisdiction. *See, e.g., Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee,* 456 U.S. 694, 698 (1982); *McDonald* v. *Mabee,* 243 U.S. 90, 91 (1917). The most recent case to have considered an ex-spouse's right to learn the new identity of her child, *Ruffalo* v. *Civiletti,* 539 F. Supp. 949, generally supports the conclusion that the government has an obligation to protect the custodial interest of the ex-spouse in such circumstances. The court in *Ruffalo* denied summary judgment for the government in a suit by an ex-spouse for damages resulting from admission of a child into the Program. While no final decision has been reached in the case, the court indicated that the government's assistance in depriving a spouse of custodial rights to her child could subject it to damages.

The only other decision to reach this question, *Leonhard* v. *Mitchell,* 473 F.2d 709, may appear to be inconsistent with this view, but we believe it should be read narrowly in light of its special factual and legal context. In *Leonhard* the Second Circuit held that the refusal of the government to disclose a child's new identity to an ex-spouse did not violate a "clear constitutional right," *id.* at 713, and therefore it denied a mandamus action to force disclosure. The court in *Leonhard,* however, was faced with the stark choice of either disclosing the witness' identity, which the government argued would result in the witness' and the child's death, or protecting their identity. There was no mechanism in that case, as there would be under the proposed procedures, for permitting a witness to litigate his claim in a safe environment. The decision in *Leonhard,* moreover, was rendered before the most recent Supreme Court decisions establishing a clearer constitutional basis to a child's relationship with his parents. The lack of clear precedent was important to the *Leonhard* court's conclusion that the plaintiff had not met the burden required for a writ of mandamus. For these reasons, we believe *Leonhard* should not be read to support the government's refusal to disclose the witness' identity where the witness could litigate the issue of custody without threat to his life.[22]

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[21] In practice, the threat to disclose the participant's identity in these circumstances might force the participants to waive objection to personal jurisdiction, thereby avoiding the constitutional problem. Thus, the inability of a spouse to obtain personal jurisdiction may not pose a significant problem.

[22] The witness in *Leonhard,* moreover, had custody of the child when he entered the Program. The government's responsibilities might well have been different if the government had admitted the child into the Program when the witness did not have custody.

We raise only one caveat to this conclusion. Disclosing the new identity of a recalcitrant participant could place the lives of the child and the participant's spouse in danger. Thus, the Marshals Service could argue in such cases that it has a sufficiently compelling interest to justify withholding the new identity of the participant, despite his recalcitrance, because disclosure would endanger the lives of other persons in the Program. Although it is impossible to judge whether or in what factual circumstances courts would accept this view, we recommend that the Marshals Service avoid this constitutional dilemma by offering to provide independent protection for the child and spouse during the pendency of litigation in such cases.

C. Protection of Ex-Spouse's Visitation Rights

Assuming that an ex-spouse has been given an opportunity to litigate and arrange for the enforcement of any custody decision, a separate constitutional problem remains with regard to the effect of the proposed policies on her visitation rights. Unlike the situation of a custody dispute, where the proposed changes, along with our recommendations, assure that any valid custodial interest of an ex-spouse is vindicated, the operation of the Program necessarily requires the extinction of an ex-spouse's visitation rights.[23] This raises two constitutional questions—one substantive and one procedural.

The substantive issue is whether it is constitutional to terminate the visitation rights of an ex-spouse merely because the custodial parent is in the Program. Although the extent of constitutional protection for an ex-spouse's visitation rights is unclear, it is probable that the absolute termination of all visitation or contact between ex-spouse and child, which necessarily occurs when a child enters the Program, would be subjected to constitutional scrutiny. *See Wise* v. *Bravo*, 666 F.2d at 1332 ("visitation rights . . . within the reach of Due Process . . . Clause"); *id.* at 1338 (Seymour, J., concurring) (same); *Ruffalo* v. *Civiletti*, 539 F. Supp. at 952 (termination of visitation rights to child in Witness Protection Program subject to constitutional scrutiny).[24] Moreover, while the Supreme Court has not articulated the permissible grounds for terminating a child's relationship with a parent, it has suggested that "the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest.'" *Quilloin* v. *Walcott*, 434 U.S. at 255 (quoting *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).[25]

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[23] Although we have not been asked what procedures should be followed when the witness and ex-spouse have been granted joint custody, as numerous state statutes permit, *see, e g.*, Cal. Civ Code, § 4600.5(a), the analysis of visitation rights should be generally applicable to this situation as well.

[24] *Cf. Leonhard* v *United States*, 633 F.2d at 618 (child in Program has constitutionally implicated interest in relationship with father outside the Program). *But cf. Leonhard* v. *Mitchell*, 473 F.2d at 713–14 (discussed above)

[25] *See also Santosky* v. *Kramer*, 455 U.S. at 760 n 10 (it is not "clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness") (emphasis in original). *Cf Stanley* v *Illinois*, 405 U.S. 645 (striking down under Due Process Clause the irrebuttable presumption that illegitimate father is unfit parent).

Because the termination of an ex-spouse's visitation rights may end, as a practical matter, any personal relationship or contact between the ex-spouse and the child for an extended period, if not forever, the question arises whether such a disruption may be accomplished constitutionally without a showing that the ex-spouse is somehow an unfit parent.

In the unique circumstance of the Witness Protection Program, the termination of the ex-spouse's visitation rights should not violate the constitutional rights of the ex-spouse. In *Quilloin* itself, the Supreme Court recognized that there were situations where a parent's rights could be terminated merely because it was in the best interests of the child. The Court upheld a state procedure permitting the adoption of an illegitimate child by a stepfather over the objections of the natural father when the state court found it was in the best interests of the child. The Court specifically relied on the fact that the traditional family unit in *Quilloin* had already been dissolved and the child was joining a family unit already in existence. Similarly, in a case arising under the Witness Protection Program, the original family unit normally will already have been dissolved, and the child will be living with one parent with custody. Even more importantly, the life of the participant and of the child could be placed in jeopardy if the spouse were able to exercise her visitation rights. The judgment that visitation could threaten the well-being of the child, moreover, will normally be shared by officials of the Marshals Service, the parent of the child, and, as discussed below, the state court overseeing the custody and visitation dispute. We do not believe that the constitutional protection for the ex-spouse's relationship with the child includes jeopardizing the physical well-being of the child or his custodial parent in these unusual circumstances. Largely for these reasons, two courts which have considered this question, *Leonhard* v. *Mitchell*, 473 F.2d at 714 and *Franz* v. *United States*, 526 F.Supp. 126 (D.D.C. 1981) have found the termination of an ex-spouse's visitation rights to a child in the Program is constitutional.[26]

Even though the termination of an ex-spouse's visitation rights is, in our view, constitutional under these unique circumstances, the procedural question remains whether the Marshals Service may ever admit a child into the Program if the participant has not *first* obtained a modification of any state court decision giving the ex-spouse visitation rights. Normally, "[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' " *Board of Regents* v. *Roth*, 408 U.S. 564, 570 n.7 (1972) (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971)). Thus, an ex-spouse could argue that the Marshals Service should not admit a child into the Program until she has had an opportunity to litigate the issue of her visitation rights in a state court. As a practical matter, any

[26] In *Ruffalo* v *Civiletti*, 539 F. Supp. at 952, the District Court denied summary judgment for the government in a suit brought by a participant's ex-wife who was seeking damages for the loss of visitation rights to her child in the Program. The court noted, however, that there are situations where the government would be justified in terminating visitation rights. *See id.* Thus, it is possible that, even under its analysis, the government could prove at trial sufficient justification for its actions to withstand constitutional scrutiny.

litigation over the issue of visitation rights would probably resolve itself into a dispute over custody. Because no participant could bring a child into the Program and continue the ex-spouse's visitation rights, any decision by the state court to continue the ex-spouse's visitation rights would effectively require that the ex-spouse receive custody. The procedural due process question therefore becomes whether the ex-spouse has a right to litigate this issue before the participant enters the Program, or whether she must wait to litigate it through the special mechanisms we have outlined above.

Because of the unusual facts of this situation, resolution of this question should be left in the first instance to officials of the Marshals Service. As the Supreme Court has observed, due process "is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). We suspect that in most instances, the participant's and child's life could be placed in jeopardy if an ex-spouse had a right to contest the extinction of her visitation rights before the child entered the Program. Such cases appear to be classic examples of "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Board of Regents* v. *Roth*, 408 U.S. at 570. *See also Duchesne* v. *Sugarman*, 566 F.2d at 826. On the other hand, there may be instances where there is an opportunity to litigate the issue in state court without endangering the participant's or the child's life. The Memorandum of Understanding (p. 5), for example, requires the witness to reach an agreement with all of his creditors before entering the Program, suggesting that there is also time, at least in the case of some participants, to litigate the visitation issue before the participant and child assume new identities. In such cases, the Marshals Service would appear to be obligated to allow the ex-spouse an opportunity to contest the extinction of her visitation rights in state court before the child enters the Program. Because we are not sufficiently familiar with the operation of the Program to assess these interests, we recommend that the Marshals Service determine the circumstances in which it believes it has a compelling interest in not providing the ex-spouse with an opportunity to obtain a modification of a visitation decree before the child enters the Program. We are, of course, available to evaluate the constitutionality of such standards or guidelines in light of the Marshals Service's analysis of the governmental interest.

VI. Protection of Child's Constitutionally Protected Relationship with the Parental Ex-Spouse

The courts have suggested that a child in the Program has a constitutionally implicated interest in his relationship with the parental ex-spouse. *See Leonhard* v. *United States*, 633 F.2d at 618; *Franz* v. *United States*, 526 F.Supp. 126 (D.D.C. 1981). As in the case of the parental ex-spouse's interest, the child's interest has two aspects—his interest in being in the custody of a parent who has a legal right to custody; and his interest in being within reach of a parent with a right to visitation. Nevertheless, for much the same reasons that the proposed

procedures, along with our recommended changes, would satisfy the constitutional interests of the ex-spouse in her relationship with the child, they would also accommodate the child's protected interest in his relationship with the ex-spouse.[27]

With respect to the custody issue, the proposed procedures would assure that an ex-spouse could litigate the issue and obtain custody pursuant to a valid custody order. Accordingly, the child would not be deprived of his interest in being in the custody of a parent who wished to pursue her custody rights.

With respect to visitation, the child would be kept out of reach of visitation by an ex-spouse, but, as where the ex-spouse challenges this action, the government has a sufficiently compelling interest in refusing to disclose the participant's and child's new identity in these circumstances. This conclusion is based on three factors.

First, the Marshals Service has a compelling interest in protecting the minor child and participating parent from the consequences that could result if the ex-spouse were permitted to visit. Assuming that officials of the Marshals Service act in good faith in assessing this danger, their decision to refuse to disclose the new identity of the child in order not to jeopardize the child's safety would surely constitute a reasonable performance of their official responsibilities.

Second, under the procedures we have proposed, either a state court or the ex-spouse would have concurred in the judgment of the Marshals Service that the visitation rights must be extinguished. Under these procedures the Marshals Service would afford the witness an opportunity to challenge the termination in state court, and the Service would honor any decision of the state court continuing visitation rights.[28] Accordingly, a child's visitation rights would only be terminated when a state court had concurred in the decision of the parent and witness as to the need to terminate visitation rights in the best interests of the child. Otherwise, the ex-spouse would not have challenged the termination.

Finally, the parent with custody of the child would have concurred in the government's judgment as to the danger to the child. Parents speak for their children in a variety of different circumstances, and usually are presumed to represent their best interests. In a related context, for example, the Supreme Court upheld a state procedure whereby a parent or guardian was permitted to commit a child to a mental institution solely on the judgment of the parent and the hospital. *Parham* v. *J.R.*, 442 U.S. 584 (1979). The court reasoned as follows:

> [O]ur constitutional system long ago rejected any notion that a child is "the mere creation of the State," and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535

[27] Only the interests of minor children are at issue. The admission of an older child into the Program would not create any constitutional problem for, like the witness, an older child would have a right, if he wished, to resume contact with the ex-spouse. *Leonhard* v. *United States*, 633 F.2d at 619

[28] As a practical matter, this would probably mean the voluntary return of the child to the ex-spouse in order to protect the witness.

> (1925). . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. at 602. (Citations omitted; emphasis in original.) Similarly, in cases arising under the Witness Protection Program, a participant who has been granted custody would enjoy this presumption of concern for the welfare and best interests of his child.

The only courts to consider this issue, *Leonhard* v. *United States*, 633 F.2d at 618, and *Franz* v. *United States*, 526 F. Supp. at 127, have denied a child's challenge to the termination of visitation rights under the Program because the parent with custody had consented. While we question whether the custodial parent's consent alone would justify terminating the other parent's visitation rights, where officials of the Marshals Service and the state courts concur in that judgment, we do not believe that the children could successfully challenge the decision on constitutional grounds.

VII. Constitutional Limitations on the Enforcement of Debts of Witnesses

A separate constitutional issue arises with respect to the proposed new policy for dealing with creditors of witnesses. Under this policy, the Marshals Service would evidently reveal the new identity of a witness to a creditor in certain egregious cases, but not in all cases. While we find no statutory or constitutional impediment to the disclosure of witnesses' identities in such cases, the failure to disclose witnesses' identities to all bona fide creditors raises a constitutional issue under the "takings clause" of the Fifth Amendment. This section provides that "private property [may not] be taken for public use, without just compensation."[29] If the Marshals Service's refusal to disclose the new identity of a witness in these circumstances constitutes a "taking" of the creditor's property within the meaning of the Fifth Amendment, the government would be required to compensate the creditor for his claim against a witness.

The Supreme Court has recognized that there is no "set formula" for determining when a government action constitutes a taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Ordinarily, in reaching its decisions, the Court has engaged in "essentially ad hoc, factual inquiries," *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), which "call[ ] as much for the exercise of judgment as for the application of logic."

[29] Contracts are property within the meaning of the Fifth Amendment. *See, e g , United States Trust Co.* v *New Jersey*, 431 U.S 1, 19 n.16 (1977), *Armstrong* v. *United States*, 364 U S. 40, 44–46 (1960), *Contributors to Pennsylvania Hospital* v *Philadelphia*, 245 U S 20 (1917).

Andrus v. *Allard*, 444 U.S. 51, 65 (1979). Such judgment has been informed, however, by the Court's weighing of four different factors.[30]

The first factor is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . ." *Penn Central*, 438 U.S. at 124. If a government action has deprived the claimant of the most reasonable use of his property, the Court is much more likely to find there has been a taking than if he is left with some reasonable economically viable use.[31]

The second factor is whether the claimant's investment-backed expectations can be said to be "reasonable." The government may prohibit certain "obnoxious" uses of property which would threaten "the health, safety, morals, or general welfare," *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928); *see Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388–89 (1926). Under such circumstances, the resulting economic loss to the owner is not considered compensable.[32] Similarly, certain areas of economic activity are heavily regulated by the government, so that it would be unreasonable for private citizens to expect that their property or contracts will not be subjected to future regulations. *See Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 249 (1978); *Veix* v. *Sixth Ward Building and Loan Assoc.*, 310 U.S. 32, 37–38 (1940).

The third factor is the extent to which the adverse government action falls upon a broad class rather than upon a discrete group. Zoning laws that affect a cross section of property in a community, *see Agins* v. *City of Tiburon*, 447 U.S. 255, 262 (1980), rather than a discrete group, as in spot zoning, *see Penn Central*, 438 U.S. at 132, and government wartime regulations that necessarily demand sacrifices from a large portion of the population, *see United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), are less likely to be classified as takings. *See also Monongahela Navigation* v. *United States*, 148 U.S. 312, 325 (1893); Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 75–76 (1964).

The final factor is the extent to which the government's action is directed at and impacts upon the defendant's property directly and physically, rather than indirectly. *See, e.g., Penn Central*, 438 U.S. at 124; *United States* v. *Central Eureka Mining Co.*, 357 U.S. at 165–66; *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 510 (1923). As the Supreme Court has recently held, "a permanent

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[30] Two general principles should be borne in mind in examining any taking question. On the one hand, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law" *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922) On the other hand, at some point the taking clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U S at 49. Any decision on taking ultimately "requires a weighing of private and public interests." *Agins* v. *City of Tiburon*, 447 U S. 255, 261 (1980) The factors discussed in the text have been cited by the Court when undertaking this balancing process.

[31] *Compare Penn Central*, 438 U S. at 136 (preservation of historical site "does not interfere with what must be regarded as . . the primary expectation concerning the use of the parcel") *with Pennsylvania Coal Co* v *Mahon*, 260 U.S. 393, 413 (1922) (where deprivation "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act")

[32] *See also Heart of Atlanta Motel, Inc* v. *United States*, 379 U.S. 241, 261 (1964) (loss of business due to government antidiscrimination laws not compensable), *Everard's Breweries* v. *Day*, 265 U.S 545, 563 (1924) (loss of value of alcoholic beverage stock due to prohibition not compensable).

physical occupation of property" is a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. at 434–35.

Application of these factors to cases arising under the Witness Protection Program is obviously complicated. In most situations, we assume that the creditors would have a reasonable expectation to the payment of their claims, depending upon the ability of the debtor to pay, and the destruction of any specific claim would obviously fall directly and probably exclusively on the claimant, thereby placing the cost of the government action upon a small discrete group rather than upon a cross section of the community. Moreover, in many cases, the Service's refusal to disclose the location of witnesses would result in the practical destruction of the creditors' entire claims, although there may be cases where the withholding of information would only be temporary, or where there is a mechanism by which a creditor could satisfy his claim against other property of the witness.

On the other hand, in virtually all of these cases, the government will not have *directly* deprived the creditor of his property, but rather only assisted a private person in changing his identity, thereby indirectly and unintentionally depriving the creditor of his property by making it impossible for the creditor to enforce his claim. As the Supreme Court has noted in finding the government was not responsible for the damage done by rioters reacting to the presence of government troops, "in any case where government action is causally related to private misconduct which leads to property damage[,] a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment." *YMCA* v. *United States*, 395 U.S. 85, 93 (1969). In cases arising under the Witness Protection Program, the government normally will have made good faith efforts not to permit a witness to enter the Program with outstanding debts, will have disclosed the identity of witnesses to creditors in particularly egregious cases, and will not itself have received any use of the property for its own purposes.[33] All these considerations would support the argument that government's actions are not "sufficiently direct and substantial" to require it to pay compensation. Indeed, the only court that, to our knowledge, has considered the question whether the Marshals Service's concealment of a witness from a creditor constitutes a taking has found that it does not, for essentially these reasons. It held that "the governmental action [of concealing the debtor's identity] was not directed at or toward the plaintiff's property right, and any interference with that right, the evidence of which plaintiff still retains, is at most

[33] This situation can be contrasted with *Webb's Fabulous Pharmacies* v *Beckwith*, 449 U.S. 155, 163 (1980), where the court struck down a state system of interpleader funds because it was "a forced contribution to general governmental revenues" rather than an adjustment of the "benefits and burdens of economic life" *See generally* Sax, *Takings and the Police Power*, 74 Yale L J. 36 (1964)

an indirect consequence of the exercise of lawful government power." *Melo-Tone Vending* v. *United States*, 666 F.2d at 689.[34]

In light of the difficulty in determining whether any one of these factors would be dispositive in a particular factual circumstance, we cannot say with any certainty whether the courts would find the refusal to disclose a witness' identity to be a taking in any particular case. We note that the refusal of the Marshals Service to admit into the Program witnesses who it knows have large debts, and its willingness to disclose the identity of witnesses to creditors in particularly egregious cases, would certainly improve its legal position in those cases where it decides not to disclose a witness' identity to creditors. Therefore, we cannot say at the present time in the abstract that the courts would *not* uphold such a refusal in a particular case. If you would like us to examine this issue in greater detail in particular factual contexts, we would be happy to do so.[35]

VIII. Witness' Statutorily Based Due Process Right

Finally, we note that the proposed procedure would satisfy any constitutionally protected interest the witness may have in the concealment of his identity. Although a witness' interest in preventing enforcement of claims does not invoke substantive constitutional protection, *see United States* v. *Kras*, 409 U.S. 434, 446 (1973),[36] the Supreme Court has recognized that a person may have a *statutorily* derived "legitimate claim of entitlement." *Board of Regents* v. *Roth*, 408 U.S. at 577. Such property or liberty interests

> are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

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[34] We also note that there is a practical consideration in support of this view. the government often does not have sufficient information to litigate whether a creditor has a valid claim against a witness, and therefore against the government The only person, other than the creditor, who has this information—the witness—has no incentive to assist the government if he knows that, by assisting the government, he may be held liable for his debt. Thus, any general policy of reimbursing claims against creditors could possibly lead to abuse because of the difficulty in establishing when a claimant has a valid case against the debtor, and therefore against the government

[35] For similar reasons, we do not believe it is wise to attempt to reach any definite conclusions whether the refusal to disclose the new identity of a witness would violate the Contract Clause. The Contract Clause provides that "[n]o State shall . pass any . Law impairing the Obligation of Contracts. ." U.S Const., Art I, § 10. While on its face the clause applies only to state impairments of contractual obligations, the Supreme Court has suggested that the Fifth Amendment may impose similar restrictions on the federal government's impairment of contracts, *see, e g., Thorpe* v *Housing Authority*, 393 U.S 268, 278 n 31 (1969); *Perry* v *United States*, 294 U S 330, 353–54 (1935), although probably less stringent. *Cf. Usery* v. *Turner Elkhorn Mining Co* , 428 U.S. 1 (1976). As in the case of takings, however, there is a question whether the refusal to disclose the whereabouts of a debtor can be said to constitute an "impairment" of the contract with his creditors in the types of cases arising under the Program. In determining whether an impairment of a contract violates the Contract Clause, moreover, the Supreme Court has considered how severe the impairment is and whether it is "necessary to meet an important general social problem " *Allied Structural Steel Co* v *Spannaus*, 438 U.S. at 247 *See United States Trust Co.* v *New Jersey*, 431 U S. 1, 29 (1977). Because such a determination is dependent on the facts of each case and the actions of the Marshals Service in minimizing unnecessary impairments of creditors' claims, we do not believe any general conclusion about the operation of the Program can be made.

[36] There is also no substantive constitutional right to prevent the government from disclosing a witness' new identity to a creditor merely because it might assist a third person in locating the citizen and injuring him. *Cf Garcia* v. *United States*, 666 F.2d at 963 (no substantive constitutional right to protection of Program)

Id. When existing law creates such an entitlement, the government's decision to withdraw the benefit must be accomplished through procedures which satisfy the protections of the Due Process Clause.

In the case of a witness already receiving protection in the Program, the statute provides that he may continue to use the government facilities "for as long as the Attorney General determines the jeopardy to his life or person continues." Pub. L. No. 91–452, § 502, 84 Stat. 922, 933 (1970). The only court to address this question has found, however, that this provision does not limit the authority of the Attorney General, and therefore does not create a due process right. *Garcia* v. *United States*, 666 F.2d at 964. *Cf. Doe* v. *Civiletti*, 635 F.2d at 97 n.21 (no vested right to subsistence payments under the Act). As we discussed above, we agree with this decision.

Moreover, even if another court confronted with a more sympathetic fact situation than that presented in *Garcia*[37] found that a witness did have such a vested right, the proposed procedures would satisfy any procedural due process right. Under these procedures, a witness would be afforded physical protection in any judicial proceeding so that he could contest any suit brought by a creditor against him and would be provided with an attorney to assist him in his defense. If he should lose in that proceeding, but nevertheless refuse to satisfy the judgment, he should not be entitled to any *additional* procedures before the Marshals Service disclosed his identity. Therefore, even if a court were to find that a witness had a vested interest in his continued participation in the Program, providing the witness with a judicial forum and an attorney would discharge the government's due process obligations. *See generally Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

IX. Conclusion

Our conclusions can be summarized as follows.[38] First, the Crime Control Act authorizes the Attorney General to adopt the proposed procedures. Second, the proposed procedures would not subject the federal government to liability under either the Federal Tort Claims Act or the Tucker Act. Third, in certain rare circumstances, the proposed procedures could possibly violate the due process rights of an ex-spouse who is unable, without knowledge of the witness' new identity, to secure a binding custody or visitation rights determination against a witness participant. Thus, in our view, the Marshals Service should disclose the witness' identity to an ex-spouse in such disputes if (1) the witness refuses to waive objections to jurisdiction, thereby precluding his ex-spouse from obtaining a forum to litigate her claims, and (2) the Marshals Service would be able to provide a secure forum for him to litigate his position if he waived objections. For similar reasons, the procedures should be modified to require a witness to seek

[37] In *Garcia*, the participant had repeatedly and flagrantly violated the terms of his agreement with the Marshals Service.

[38] We have not considered the question of the child's inheritance rights or possible future claim to use the name of his natural parent, insofar as these issues are not presented by the proposed procedures.

amendment of state custody orders granting his ex-spouse visitation rights before the witness and child enter the Program if any resulting delay would not endanger the physical well-being of the child or the witness. If such a modification cannot be sought before entering the Program, appropriate efforts should be made as promptly thereafter to provide an opportunity for litigation in a secure environment provided by the Service.

Finally, the decision to disclose a witness' new identity to a creditor is permissible in the egregious cases which have been described. On the other hand, we cannot say at this point that a *refusal* to identify the witness to a creditor would violate the Fifth Amendment, although we caution that resolution of this question may be dependent on the facts of each case and the developing state of the law in this complex area. To improve our legal position in such cases, we recommend that the Service make every effort to assure that witnesses not be admitted into the Program with outstanding debts, and that a good faith effort be made to induce witnesses to pay legitimate claims in those cases where the Service concludes it is inappropriate to reveal their new identities.

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Approval and Disapproval of Bills by the President After *Sine Die* Adjournment of the Congress

The President may approve a bill after the *sine die* adjournment of Congress. If he wishes to disapprove legislation, the correct procedure is simply inaction, which results in a pocket veto. While a formal veto message is inappropriate, the President may express his disapproval through a memorandum of disapproval.

December 30, 1982

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

This responds to your request for our advice regarding several questions related to the approval or disapproval of bills by the President after the *sine die* adjournment of the 97th Congress.

A. *Approval of bills.* Originally, Presidents had doubts whether they could approve bills when Congress was not in session.[1] President Lincoln apparently was the first President to approve a bill after the adjournment of Congress. The practice became firmly established during the administrations of Presidents Wilson and Hoover. 32 Op. Att'y Gen. 225 (1920); 36 Op. Att'y Gen. 403 (1931). The practice was held constitutional in *Edwards* v. *United States*, 286 U.S. 482 (1932). The basic rationale of *Edwards* is that the Constitution gives the President ten days to consider whether he should approve a bill and that this period may not be shortened by a *sine die* adjournment of Congress. *Id.* at 493.

Examples of instances in which Presidents have approved legislation after an adjournment *sine die* of the Congress and even after its termination are:

1. Following the termination of the 76th Congress on January 3, 1941, President Roosevelt approved bills as late as January 9, 1941. (*See* Pub. Res. No. 111, 54 Stat. 1227 (1941).)

2. After the *sine die* adjournment of the 81st Congress on January 2, 1951, and its termination of January 3, 1951, President Truman approved bills as late as January 12, 1951. (*See* The Public Papers of the Presidents, Harry S Truman 1951, 26–27.)

[1] These doubts were based on the now rejected theory that the approval of a bill is a legislative act which can be performed only while Congress is in session. *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 453–55 (1899).

3. After the *sine die* adjournment of the 91st Congress on January 2, 1971, and its termination on January 3, 1971, President Nixon approved bills as late as January 13, 1971. (*See* 7 Weekly Comp. Pres. Doc. 71 (Jan. 18, 1971).)

B. *Disapproval of bills.* Article I, § 7, clause 2 of the Constitution provides that if Congress by its adjournment prevents the return of a bill, a bill not approved by the President within ten days after the presentation "shall not be a Law." The effect of this provision is twofold. First, if the President wants to disapprove a bill, he cannot return it to the House in which it originated. Second, if he wants to approve it, he must act positively during the ten-day veto period. Failure to do anything results in the disapproval of the legislation, *i.e.*, a pocket veto. *Edwards* v. *United States*, 286 U.S. at 491–92.

The correct procedure for disapproving a bill after a *sine die* adjournment of the Congress is inaction. A formal veto message is inappropriate. The President's disapproval of the legislation may be expressed by a memorandum of disapproval. Thus, after the *sine die* adjournment of the Congress on January 2, 1951, and its termination on January 3, 1951, and the convening of the 82d Congress on the same day, a memorandum of disapproval, dated January 6, 1951, disclosed President Truman's failure to approve a private bill. The Public Papers of the Presidents, Harry S Truman 1951, 657. After the termination of the 91st Congress on January 3, 1971, President Nixon issued a memorandum of disapproval, dated January 4, 1971, disclosing his failure to approve a bill to provide special retirement benefits for firefighters. 7 Weekly Comp. Pres. Doc. 32 (1971).

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