OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL

AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

VOLUME 7

1983

WASHINGTON
1993

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Foreword

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and of the professional bar and the general public. The first six volumes of opinions published covered the years 1977 through 1982; the present volume covers 1983. The opinions included in Volume 7 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 1983 are not included.

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

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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Designation of Interpol as a Public International Organization Under the International Organizations Immunities Act

The International Criminal Police Organization, INTERPOL, qualifies for designation by the President as a "public international organization" under the International Organizations Immunities Act, 22 U.S.C. § 288 (IOIA), entitled to enjoy certain privileges, exemptions, and immunities under United States law. INTERPOL is composed exclusively of states as members and the United States participates in INTERPOL pursuant to statutory authority.

Statutory protection is limited to international organizations that can demonstrate a particularized need for such protection. INTERPOL's contacts with the United States are sufficient to demonstrate a need for protection, notwithstanding its lack of an office and permanent staff in the United States. Because INTERPOL does not have an office or staff in the United States, however, several of the specific privileges, exemptions and immunities available under the IOIA may be inapplicable. In an executive order designating INTERPOL as a public international organization, the President could limit the privileges, exemptions, and immunities accorded to INTERPOL to those necessary to carry out its essential functions in the United States.

January 12, 1983

MEMORANDUM OPINION FOR THE CHIEF, INTERPOL
UNITED STATES NATIONAL CENTRAL BUREAU

This responds to your request for our opinion whether the International Criminal Police Organization (INTERPOL) qualifies for designation as a "public international organization" under the International Organizations Immunities Act, 22 U.S.C. § 288 (IOIA or Act). The IOIA provides certain privileges, exemptions, and immunities under United States law to eligible public international organizations designated by executive order. For the reasons set forth below, we conclude that INTERPOL meets the threshold legal requirements for designation under the IOIA. The most important immunity available to INTERPOL by virtue of such designation would be immunity of INTERPOL and its officers, employees, and representatives from suit or legal process with respect to acts performed within the scope of the functions of INTERPOL. Because INTERPOL does not maintain any office or permanent staff in the United States, many of the other privileges, exemptions, and immunities afforded by the IOIA may be irrelevant or unnecessary to protect the functioning of INTERPOL in the United States. We suggest, therefore, that the privileges, exemptions, and immunities available under the Act could be limited by executive order to those necessary for INTERPOL to carry out its essential function, *i.e.*, the coordination and exchange of police information among its member states.

At the outset, we note that our advice here is limited to the threshold legal considerations raised by the possible designation of INTERPOL under the IOIA. INTERPOL has not yet applied for designation, although we understand an application will be filed with the Department of State in the near future. We therefore cannot comment specifically on the details of the designation. This Office will, of course, review for form and legality the draft executive order designating INTERPOL, if the decision is made to proceed. We also do not address policy questions raised by INTERPOL's possible designation under the IOIA. You may wish to pursue those questions through appropriate channels within this Department, the State Department, and the White House.

I. Background

The IOIA authorizes the President to designate "public international organizations" in which the United States participates as being entitled to enjoy certain privileges, exemptions, and immunities under United States law. 22 U.S.C. 288. These privileges, exemptions, and immunities include: (1) the capacity to contract, to acquire and dispose of real and personal property, and to institute legal proceedings; (2) immunity from suit and legal process for the organization; (3) immunity of the organization's property and assets from search and confiscation, and inviolability of its archives; (4) exemption from customs duties and internal revenue taxes on goods imported by the organization, exemption from registration requirements for foreign agents, and inviolability of official communications; and (5) exemption from property taxes. *Id.* §§ 288a(a)-(d), 288c. The Act also provides certain immunities and exemptions for officers and employees of the organization and for foreign representatives to the organization including, most importantly, immunity from suit and legal process with respect to "acts performed by them in their official capacity and falling within their functions." *Id.* § 288d(b).[1] Section 288 authorizes the President to withhold, withdraw or condition any of the specific privileges, exemptions, and immunities "in light of the functions performed by the organization," and to revoke the designation if the organization or its officers or employees abuse those privileges, exemptions, and immunities.

INTERPOL has not previously sought designation as an international organization under the IOIA, even though the organization has existed since 1923

[1] The Act also provides for exemptions from customs duties and internal revenue taxes on baggage and effects of the organization's officers, employees and representatives, and their families and households, *id.* § 288b, and exemptions for such individuals from laws regulating entry into or departure from the United States, alien registration and fingerprinting requirements, and requirements for registration as foreign agents. *Id.* § 288d(a). Unlike the immunity from suit and legal process afforded by § 288d(b), which is available to citizens of the United States who serve as officers or employees of the organization, the exemptions provided by §§ 288b and 288d(a) are not available for United States citizens.

and, since 1938, the United States has participated on a formal or informal basis pursuant to the authority provided to the Attorney General in 22 U.S.C. § 263a.[2] We understand the Secretary General of INTERPOL has decided to seek designation under the IOIA primarily because of the recent decision by the United States Court of Appeals for the District of Columbia in *Steinberg* v. *International Criminal Police Organization*, 672 F.2d 927 (D.C. Cir. 1981). In that decision the court ruled that *in personam* jurisdiction exists over INTERPOL under § 13423(a)(4) of the District of Columbia's long arm statute, which authorizes the exercise of personal jurisdiction over a nonresident "who caus[es] tortious injury in the District of Columbia by an act or omission outside the District" if the nonresident "regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the District of Columbia." 672 F.2d at 930. We also understand that an additional consideration relevant to the Secretary General's decision is the negotiation by INTERPOL and the French Government of a new Headquarters Agreement, which will provide INTERPOL with expanded privileges and immunities under French law.[3] INTERPOL anticipates that the new Headquarters Agreement could serve as a model for similar grants of privileges and immunities in other countries, by agreement or by statute, if it becomes advisable or necessary to seek such protections.

II. Analysis

The threshold issue is whether INTERPOL qualifies for designation by the President under the IOIA. To qualify for designation, the organization must be a "public international organization," *i.e.*, it must be "composed of governments as members." *See* H.R. Rep. No. 1203, 79th Cong., 1st Sess. (House Report). The United States must participate in the organization pursuant to treaty or "under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation." 22 U.S.C. § 288. Although the statute itself does not impose any requirement that the organization have particular contacts with the United States, the House Report notes,

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[2] 22 U.S.C. § 263a authorizes the Attorney General "to accept and maintain, on behalf of the United States, membership in the International Criminal Police Organization." The purposes of INTERPOL, as set forth in its Constitution, are:

> (a) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the "Universal Declaration of Human Rights;" [and]
>
> (b) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.

Constitution of the International Criminal Police Organization, Art. 2. The primary function of INTERPOL is to coordinate the exchange of information relating to crimes and criminal investigations and of certain humanitarian information among the member states, each of which is represented by a designated national central bureau.

[3] You have informed us that the Headquarters Agreement and the Exchange of Letters were approved by the INTERPOL General Assembly at its annual meeting in October 1982, and have been signed by the President of INTERPOL and by a representative of the Government of France. The one remaining step is submission of the Agreement and Exchange of Letters to the French Parliament for ratification, which we understand will take place this spring.

"as a practical matter, the bill will not be applicable to public international organizations to which the United States does belong but which do business entirely outside of the United States and which will therefore have no need for protection under the legislation." House Report, *supra*, at 1–2.

Under Executive Order No. 9698, 3 C.F.R. 508 (1946), the Secretary of State is charged with reviewing applications and proposing organizations to be designated pursuant to the Act. The Department of State, elaborating on the substantive criteria for eligibility under the Act, has established the following threshold requirements:

> (1) The applicant organization, and its officers and employees, must be doing sufficient business in the United States to warrant granting them the privileges of the legislation, and their activities must be such as reasonably to require the said privileges. In general, this will mean that the organization must have an office and staff located within the United States.
>
> (2) The Government of the United States must be a participating member of the applicant organization.
>
> (3) The participation of the Government of the United States must be pursuant to a treaty or under the authority of an Act of Congress authorizing such participation or making an appropriation for such participation.
>
> (4) The applicant organization must be composed principally of governments, as distinguished from private organizations, as members.
>
> (5) The applicant organization must not be scheduled for liquidation in the immediate future.

Bulletin of the Department of State, No. 128 (Feb. 20, 1946) (State Department Bulletin). We believe INTERPOL satisfies the threshold legal requirements for designation under § 288 and the State Department's guidelines. First, although there has been some confusion in the past about characterization of INTERPOL as a "public" or "private" organization, we are satisfied that INTERPOL would be considered a "public international organization" for the purposes of the IOIA.[4] INTERPOL is composed exclusively of states as members; each national central bureau responsible for liaison with INTERPOL's General Secretariat is an official law enforcement agency within its country's government; and INTERPOL's officers and Executive Committee members are elected by government officials from all member states. Second, although INTERPOL was not set up by treaty, convention, or executive agreement, the United States participates in INTERPOL pursuant to specific statutory authority. *See* 22

[4] A 1976 Comptroller General's Report on the United States' participation in INTERPOL noted, "various terms have been used to describe INTERPOL's status. The United Nations, the General Secretariat, and U.S. Treasury officials refer to it as intergovernmental; others call it a private or nongovernmental organization, and many perceive it as an organization in the mold of a United Nations." Report of the Comptroller General of the United States, "United States Participation in INTERPOL, The International Criminal Police Organization" 25 (Dec. 27, 1976).

U.S.C. § 263a.[5] Moreover, Congress has repeatedly authorized and appropriated funds for payment by the United States of dues to INTERPOL.[6] The only question that gives us some pause is whether the lack of any office or permanent staff in the United States precludes INTERPOL, as a matter of law, from eligibility for designation under the IOIA. The legislative history of the Act and the implementing State Department Bulletin suggest the statute is intended primarily to meet the needs of international organizations that have offices and staff in the United States. We have been told informally by the State Department that all of the organizations that have been designated under the IOIA to date have some permanent facilities and/or staff in the United States.[7] To our knowledge, however, no organization has requested and been denied designation on the ground that the statute applies only to organizations with offices or staff in the United States.

We do not believe the IOIA requires that an international organization seeking designation have offices, facilities, or permanent staff in the United States. The focus of the Act, as reflected in the Department of State's guidelines, is on the need of the international organization for the particular privileges, exemptions, and immunities provided by the Act, in order to carry out the organization's legitimate functions. Although the House Report recognizes that "as a practical matter" the statute would not apply to organizations that do business entirely outside of the United States, it does not suggest that an organization must have offices or staff in the United States in order to have sufficient contacts to warrant the protection of the Act. *See* House Report, *supra*, at 1. Similarly, the statement in the State Department Bulletin that "in general" an organization must have an office and staff in the United States is only an elaboration on the requirement that the organization "be doing sufficient business in the United States to warrant granting them the privileges of the legislation, and their activities must be such as reasonably to require the said privileges." Thus, the State Department Bulletin does not rule out the possibility that an organization with no office or staff located within the United

[5] The primary constitutive document of INTERPOL is its Constitution. The currently effective Constitution was adopted by the INTERPOL General Assembly in 1956. It provides that all countries then participating in the organization were deemed to be members unless they declared within six months of the effective date of the Constitution that they would not accept the Constitution. The United States has never submitted a declaration of non-acceptance.

[6] The current version of § 263a provides that dues and expenses for the membership of the United States in INTERPOL "shall be paid out of sums authorized and appropriated for the Department of Justice." Pub. L. No. 95–624, § 21(a), 92 Stat. 3459, 3466 (1978).

[7] A wide variety of organizations, with differing structures, membership requirements, and functions, has been granted designation under the IOIA. These include, for example, the African Development Fund, the Food and Agriculture Organization, the Great Lakes Fishery Commission, the Inter-American Tropical Tuna Commission, the International Bank for Reconstruction and Development, the International Coffee Organization, the International Cotton Advisory Committee, the International Maritime Satellite Organization, the International Pacific Halibut Commission, the International Telecommunications Union, the International Wheat Advisory Committee, the Organization of African Unity, the Organization of American States, the United Nations, the World Health Organization, and the World Meteorological Organization. Most recently, the President has designated the Multinational Force and Observers and the International Food Policy Research Institute as public international organizations for purposes of the IOIA. See Exec. Order No. 12359, 3 C.F.R. 180 (1982).

States may nonetheless be able to demonstrate a nexus with the United States that creates a reasonable need and basis for receipt of the privileges, exemptions, and immunities provided by the Act.

Therefore, we believe the lack of an office and permanent staff in the United States does not make INTERPOL ineligible as a matter of law for designation under the IOIA. The clear legislative intent of the statute, however, is to limit the protection afforded by the Act to international organizations that can demonstrate a particularized need for such protection. We thus must consider whether the contacts INTERPOL has with the United States, which consist primarily of frequent communications by radio, teletype, and mail to the USNCB and occasional visits by INTERPOL officials or employees to consult with appropriate U.S. law enforcement personnel, provide a sufficient nexus to trigger designation under the IOIA.

We believe INTERPOL's contacts are sufficient, particularly in light of the *Steinberg* decision, to satisfy the threshold legal requirements for designation under the IOIA. The essential function of INTERPOL and its primary usefulness to United States law enforcement efforts lie in the exchange of information with the national central bureaus, including the USNCB. The ruling in the *Steinberg* case potentially exposes INTERPOL to suit in the United States, at least within the District of Columbia, for performance of that function.[8] It is not clear at this time how substantial that exposure is, or how the risk of suit will affect INTERPOL's ability or willingness to continue the exchange of information with the USNCB.[9] We are satisfied nonetheless that the Steinberg ruling demonstrates INTERPOL's need for at least some of the protections afforded by designation under the IOIA, and therefore we conclude INTERPOL would satisfy the minimum threshold legal requirements for such designation.

You have also asked us to consider whether the privileges, exemptions and immunities available to INTERPOL under the IOIA should be limited or conditioned, if a decision is made to grant INTERPOL designation as a public international organization. That decision rests ultimately on policy considerations that are not appropriately addressed by this Office. As a matter of legal analysis, however, we note that § 288 gives the President the authority to place conditions or limitations on the available privileges, exemptions, and immunities, "in light of the functions performed by the organization." Although we do not interpret this language to impose any mandatory obligation upon the President to limit the designation of organizations in any specific manner, we believe it would be appropriate in light of INTERPOL's specific and somewhat limited need for immunity for the President to limit the privileges, exemptions, and immunities accorded to INTERPOL to those that are necessary to preserve and protect the functions performed by INTERPOL in the United States.

[8] In practical terms, suits in the District of Columbia would be INTERPOL's primary concern, since most of the information transmitted to the United States by INTERPOL is sent to the USNCB in the District of Columbia. Consequently, most plaintiffs alleging injury from such transmissions could probably establish jurisdiction and venue within the District.

[9] It is certainly relevant that the Secretary General of INTERPOL deems the *Steinberg* ruling of sufficient concern to warrant application for designation under § 288 of the IOIA.

Because INTERPOL does not have an office or staff in the United States, and therefore has no property, assets, archives, or permanent employees located in the United States, several of the specific privileges, exemptions, and immunities available under the IOIA may be inapplicable or irrelevant to INTERPOL.[10] These include the following:

(1) capacity to acquire and dispose of real and personal property;[11]

(2) immunity of property and assets from search and inviolability of archives;[12]

(3) exemptions from customs duties and internal revenue taxes with respect to goods or articles imported into the United States by the organization;[13] and

(4) immunity of the organization from property taxes.[14]

Several other privileges, exemptions and immunities specified in the IOIA could, however, be considered critical to preservation of INTERPOL's functions in the United States, and therefore should be specifically included in the designation order. These would include the following:

(1) immunity of the organization from suit and judicial process;[15]

(2) privileges for official communications;[16] and

(3) immunity of representatives of foreign governments in or to the organization and officers and employees of the organization from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as representatives, officers or employees.[17]

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[10] This conclusion is based on the facts available to us with respect to INTERPOL's contacts with the United States. It may be that additional considerations exist or may exist in the future that would warrant application of the particular privileges, exemptions, or immunities listed in the text. We do not suggest that, as a matter of law, the President must limit INTERPOL's designation to exclude those privileges, exemptions and immunities.

[11] 22 U.S.C. § 288a(a). That section also provides that a designated international organization shall have the capacity to contract and to institute legal proceedings. Although we are not aware of any particular need for INTERPOL to be able to enter into contracts or to institute legal proceedings in the United States, that authority is not as clearly unrelated to INTERPOL's activities within the United States as is the authority to acquire and dispose of property.

[12] 22 U.S.C. § 288a(c). We understand the term "archives" to mean permanent files maintained by the organization. To our knowledge, the only archives maintained by INTERPOL are located in France. The protection for archives of international organizations available under the IOIA would not extend to information within the possession, custody, or control of a United States citizen or agency that may have originated in the archives of the international organization. Thus, even if it is deemed appropriate to provide in the executive order for the inviolability of INTERPOL's archives, that protection would not extend to information maintained by the USNCB that originated with INTERPOL. As the USNCB's Privacy Act Notice points out, the records maintained by the USNCB are separate and distinct from records maintained by INTERPOL. *See* 46 Fed. Reg. 60328 (1981). In the hands of the USNCB, those records are clearly subject to all applicable federal laws and regulations.

[13] 22 U.S.C. § 288a(d).

[14] 22 U.S.C. § 288c.

[15] 22 U.S.C. § 288a(b).

[16] 22 U.S.C. § 288a(d).

[17] 22 U.S.C § 288d(b).

Finally, it is not clear to us whether the exemptions and immunities from import taxes, entry and exit regulations, alien registration and fingerprinting requirements, and foreign agent registration requirements provided in §§ 288b and 288d(a) of the Act for alien officers, employees, and representatives of designated organizations would be necessary or appropriate to preserve and protect the functioning of INTERPOL in the United States. We understand that officials and employees of INTERPOL travel to the United States with some frequency for consultations with the USNCB or other United States law enforcement personnel, and that meetings or conferences of INTERPOL may be held in the United States in the future. If INTERPOL and the Department of State believe some or all of the exemptions provided by §§ 288b and 288d(a) are necessary or advisable to facilitate such visits, the designation order could appropriately include those exemptions and immunities.

If the designation order is limited as we discuss, the privileges and immunities afforded INTERPOL under United States law would be considerably more narrow than those afforded INTERPOL under French law pursuant to the new Headquarters Agreement. The breadth of the privileges and immunities provided by the Headquarters Agreement reflects that INTERPOL maintains its headquarters and staff in France and therefore needs additional protections under French law that would not be necessary in the United States, as we have discussed. With one exception, the privileges and immunities we suggest may be critical to INTERPOL's functions in the United States, *i.e.*, immunity of INTERPOL and its officers, employees and representatives from suit and legal process, and privileges for official communications, are comparable in scope to analogous privileges and immunities provided in the Headquarters Agreement.[18] The one exception is the provision in the Headquarters Agreement for full diplomatic privileges and immunities for the Secretary General of INTERPOL. Under the IOIA, the privileges and immunities accorded to officials or employees of designated international organizations must be limited to the specific privileges and immunities set out in the Act, and cannot extend to full diplomatic privileges. Section 288e(c) provides that:

> No person shall, by reason of the provisions of this subchapter, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein.

22 U.S.C. § 288e(c). Therefore, the Secretary General of INTERPOL could not be accorded full diplomatic privileges under United States law.[19]

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[18] We understand that the Headquarters Agreement provides, *inter alia*, for limited immunity from legal process for the Organization, inviolability of official correspondence, and immunity from legal process for representatives, officials, and members of the Organization's staff with respect to acts performed in connection with their official duties.

[19] The primary practical effect of this limitation is to restrict the immunity of the Secretary General from suit and legal process under United States law to acts performed in his official capacity or within his functions as Secretary General. The House Report notes this limitation was intentional:

Continued

In addition to the specific privileges and immunities provided in the Headquarters Agreement, the accompanying Exchange of Letters between INTERPOL and the French Government requires INTERPOL to establish a Supervisory Board to verify the accuracy of personal information maintained by INTERPOL in its internal archives in France and to supervise INTERPOL's collection, maintenance, and dissemination of such information. We understand agreement on such a Supervisory Board was a precondition imposed by the French Government for its assent to the specific privileges and immunities set out in the Headquarters Agreement. We believe the creation of the Supervisory Board, although not legally relevant to the question of INTERPOL's eligibility for designation under the IOIA, could be advantageous in dispelling concerns that may exist both within and outside the federal government about the possibility of abuse by INTERPOL of its ability to collect and exchange personal information outside the reach of any nation's laws.[20] The *Steinberg* litigation demonstrates that some concern exists about the possibility of injury to innocent individuals by INTERPOL's dissemination of erroneous information linking those individuals with criminal investigations, concerns that could be exacerbated if INTERPOL seeks immunity from suit under U.S. law. We believe those concerns could be alleviated somewhat once the Supervisory Board is in operation.

Because we do not believe the existence or operation of the Supervisory Board is a legal prerequisite to designation of INTERPOL under the IOIA, we do not suggest the designation be conditioned on the existence of the Board. However, it may be advisable to describe, either in the executive order itself or in an accompanying statement, the operation of the Supervisory Board and the protections afforded by the Board for United States citizens.

RALPH W. TARR
Deputy Assistant Attorney General
Office of Legal Counsel

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[19] (. . . continued)

> [T]he immunity from suit to be extended to officers and employees of international organizations is limited to immunity for acts performed by them in their official capacity whereas diplomatic officers enjoy full immunity from legal processes in this country.

House Report, *supra*, at 6.

[20] Nothing in the IOIA or its legislative history suggests Congress contemplated that the privileges, exemptions, or immunities available under the Act should be conditioned on the existence of some alternative form of redress for harms caused to United States citizens by activities of designated international organizations. Insofar as we are aware, no such conditions have been placed on other designated organizations.

Waiver of the Application of Conflict of Interest Laws for Members of the President's Commission on Strategic Forces

Members of the President's commission on Strategic Forces are special government employees for purposes of the conflict of interest laws, based on a Department of Defense determination. Under 18 U.S.C. § 208(a), such employees may not participate without a waiver in any particular matter in which they or their employers have a financial interest.

Waivers of the application of § 208(a) for members of the Commission may be granted by the Counsel to the President. This authority is based in part on 3 C.F.R. § 100.735–32, by which the President delegated to the Counsel his authority to grant waivers under 18 U.S.C. § 208(b)(1) for "Presidential appointees to committees, boards, commissions, or similar groups established by the President."

The statutory standard for the grant of waivers clearly anticipates the exercise of discretion by the appointing official. Factors suggested by § 208(b)(1) include the nature and magnitude of the employee's financial interest, the nature of the anticipated services to the government, and the likelihood that integrity of those services may be compromised. Other non-statutory factors might be considered with caution, such as the ability to reduce conflict by public disclosure of the employee's interest, the government's need for the employee's services, and the agency's general policy or practice in granting waivers.

January 19, 1983

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE

You have asked us to advise you concerning possible waivers of the application of a conflict of interest statute, 18 U.S.C. § 208, for particular members of the President's Commission on Strategic Forces. We have agreed to assist you (1) by identifying the appropriate official(s) to consider and, if appropriate, approve such waivers; and (2) by describing some of the factors that may be considered by that official in applying the waiver standard. We understand that your inquiry was prompted by the case of a potential member of the Commission who has an ongoing consulting arrangement with one of the primary contractors for the MX missile project.

We understand from our discussions and the materials you have provided that the Department of Defense has determined that members of this advisory committee are special government employees for purposes of the conflict of interest laws. *See generally* 18 U.S.C. § 202; Federal Personnel Manual, Appendix C. As you know, as special government employees, the members of this advisory committee may not participate in any particular matters in which they, or their employers, have a financial interest. 18 U.S.C. § 208(a). This restriction on an individual employee's activities may be waived if "the official responsible for the appointment to [the employee's] position" determines in writing that the interest of the employee "is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect" from the employee. 18 U.S.C. § 208(b)(1). Because it is anticipated that the Commission will be advising the President concerning the MX missile and its possible basing modes, the application of § 208 to this situation has been raised.

I. Appropriate Official to Grant Waiver Under 18 U.S.C. § 208(b)

As mentioned above, § 208(b) authorizes the "Government official responsible for the appointment [of an employee] to his position" to waive the application of § 208(a) to the employee in certain circumstances. In determining which officials can exercise such power, we consider two questions: (1) which official is "responsible for the appointment" of the members of the Commission; and (2) has the official "responsible for the appointment" delegated his authority under this provision to any other person(s).

With respect to the first question, we believe the President is the official "responsible for the appointment" of the members of the Commission. Pursuant to Executive Order No. 12400, members of the Commission are "appointed or designated by the President" to membership on the Commission. There is no provision that any other official should be responsible for the appointment of any of the members to the Commission. In the process of drafting Executive Order No. 12400, members of the White House Counsel's Office and the General Counsel's Office of the Office of Management and consistently expressed an intent and understanding that the Commission was to be a Presidential Advisory Committee, with control over the appointment and dismissal of members of the Commission to be vested solely in the President. Accordingly, in our view, the President is the "Government official responsible for the appointment [of the members] to [their] position[s]" within the meaning of 18 U.S.C. § 208.

Even though the President is the appointing "Government official" within the meaning of 18 U.S.C. § 208, he may, pursuant to 3 U.S.C. § 301, delegate his authority with respect to "any function vested in the President by law" to "the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate." Such delegation must be in writing and published in the Federal Register. *Id.* In addition, the President has certain inherent authority, which is recognized but not specifically enumerated in 3 U.S.C. § 302, to delegate authority to officials who do not meet the requirements set forth in § 301. In Executive Order No. 11222, Part V, as amended, the President delegated his authority to grant waivers under 18 U.S.C. § 208(b) with respect to many Presidentially appointed officers and employees, while specifically exempting from this delegation, among other persons, "Presidential appointees to committees, boards, commissions, or similar groups established by the President." In 3 C.F.R. § 100.735–32, however, the President delegated to the Counsel to the President the authority reserved in the above provision. Although the Counsel to the President is not appointed by the President with the advice and consent of the Senate, this delegation has existed at least since 1968 and has never, to our knowledge, been challenged by Congress. While we do not need to pass on that issue for the purpose of this memorandum, the delegation of power to the Counsel to the President would appear to fall within the President's inherent power to delegate, and thus, the President and the Counsel to the President currently appear to have authority to grant a waiver under 18 U.S.C. § 208(b) to members of the Commission with respect to their service on the Commission.

An argument could be made that § 4 of Executive Order No. 12400, which created the Commission, also delegates to the Secretary of Defense the President's authority to grant waivers under 18 U.S.C. § 208. We conclude, however, that if the President wishes the Secretary of Defense to exercise the President's authority under § 208(b), the proper course would be to execute a new, more specific memorandum under 3 U.S.C. § 301, specifically delegating such authority to the Secretary of Defense. Section 4 of Executive Order No. 12400 delegates the "performance" of the President's "functions" under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. app. § 1, to the Secretary of Defense. The FACA, 5 U.S.C. app. § 8, provides, *inter alia*, that each agency head, in this case the Secretary of Defense, "shall establish uniform administrative guidelines and management controls for advisory committees" and appoint an Advisory Committee Management Officer to "exercise control and supervision" over the committee. The FACA, however, does not specifically address conflict-of-interest problems related to members of advisory committees. Thus, granting a waiver of conflicts of interest under 18 U.S.C. § 208 may not be a "function" "performed" under the Federal Advisory Committee Act. In light of the fact that the President expressly reserved to himself in Executive Order No. 11222, as amended, the authority to grant waivers under 18 U.S.C. § 208(b), it is doubtful that the delegation of authority in Executive Order No. 12400 is sufficiently specific to constitute a delegation of the Presidential waiver authority. For these reasons, if the President wishes the Secretary of Defense, rather than the Counsel to the President, to assume the authority to grant waivers for members of the Commission, we conclude that a new memorandum of delegation should be executed. In addition, if the President wishes some other official to exercise this authority, he may execute a memorandum delegating this to any official appointed by the President with the advice and consent of the Senate. *See* 3 U.S.C § 301.

II. The Waiver Standard

Section 208(b)(1) provides that waivers of the restriction of § 208(a) may be granted upon a written determination that the disqualifying interest of the employee is "*not so substantial as to be deemed likely to affect the integrity of the services which the government may expect*" from the employee. (Emphasis added.) This standard clearly anticipates the exercise of discretion and personal judgment by the appointing official. We have not reviewed the facts of this matter in sufficient detail to make our own judgment concerning a waiver in this case, nor would it be appropriate for us to do so inasmuch as the responsibility of the Commission will relate to matters that are beyond our knowledge and expertise. The discussion that follows is intended simply to direct attention to some of the factors which are generally used to inform such judgments.

The standard set forth in the statute suggests two lines of inquiry, focusing on (1) the financial interest and (2) the services of the employee. In our view, it is appropriate to consider any factors that develop either of these lines of inquiry suggested by the statute.

There are numerous factors that may help to clarify the nature and magnitude of the employee's financial interest. Certainly it is helpful to quantify the dollar amount of the interest, or its outer limits. In this case, the consulting contract presumably is worth $50,000, and possibly more if the contract is extended or additional contracts are expected. These factors might be compared with the potential member's overall income, and with his net worth, to obtain some sense of the relative value of the consulting contract(s) to him.[1] The type of the financial interest may also be important. In this case, the financial interest arises from an employment relationship. While employment relationships frequently create stronger and more personal ties than ordinary investment relationships, the tenure and details of this particular relationship could be significant factors in making a waiver determination. For example, one might find it more difficult to justify a § 208(b) waiver if the potential member's contract activities involve defense issues that will be before the Commission than if they involve giving technical advice on completely unrelated subjects. Similarly, a long or frequent association with the contractor might also counsel against a waiver in this case.

The employee's anticipated services to the government should also be examined. We think that, in this regard, it is appropriate to consider both the likelihood that the integrity of the employee's services may be compromised, and the nature and significance of the services themselves. In this case, the employee's services will presumably involve giving advice on a subject of direct concern to a present client of his consulting firm. There appears to be little doubt that the contractor will be affected by the government's final decision regarding the MX, but the impact of the potential member's advice through the advisory committee may be somewhat more remote. On the other hand, one might predict that the advice would be particularly influential in light of the potential member's background and stature. The potential value to the contractor of the potential member's service on this advisory committee should

[1] Although the value of the consulting contract in relation the potential member's annual income and overall net worth may indeed be considered, it should not overshadow the significance of the absolute value of the contract, which is, in our view, a far more important criterion in making a waiver decision.

also be considered. In this regard, one may want to consider the value of the MX contract to the contractor in absolute dollars and as a proportion of the company's anticipated receipts for upcoming years.

There are undoubtedly numerous other factors that might be considered. Some of these derive more justification from common sense and other disqualification standards than they do from the actual text of § 208(b). *See, e.g.*, Decisional Officials' Participation in Rulemaking Proceedings, Administrative Conference of the United States, 1980 Report, at 51–55. *See also* Code of Professional Responsibility, American Bar Association (in particular Canons 4, 5 and 9). For example, public disclosure of the employee's interest and the government's need for the services of the particular employee are factors that could be compelling in some circumstances.[2] We would also advise that some deference be given to the agency's general policy or practice in granting waivers under § 208(b)(1). Accordingly, we are not prepared to reject all consideration of factors that do not reflect directly the statutory standard. We must urge, however, that non-statutory factors be used with caution and that the weight given to them be analyzed in light of the fact that they are not directly articulated in the statutory standard.

Numerous other nonstatutory factors have been suggested for use in this case. We think that many of these factors, especially when taken in their combination, could confuse rather than clarify the inquiry. For example, the importance of the advisory committee to the government's national security interests is a factor that can be used convincingly either to justify or deny a waiver.[3] The same can be said of the temporary, short-term nature of the Commission's work. It also can be counterproductive, in our view, to focus on the reputation for personal integrity of the employee. The integrity factor is extremely subjective. As we see it, § 208 was enacted, in large part, to eliminate such subjective judgments from the disqualification process. Furthermore, we fear that a heavy or frequent reliance upon an official judgment of the employee's personal integrity will detract from the public acceptance of the waiver process, as well as make it more difficult to deny waivers because of the possible negative implication of a denial with respect to the integrity of the employee. Accordingly, we must counsel against a reliance upon a subjective, personal evaluation of an individual's reputation for integrity in considering the propriety of § 208(b)(1) waivers.

In the end, waiver decisions are committed to the judgment of the appointing official. Although the statutory standard should guide the exercise of that discretion, Congress has clearly left that ultimate decision in the hands of the appointing official. It is the responsibility of that official to exercise his considerable discretion soundly and in good faith, after a careful and thorough

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[2] In this case, public disclosure of the potential member's contractual interest would help to eliminate many of the potential adverse effects of the interest.

[3] In addition, it should be noted that a "national interest" factor was suggested to Congress as a basis for granting waivers when § 208 was enacted, but such a test was never adopted. *See Conflict of Interest Hearings on H.R. 8140 Before the Senate Judiciary Comm.*, 87th Cong., 2d Sess. 46 (1962) (testimony of Roswell Perkins).

consideration of all of the pertinent facts. We are not in a position to advise you about the pertinent facts or about the relative weight that should be assigned to the various factors discussed above. We hope this opinion will assist the decision-maker in his task, but we do not intend for it to imply any judgment on our part concerning the proper direction of that decision.

The Office of Government Ethics has reviewed this opinion and has advised us that it agrees with the conclusions set forth above.

RALPH W. TARR
Assistant Attorney General
Office of Legal Counsel

Authorization for Publication and Advice on Copyright Protection for a Manuscript Prepared by a Department of Justice Employee

The key inquiry in determining the application of 28 C.F.R. § 45.73512, which governs publication of a manuscript by a Department of Justice employee, is whether the manuscript was prepared as a part or the employee's official duties, is devoted substantially to the responsibilities and operations of the Department, or is otherwise dependent on information obtained as a result of government employment.

The manuscript at issue, which was prepared by an employee of the Bureau of Prisons, is sufficiently related to the employee's official duties as to prohibit remuneration for publication under 28 C.F.R. § 45.735–12(a). The Deputy Attorney General may authorize publication without remuneration under 28 C.F.R. § 45.735–12(c) if it is determined that publication is in the public interest.

Although a decision on whether the manuscript in question may be copyrighted can only be made by the Register of Copyrights, it appears doubtful that the Register would grant copyright protection. The manuscript would probably be viewed as a "work of the United States Government," because the work was prepared by a government employee as part of his official duties. Such works may not be copyrighted under the Copyright Act, 17 U.S.C. § 105.

January 24, 1983

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This responds to your request for our advice regarding authorization for publication and copyright protection of a manuscript setting forth the results of a study on aggression in federal prisons prepared by Mr. A, an employee of the Bureau of Prisons. As we understand the facts surrounding the preparation of this manuscript, we believe that authorization for publication, without a fee, should be granted based on the recommendation by the Director of the Bureau that publication of the study is in the public interest. The copyright issue raises more difficult questions, because a substantial portion of the manuscript was prepared by Government employees during the course of their official duties. Based on the limited facts presented to us, we doubt whether Mr. A's manuscript may be copyrighted, but ultimately that determination must be made by the Register of Copyrights at the Library of Congress.

I. Facts

The manuscript which Mr. A seeks to publish and copyright records the results of a study, developed and analyzed primarily by three Bureau of Prisons employees over a period of several years. The study was initiated in response to a perceived need within the Bureau for a better understanding of, and greater insight into, an identified aspect of inmate behavior in the Federal Prison System. The manuscript runs approximately 400 pages in length, and includes extensive tables, models, graphs, and sample questionnaires, as well as narrative analyses and a twelve-page Executive Summary of the longer manuscript prepared for a 1980 Warden's Conference. The introduction to the manuscript sets forth the goals of the Federal Prison System Project, under which the data was gathered and analyzed, as "providing useful information to administrators" and "producing data that will interest students of the Criminal Justice System." This perception was stimulated by, *inter alia*, a 1976 study of assaults at the Lewisberg Penitentiary, which showed that 5 out of 8 homicides occurring within the 26–month period studied were related to a particular aspect of inmate behavior, and a 1977 finding that such behavior is the primary motive for prison homicides and leads to other especially violent acts. Mr. A stated that because of the increasingly apparent lack of, and need for, comparative information regarding these findings, the Federal Prison System's Office of Research recommended the establishment of a national project to establish rates of this behavior.

The study was conducted and the manuscript prepared over a period of approximately two years by Mr. A and his co-author, Mr. B, another employee at the Bureau. Both Mr. A and Mr. B prepared approximately one half of the manuscript during the course of their official duties at the Bureau and the remaining half on their own time. The authors were assisted in large part by Mr. C, a Bureau of Prisons employee, who made significant contributions to the development of survey instruments and computer data files and also performed archival data analyses to demonstrate sample representativeness for the study. Mr. C's contributions were all made during the course of his official duties. In addition to the three primary contributors, the project received support services from many other people, both Government and non-Government employees.[1] As far as we have been able to determine, the study was funded from the Bureau of Prisons general operating budget, and was supported in large measure by the Bureau's staff in the course of their official duties.

II. Publication

Publication of Mr. A's manuscript is governed by 28 C.F.R. § 45.73512. Subsection (a) of this provision prohibits Department employees from accepting fees from outside sources for publications that were prepared as "a part of the official duties of the employee."[2] Subsection (b) prohibits receipt of

[1] For example, we understand that the person who interviewed the inmates for the study was hired from outside the Government and paid with Bureau of Prisons funds for his services.

[2] 28 C.F.R. § 45.735–12(a) provides:

> (a) No employee shall accept a fee from an outside source on account of a public appearance, speech, lecture, or publication if the public appearance or the preparation of the speech, lecture, or publication was a part of the official duties of the employee.

> compensation or anything of monetary value for . . . writing . . . the subject matter of which is devoted substantially to the responsibilities, programs or operations of the Department, or which draws substantially on official data or ideas which have not become part of the body of public information.

Subsection (c) prohibits Department employees from engaging in writing

> whether with or without compensation . . . that is dependent on information obtained as a result of . . . Government employment except when that information has been made available to the general public or when the Deputy Attorney General gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

The key inquiry in determining the applicability of the prohibitions contained in these provisions to Mr. A's manuscript is whether the manuscript was prepared as a part of Mr. A's official duties at the Bureau of Prisons, is devoted substantially to the responsibilities and operations of the Department, or is otherwise dependent on information obtained as a result of his Government employment.[3]

The Department generally has interpreted the prohibitions contained in § 45.735–12 rigorously to preclude any substantial potential for conflicts of interest and the resulting impairment of public confidence in the performance of its federal law enforcement duties. Notwithstanding Mr. A's intention to publish the manuscript without compensation, we believe it is clear that Mr. A's manuscript is within the category of documents to which the provisions contained in § 45.73512 apply. The factors which lead us to this conclusion are: (1) the manuscript is styled as a Final Report to the Director; (2) the subject matter of the study is devoted substantially to work carried on by the Bureau of Prisons' Office of Research; (3) the study upon which the manuscript is based was developed and executed largely on "on duty" time by Department employees; and (4) the study was prepared in response to an official request of the Director of the Bureau of Prisons, although it seems clear that the Director did not request a report of the detail and magnitude of that prepared by Mr. A.[4]

Accordingly, we believe that the manuscript is sufficiently related to Mr. A's official duties at the Bureau of Prisons as to prohibit his remuneration for its publication. The question of whether publication of the manuscript should be permitted at all is a question of judgment which we believe can best be

[3] A secondary inquiry is whether the data contained in Mr. A's study has "become part of the body of public information." If the information already has been made available to the general public, without regard to the question of compensation, subsection (c) does not require the written authorization of the Deputy Attorney General for publication. If the preparation of the work was a part of the official duties of employees or if the subject matter of the work is "devoted substantially" to the responsibilities or operations of the Department, however, subsections (a) and (b) preclude receipt of compensation from outside sources, even *if* the Deputy Attorney General has authorized publication or the information has otherwise been made public.

[4] In fact, Mr. A prepared a preliminary thirteen-page Executive Summary for the Director which outlined the tentative results of the study and projected future areas of inquiry.

exercised by the Bureau of Prisons. Even assuming the information contained in the study is not public information at this time, we see no reason why the Deputy Attorney General should deny the authorization required by subsection (c) for publication if the Director of the Bureau has, by his request for authorization on Mr. A's behalf, indicated his interest in publication of the study's results. Absent a concern elsewhere in the Department that such official data be kept confidential, we would defer to the judgment of the Division or Office which developed the data that its publication will not harm the Government's activities.

III. Copyright Protection

The determination whether Mr. A's manuscript may receive copyright protection turns on whether the manuscript properly may be described as a "work of the United States Government." Section 105 of the Copyright Act, 17 U.S.C. § 105, prohibits the granting of copyright protection to "any work of the United States Government," defined in § 101 as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." Thus, all work of the United States Government is intended to be in the public domain. The Historical Notes to § 105 explain that "under this definition, a Government official or employee would not be prevented from securing copyright in a work written at that person's own volition and outside his or her duties, even though the subject matter involves the Government work or professional field of the official or employee."[5]

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[5] *See* H.R. Rep. No. 1476, 94th Cong , 2d Sess 58 (1976). The Notes go on to address:

> [t]he more difficult and far-reaching problem whether the definition should be broadened to prohibit copyright in works prepared under U.S. Government contract or grant As the bill is written, the Government agency concerned could determine in each case whether to allow an independent contractor or grantee, to secure copyright in works prepared in whole or in part with the use of Government funds. The argument that has been made against allowing copyright in this situation is that the public should not be required to pay a "double subsidy," and that it is inconsistent to prohibit copyright in works by Government employees while permitting private copyrights in a growing body of works created by persons who are paid with Government funds. Those arguing in favor of potential copyright protection have stressed the importance of copyright as an incentive to creation and dissemination in this situation, and the basically different policy considerations applicable to works written by Government employees and those applicable to works prepared by private organizations with the use of Federal funds.
>
> The bill deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a Government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works. Where, under the particular circumstances, Congress or the agency involved finds that the need to have a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions

Id. at 59 *See generally Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), *cert denied*, 455 U.S. 948 (1982). This provision would not apply to Mr. A's circumstances because he is a Government employee, not a contractor.

Using these guidelines, we believe that Mr. A's manuscript falls within the parameters of a "work of the United States Government" and therefore is not entitled to copyright protection. Although the magnitude of the manuscript is arguably a reflection of Mr. A's personal estimation of the significance of the study for the Federal Prison System, some portion of which undoubtedly was prepared during off-duty hours, the facts that the study was initiated in response to an official request or recommendation from within the Bureau of Prisons' Office of Research, the analytical tools used in the study were developed and implemented substantially by Bureau employees during on duty hours, and the study was presented as a "Final Report to the Director" setting forth the results of the Federal Prison System's study are, in our judgment, sufficient to render the manuscript an "official" document for the purposes of the Copyright Act. Thus, even though the study may have far exceeded the scope of the official request for such data — indeed, it is precisely because the work is so substantial that a significant risk of pirating exists — to permit the author(s) to claim copyright protection for work which was substantially supported and funded by the federal government through the work of its employees would significantly undermine the statutory scheme and legislative intent of § 105.

Judicial interpretations of § 105, and its predecessor provisions in the 1909 Copyright Act, support this conclusion.[6] In *Public Affairs Associates, Inc.* v. *Rickover*, 268 F. Supp. 444 (D.D.C. 1967), the court held that two speeches prepared and delivered by Vice Admiral Rickover on his own private time could properly be the subject of copyright protection, even though the subject of one of the speeches related to the Vice Admiral's official duties as an employee of the United States Navy and the Atomic Energy Commission. The court found significant the following facts: (1) neither Admiral Rickover nor his Government employers believed that the speeches fell within Rickover's official duties, nor was there any evidence that he was directed to make the speeches by his superiors; (2) delivery of the speeches was precipitated by invitations extended directly to Rickover in his private capacity by two private organizations; (3) the speeches were drafted in Rickover's home, and were delivered on his own time; and (4) the speech the subject matter of which related to Rickover's official duties

> was a non-technical address to a non-technical audience. The speech was subjective in nature and was not consistent with Atomic Energy Commission policy . . . . All information concerning Shippingport [Power Station] was unclassified. Prior to the speech there had been full dissemination of the technical information derived from Shippingport by the Technical Information Division of the Atomic Energy Commission.

Id. at 453. In short, the only connection the court found between Admiral

[6] *See* 17 U.S.C. § 8 (1970), which provided in pertinent part that "[n]o copyright shall subsist . . in any publication of the United States Government."

Rickover's speeches and the United States Government was in the "purely mechanical operations" of his administrative assistant, who "typ[ed] a final draft for duplication . . . on Naval facilities." This connection was held to be insufficient to render the speeches "works of the United States Government." *Id.* at 449.

Earlier consideration of the 1909 Act's provision excepting works of the United States Government from copyright protection is found in *United States* v. *First Trust Company of Saint Paul*, 251 F.2d 686 (8th Cir. 1958). There the court examined the rough notes prepared by Captain Clark during the Lewis and Clark Expedition in 1803–04. Based upon the fact that the materials contained, in addition to data that President Jefferson requested the Expedition to gather in its official record, "a great many personal and private notations, including information about the receipt of newspapers or letters, details of personal illnesses, social engagements, and other such items as might not be expected to be found in notes of an official character or in an official record," the court affirmed the district court's conclusion "that the notes were the private and personal writings of Captain Clark, unofficial in character and therefore not the work of a Government representative engaged in the performance of his official duties." *Id.* at 690.

Judgments about copyright protection rest ultimately with the Register of Copyrights. This Office therefore is necessarily tentative in making such judgments, particularly when we do not have at our disposal all facts relevant to the determination. Accordingly, we recommend that you advise Mr. A to seek further guidance on this matter from the Copyright Office directly.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Applicability of the Antideficiency Act Apportionment Requirements to the Nonadministrative Funds of the Federal Savings and Loan Insurance Corporation

The plain language and legislative history of the apportionment requirements in the Antideficiency Act, 31 U.S.C. §§ 1511–1519, make clear that Congress intended all funds, including nonadministrative funds, of government corporations such as the FSLIC to be subject to apportionment.

The provision in 12 U.S.C. § 1725(c)(5) that the FSLIC shall determine its necessary expenditures "without regard to the provisions of any other law governing the expenditures of public funds," does not specifically exempt FSLIC funds from the apportionment requirements of the Antideficiency Act.

February 18, 1983

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

Your opinion request raises the issue whether the nonadministrative funds of the Federal Savings and Loan Insurance Corporation (FSLIC) are subject to the apportionment requirements of the Antideficiency Act, as recently amended. 31 U.S.C. §§ 1511–1519 (1982). Notwithstanding a General Accounting Office (GAO) opinion that concluded that the Antideficiency Act applies to such FSLIC funds, 43 Comp. Gen. 759 (1964), the Federal Home Loan Bank Board (FHLBB) apparently asserts that the Office of Management and Budget (OMB) has no authority to apportion nonadministrative funds of the FSLIC.[1] Based upon our independent examination of the language and legislative history of the Antideficiency Act, we conclude that Congress intended the apportionment requirements of the Antideficiency Act to apply to the nonadministrative funds of wholly or partly owned government corporations such as the FSLIC.

I. Background

A. The FSLIC and its Organic Statute

The National Housing Act, Act of July 27, 1934, ch. 847, Title IV, 48 Stat. 1256, (codified as amended at 12 U.S.C. §§ 1725 *et seq.*), created the FSLIC to

[1] In the 1982 codification, the word "President" is substituted for "Director of the Office of Management and Budget," "Office of Management and Budget," and "Director," because §§ 101 and 102(a) of Reorganization Plan No. 2 of 1970, 84 Stat. 2085, designated the Bureau of the Budget as the Office of Management and Budget and transferred all functions of the Bureau to the President. *See* H.R. Rep. No. 651, 97th Cong., 2d Sess. 75 (1982).

insure the accounts of certain eligible institutions, particularly federal savings and loan associations.[2] 12 U.S.C. § 1725(a). Congress intended the insurance of accounts in such savings and loan associations to protect the small savers in these institutions and to encourage a flow of money into the institutions, thereby providing more adequate capital for the long-term financing of homes. *See* 79 Cong. Rec. 5430 (1935) (remarks of Sen. Buckley). FSLIC funds are derived from assessments imposed by the FSLIC on the institutions it insures. The FSLIC prescribes a premium for insurance equal to a specified percentage of the total amount of all accounts of insured members of the institution. 12 U.S.C. § 1727(b)(1). It may also assess additional premiums for insurance to cover any FSLIC losses and expenses. *Id.* § 1727(c). In turn, each institution insured by the FSLIC is entitled to insurance up to the full withdrawal or repurchasable value of the accounts of its members and investors holding shares, investment certificates, or deposits, except that no member or investor, with certain exceptions, shall be insured for an aggregate amount in excess of $100,000. *Id.* § 1728(a).

In the event of a default by an insured institution, the FSLIC must make payment of each surrendered insured account in that institution either by cash or provision of an equivalent, transferred account in another insured institution. 12 U.S.C. § 1728(b). However, in order to prevent a default in an insured institution, the FSLIC is authorized, in its discretion, to make loans or contributions to, or to purchase the assets of, an insured institution. *Id.* § 1729(f)(1). Further, whenever an insured institution is in danger of default, the FSLIC may purchase assets, assume liabilities, or make loans or guarantees to facilitate a merger or consolidation of the endangered institution with another insured institution. *Id.* § 1729(f)(2).

The National Housing Act also provides that the FSLIC "shall determine its necessary expenditures under this chapter and the manner in which the same shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditures of public funds." 12 U.S.C. § 1725(c)(5).[3] The FHLBB primarily bases its argument that FSLIC nonadministrative funds are not subject to apportionment requirements on this provision in the FSLIC enabling statute. At the outset, we note only that the term "necessary expenditures" in § 1725(c)(5) makes no between administrative and nonadministrative expenses.

B. The Antideficiency Act

In 1870, Congress enacted a statutory prohibition against Executive departments or agencies incurring obligations in excess of appropriations or involv-

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[2] The FSLIC is required to insure the accounts of all Federal savings and loan associations and Federal mutual savings banks. It may insure the accounts of building and loan, savings and loan, and homestead associations and cooperative banks organized and operated according to the laws of the State, District, Territory, or possession in which they are chartered or organized. 12 U.S.C. § 1726(a).

[3] This provision was added to Title IV of the National Housing Act by § 22 of the Act of May 28, 1935, 49 Stat. 298 (1935).

ing the United States in any contract or obligation for the payment of money in excess of appropriations unless authorized by law. *See* Act of July 12, 1870, 16 Stat. 230, 251. Since then, Congress has amended this statutory prohibition, referred to as the Antideficiency Act, seven times.[4] While reenacting the original prohibition against incurring obligations in excess of appropriations in substantially the same language, Congress attempted, with each amendment, to prohibit deficiency spending more effectively by requiring with increasing stringency that agencies apportion their spending throughout the fiscal year. The apportionment requirement first appeared when the Antideficiency Act was amended in 1905. *See* Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257. From 1905 to 1950, Congress authorized the heads of agencies to waive apportionments administratively in the event of an "extraordinary emergency."[5] Currently, an executive agency head may request, but only the President (or an official having administrative control of an appropriation available to the legislative or judicial branch) may make, an apportionment that would indicate a necessity for a deficiency or supplemental appropriation because of an emergency expenditure. 31 U.S.C. § 1515(b) (1982).

Moreover, in amending the Antideficiency Act, Congress brought increasing types and kinds of appropriations within the scope of the Act: no year (indefinite) appropriations as well as annual (definite) appropriations; corporate funds (which may come from receipts, assessments, user fees) as well as the customary fiscal year appropriations that Congress makes permitting agencies to make payments out of Treasury monies. *Compare* R.S. § 3679, 31 U.S.C. § 665 (1946) *with* 31 U.S.C. § 1511 (1982).[6] As recently codified and enacted, the Antideficiency Act provides that:

> (a) (1) An officer or employee of the United States Government or of the District of Columbia government may not
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

[4] Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48; Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765; Pub. L. No. 85-170, § 1401, 71 Stat. 440 (1957), Pub. L No. 93198, § 421, 87 Stat. 789 (1973); Pub. L. No. 93-344, § 1002, 88 Stat. 332 (1974); Pub. L. No. 93-618, § 175(a)(2), 88 Stat. 2011 (1975).

[5] Prior to 1950, apportionments could be waived or modified by an executive department head "upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment." R.S. § 3679; Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48.

As of 1933, however, § 16 of Executive Order No. 6166 (June 10, 1933) transferred the functions of "making, waiving, and modifying apportionments of appropriations" to the Director of the Bureau of the Budget.

[6] *See also* 96 Cong. Rec. 6725-31, 6835-37 (1950) (legislative debate).

31 U.S.C. § 1341(a)(1). Further,

> (a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section.

Id. § 1512(a).

C. The Present Dispute

As we understand the facts, the FHLBB recently took action to avert the failures of three financially troubled savings and loan associations by effecting an FSLIC-assisted merger. *See* 12 U.S.C. § 1729(f)(2). This action caused the FSLIC, which operates under the direction of the FHLBB, *see* 12 U.S.C. § 1725(a), to exceed by $2.8 million the amount OMB had apportioned to provide for the "Purchase of Income Capital Certificates," a fund line item. Under the Antideficiency Act, if an officer or employee of an executive agency authorizes an expenditure exceeding an apportionment, the head of the executive agency must report immediately to the President and Congress all relevant facts and a statement of actions taken. 31 U.S.C. § 1517(b). Because the General Counsel of the FHLBB believes that FSLIC nonadministrative expenses are not subject to apportionment under the Antideficiency Act, however, the FHLBB informed OMB that no report of the transaction would be submitted.[7] To avoid recurring disagreements regarding the potential overobligation of FSLIC funds, OMB then requested this Office to determine whether OMB, on behalf of the President, has authority to apportion FSLIC nonadministrative funds pursuant to the Antideficiency Act.

II. Analysis

We are confronted with conflicting statutory provisions and our task is to determine how Congress intended these facially inconsistent statutes to function. The FSLIC's organic statute states that the FSLIC shall determine how its

[7] We attempt no definitive categorization of administrative and nonadministrative expenses. The FHLBB roughly defines administrative expenses as those expenses for which estimates are submitted to support an annual appropriation for the FSLIC pursuant to the Government Corporation Control Act, Act of Dec. 6, 1945, ch. 557, § 2, 59 Stat. 597 (codified as amended at 31 U.S.C. §§ 9101, 9104). The FSLIC believes administrative expenses exclude "interest paid, depreciation, properly capitalized expenditures, expenses in connection with liquidation of insured institutions, . . . liquidations, payment of insurance, and action for or toward the avoidance, termination, or minimizing of losses in the case of insured institutions, legal fees and expenses."

necessary expenses are to be incurred, allowed and paid, "without regard to the provisions of any other law governing the expenditures of public funds." 12 U.S.C. § 1725(c)(5). The Antideficiency Act with equal clarity provides that the President and OMB are to exercise apportionment authority over all appropriations or funds available to the Executive Branch, regardless of whether the funds are available for obligations for a definite or indefinite period. *See* 31 U.S.C. §§ 1511–1513. We proceed first to examine the provision exempting the FSLIC from the application of other fiscal statutes and then to analyze the pertinent Antideficiency Act amendments enacted in 1950. We conclude that these specifically crafted, later-enacted amendments were intended to supersede, to the extent any inconsistencies exist, the earlier, generally worded FSLIC exempting provision.

A. FSLIC Exemption from Government Control Over Its Funds

In 1935, one year after the FSLIC was established under the National Housing Act, Congress revisited and amended the Federal Home Loan Bank Act, the Home Owners' Loan Act of 1933 and the National Housing Act in order to provide additional home mortgage relief. *See* S. Rep. No. 438, 74th Cong., 1st Sess. 1 (1935); 79 Cong. Rec. 7851–55 (1935) (House Conference Report). With respect to the FSLIC, Congress primarily intended the statutory amendments to reduce the cost of insurance of the accounts of savers and investors in savings and loan associations, thus encouraging the use of such insurance and stimulating the confidence of the public in home financing institutions. *See* S. Rep. No. 438, 74th Cong., 1st Sess. 2 (1935). Congress at this time also added § 1725(c)(5), which authorizes the FSLIC to determine its necessary expenditures and the manner in which they shall be incurred and paid "without regard to the provisions of any other law governing the expenditure of public funds." *See* Act of May 28, 1935, ch. 150, § 22, 49 Stat. 298. Although many of the 1935 amendments were hotly debated, the legislative history pertinent to the amendment of 12 U.S.C. § 1725(c)(5) is sparse.[8]

Initially, when H.R. 6021, which as amended became the 1935 Act, was reported to the full House, it contained a section that gave the FSLIC free use of the United States mails and the right to determine its expenditures and assessments "without use of the usual appropriation and routine." 79 Cong. Rec. 3154 (1935) (remarks of Rep. Hancock) (describing § 16 of proposed bill). As then explained, "this is necessary as this Corporation collects insurance premiums and must be in position to pay losses and other expenses, which cannot be budgeted or anticipated in advance." *Id.* In the course of the House debate, however, the portion of this proposed section exempting the FSLIC from any legal limitations on the expenditure of public funds was deleted. Representative Williams offered the following explanation for his amendment to strike: "It simply places the accounts of the FSLIC, in accordance with the Executive Order of the President, as I understand it on exactly the same basis as all other

[8] *See* 79 Cong. Rec. 3121–36, 3137–68, 3239–73, 3289–316, 347080, 5418–46, 5489–507 (1935).

corporations, namely, that they shall submit their expenditure accounts to the General Accounting Office for audit." 79 Cong. Rec. 3308 (1935) (remarks of Rep. Williams).[9]

When the Senate Committee on Banking and Currency reported H.R. 6021 with amendments to the full Senate, the provision authorizing the FSLIC to determine its necessary expenditures "without regard to the provisions of any other law governing the expenditure of public funds" reappeared. *See* 79 Cong. Rec. 5420 (1935) (remarks of Sen. Buckley). No explanation of the provision was offered, however, *see id.* at 5420–21 (1935) (remarks of Sen. Buckley), and the Senate Report is noticeably silent with respect to the congressional intent regarding this provision. *See* S. Rep. No. 438, 74th Cong., 1st Sess. 5 (1935). We are reluctant to attribute any specific intent to Congress in the face of such unilluminating evidence. *See County of Washington* v. *Gunther*, 452 U.S. 161, 172 & n.12, 176 (1981). The Senate amendment may have reflected the same concern expressed earlier in the House: the difficulty of controlling unanticipated expenses in advance. More probably, the absence of any debate or explanation suggests that Congress regarded the provision as more of a customary, general exemption for corporations than a critical statutory protection specifically designed for the FSLIC's peculiar needs.[10] At that time, after all, the Government Corporation Control Act, Act of Dec. 6, 1945, ch. 557, 59 Stat. 597 (codified at 31 U.S.C. §§ 9101 *et seq.*), was not yet in existence and, as will be explained below, the Antideficiency Act did not apply to the indefinite or revolving funds of government corporations. *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S 191, 206 (1978) (legislation and treaties to be read in light of common notions of the day and the assumptions of those who drafted them).

B. The Antideficiency Act Provisions

1. Statutory Language

The Antideficiency Act provisions, previously set forth at 31 U.S.C. § 665 (1976), were recently revised, codified and enacted without substantive change. *See* Pub. L. No. 97–258, 96 Stat. 877, 923–24, 92832 (1982) (codified at 31

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[9] *See* Exec. Order No. 7126 (Aug. 5, 1935)

[10] Enabling statutes for other corporations often have comparable provisions. For example, the Saint Lawrence Seaway Corporation has statutory authority 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, subject to provisions of law specifically applicable to Government corporations." 33 U.S.C. § 984(a)(9). The Comptroller General somewhat ambiguously has held that funds available to the Corporation which are derived from user fees are appropriated funds (and therefore presumably subject to the Antideficiency Act), but that the Corporation is not subject to all restrictions governing the use of appropriated funds by noncorporate federal entities. While failing to draw a line between the areas in which Congress had and had not retained control of corporation expenditures, the Comptroller General suggested that the corporation would be exempt at least from statutory restrictions on the expenditure of appropriated funds for the lodging and feeding of nongovernment employees at conventions. *See* 31 U.S.C. § 1345 (excepting agencies from travel expenses prohibition); Comp. Gen. Op. B-193573 (Dec. 19, 1979) (unpublished opinion).

U.S.C. §§ 1341–1342, 1511–1519); H.R. Rep. No. 651, 97th Cong., 2d Sess. 1, 3 (1982) ("bill makes no substantive change in law"). The apportionment requirements, 31 U.S.C. §§ 1511–1519, apply to all appropriations which fall within the following broad definition: (1) appropriated amounts; (2) funds; and (3) authority to make obligations by contract before appropriations. *Id.* § 1511(a). The statutory apportionment requirements do not apply to three narrow categories: (1) funds for price support and surplus removal of agricultural commodities, including funds (under 7 U.S.C. § 612c) to encourage exportation and domestic consumption of agricultural products; (2) corporations getting amounts to make loans (except paid in capital amounts) without legal liability on the part of the United States Government; and (3) the Senate, the House of Representatives, a committee of Congress, or an officer or employee of either House. *See* 31 U.S.C. § 1511(b).

For several reasons, the statute on its face indicates that FSLIC funds fall within the scope of the apportionment requirements. Prior to 1950, the Antideficiency Act did not subject indefinite or permanent appropriations, which included the nonadministrative funds of government corporations, to apportionment. Rather,

> all appropriations made for contingent expenses or other general purposes, *except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor*, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made. . . .

R.S. § 3679 (codified as amended at 31 U.S.C. § 665 (1946)) (emphasis added). The 1950 amendments considerably expanded the types of funds subject to apportionment so as to provide:

> Except as otherwise provided in this section, *all appropriations or funds* available for obligation for a definite period of time shall be so apportioned as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; and *all appropriations or funds not limited to a definite period of time*, and all authorizations to create obligations by contract in advance of appropriations, shall be so apportioned as to achieve the most effective and economical use thereof.

Act of Sept. 6, 1950, ch. 896, 64 Stat. 765 (codified at 31 U.S.C. § 665(c)(1) (1976)) (emphasis added). Apportionment no longer was limited to Congress' *annual* appropriations; instead, all *appropriations or funds* were to be apportioned. Congress further indicated that the agency appropriations requiring apportionment were to include FSLIC funds by specifying that

> When used in this section, the term 'agency' means any executive department, agency, commission, authority, administration, board, or other independent establishment in the executive branch of the Government, *including any corporation wholly or partly owned by the United States which is an instrumentality of the United States. . . .*

31 U.S.C. § 665(d)(2) (1976) (emphasis added).[11] If these 1950 statutory changes meant anything, they were clearly intended to bring funds other than annual appropriations, such as the FSLIC funds from assessments (regardless of whether they are defined as revolving or trust funds) within the scope of the apportionment requirements.[12] Importantly, these 1950 amendments, with only minor subsequent changes, provide the substance for the 1982 codification and enactment.

Another 1950 statutory change, which permitted designated officers to exempt certain trust funds, working funds, working capital funds and revolving funds from apportionment, further supports the position that such funds are subject, as a general rule, to the Antideficiency Act apportionment provisions. 31 U.S.C. § 665(f) (1976).[13] Were trust funds and revolving funds not included

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[11] One superficial difference between the 1982 enactment of Title 31 and the earlier codification is the deletion of this definition of agency In its place, the general definitions included in Title 31 provide that agency "means a department, agency, or instrumentality of the United States Government," 31 U S C. § 101 (1982), and executive agency "means a department, agency, or instrumentality in the executive branch of the United States Government." *Id.* § 102. The apportionment requirements are exercised (1) by officials having control of appropriations available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government, or (2) by the President if an executive agency is involved. Because the FSLIC does not belong to the legislative or judicial branches it must be an executive agency for purposes of 31 U.S C. § 1513 (1982), even though the definition of executive agency no longer specifically includes wholly owned government corporations, as the earlier version did. *Cf.* 31 U.S.C. § 665(d)(2) (1976). Clearly, Congress intended government corporations to be covered by the Act, because the Act contains a provision that such corporations which make loans without legal liability on the part of the United States are specifically exempted. *See* 31 U.S.C. § 1511(b)(2) (1982)

[12] Although the FSLIC refers to its nonadministrative funds as "trust revolving funds" and OMB defines such funds as "public enterprise revolving funds," resolution of this disagreement is not necessary for disposition of the issue we are addressing.

[13] After the 1950 amendments, 31 U.S.C. § 665(f)(1) read:

> The officers designated in subsection (d) of this section to make apportionments and reapportionments may exempt from apportionments trust funds and working funds expenditures from which have [sic] no significant effect on the financial operations of the Government, working capital and revolving funds established for intragovernmental operations, receipts from industrial and power operations available under law . .

As codified and enacted in 1982, the equivalent provision, 31 U.S.C. § 1516, states:

> An official designated in section 1513 of this title to make apportionments may exempt from apportionment
>
> (1) a trust fund or working fund if an expenditure from the fund has no significant effect on the financial operations of the United States Government;
>
> (2) a working capital fund or a revolving fund established for intragovernmental operations; [or]
>
> (3) receipts from industrial and power operations available under law; . . . .

initially within the scope of the Act, it would not be necessary to make special provision for their exemption.

Finally, the FSLIC does not fit within any of the narrowly defined exceptions, specified in 1950 and preserved unchanged in the 1982 codification, from the Antideficiency Act's coverage. *Compare* Act of Sept. 6, 1950, 64 Stat. 765 (codified at 31 U.S.C. § 665(d)(2) (1976)) *with* 31 U.S.C. § 1511(b) (1982). Unlike Federal Home Loan Banks, which fall within the definition of excepted corporations because they obtain funds for making loans without legal liability on the part of the United States, *see* 31 U.S.C. § 1511(b)(2), the FSLIC apparently is not a lending institution whose operations are without liability on the part of the United States.[14] *See FSLIC* v. *Quinn*, 419 F.2d 1014 (7th Cir. 1969) (FSLIC acting as instrumentality of United States may assert defense of sovereign immunity to extent that United States could); *see also* 12 U.S.C. §§ 1725(c)(4), 1728(c).

Thus, relying solely on the plain language of the statute, we would conclude that FSLIC funds, whether administrative or nonadministrative, are subject to apportionment.

2. Legislative History

Examination of the legislative history buttresses the conclusion we have reached in reliance on the plain language of the statute. Indeed, the legislative history clearly illustrates that an important objective of the 1950 revisions was to subject all funds of government corporations to apportionment. Moreover, because the 1950 amendments constitute the modern version of the Antideficiency Act, with subsequent amendments making only minor changes, the legislative history regarding these statutory changes carries particular weight.[15] Representative Norrell, a sponsor of the 1950 Antideficiency Act amendments, explained their significance in the debate on the floor of the House:

> For years and years we have been creating corporations, giving them power to incur indebtedness on behalf of the Government and authorizing the Treasury Department to transfer money to them. . . . The idea is that the Bureau of the Budget and the Congress at the beginning of each year should have a look at the total indebtedness to be created during ensuing fiscal year [sic] by these independent corporations, so that we can weigh that with the indebtedness we create by virtue of our appropriation bills for such fiscal year.

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[14] The governing statute for the Federal Home Loan Banks expressly requires that "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.

[15] Congress stressed that mere changes in terminology and style resulting from the 1982 enactment of Title 31 into positive law should not be interpreted as intended to make any substantive change in the law. *See* H.R. Rep. No. 651, 97th Cong., 2d Sess. 3 (1982).

96 Cong. Rec. 6725 (1950) (remarks of Rep. Norrell).[16] Should there remain any doubt that Congress intended all funds of government corporations, including nonadministrative funds, to be subject to apportionment, the section-by-section analysis in the legislative record removes any ambiguities:

> The first part of this provision [which enacted 31 U.S.C. § 665(c)] relates to the so-called no-year appropriations and to funds, such as funds used by corporations for purposes other than administrative expenses which are available indefinitely and without relation to any particular fiscal year. . . .
>
> It is necessary that no-year appropriations and funds (including all funds of corporations, whether for administrative expenses or for other purposes) and contract authorizations be included in the apportionment system and be controlled to the extent necessary to insure efficiency and economy in carrying out the purpose for which such appropriations and authorizations are granted by the Congress.

96 Cong. Rec. 6836 (1950) (remarks of Rep. Norrell).

In hearings before the Senate it was again emphasized that, whereas the proposals of the Bureau of the Budget and GAO provided for apportionment only of corporate funds available for *administrative* expenses, the House bill, which after minor amendments was enacted as the Act of Sept. 6, 1950, provided for apportionment of *all* corporate funds. *See* General Provisions, General Appropriations Act, 1951, *Hearings on H.R. 7786 before the Senate Comm. on Appropriations*, 81st Cong., 2d Sess. 3 (1950) (statement of Frederick J. Lawton, Director, Bureau of the Budget) (Hearings). Moreover, the Hearings clarified that the specific exemption for corporations which obtain funds for making loans without legal liability on the part of the United States applied to the Central Bank for Cooperatives, the Regional Bank for Cooperatives, the Federal Home Loan Bank, and the Federal Intermediate Credit Corporation. *Id.* at 6. Understandably, the FSLIC was not mentioned.

Therefore, the legislative history of the Antideficiency Act clearly indicates that Congress intended all funds — including nonadministrative funds — of the FSLIC to be subject to apportionment.

C. Countervailing Considerations

In light of the clear language and fully consistent legislative history of the Antideficiency Act, the contention that the FSLIC's organic act exempts FSLIC

[16] Another Congressman was assured that

> what is sought to be accomplished by one provision of this rule is to give the Committee on Appropriations and the Congress the opportunity to look at the operation of these Government corporations that do not operate on direct appropriations, but which are given the authority to transfer their bonds directly to the Treasury and thus secure the money to carry on their operation without any look or supervision so far as the Congress is concerned at the expenditure of those funds. . . .

96 Cong. Rec. 6728 (1950) (remarks of Rep. Keefe)

nonadministrative funds from the apportionment requirement is not persuasive. We recognize, of course, the importance of the doctrine of *in pari materia*, namely, that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (citing *Morton* v. *Mancari*, 417 U.S. 535, 550–51 (1974)). However, we are convinced neither that the FSLIC's exempting provision in 12 U.S.C. § 1725(c)(5) functions as a "specific" statute nor that the applicable Antideficiency Act provisions, 31 U.S.C. §§ 1511–1519, operate as "general" provisions. To the contrary, 12 U.S.C. § 1725(c)(5) does not specifically exempt FSLIC funds from apportionment requirements; rather, it generally insulates the necessary expenditures of the FSLIC from the provisions of other laws governing the expenditures of public funds. On the other hand, the Antideficiency Act was amended expressly to apply to all funds, specifically including those of all wholly or partly owned government corporations and explicitly exempting only those of corporations that make loans without legal liability on the part of the United States.

Concededly, a related rule, that "repeals by implication are not favored," *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936), applies with special force when the allegedly repealing measure is a provision in an appropriations bill, as is the case with the 1950 amendments to the Antideficiency Act. *See* *TVA* v. *Hill*, 437 U.S. 153, 190 (1978). Nevertheless, when Congress desires to alter or repeal an existing statutory provision, "there can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise." *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940) (*quoted in United States* v. *Will*, 449 U.S. 200, 222 (1980)). The question is entirely one of congressional intent as expressed in the statutes. *See United States* v. *Mitchell*, 109 U.S. 146, 150 (1883).

Here, the enactment of the relevant 1950 Antideficiency Act amendments as one title in a general appropriations act is not dispositive. As indicated in the legislative history set forth above, Congress specifically intended the Antideficiency Act provisions to apply to an extremely broad definition of funds, including the nonadministrative funds of independent corporations. *Cf.* *TVA* v. *Hill*, 437 U.S. at 189 & n.35 (appropriations for Tellico Dam did not implicitly repeal provisions of Endangered Species Act because appropriations did not identify the projects for which the sums had been intended and Tellico Dam funds represented relatively minor component of a lump sum amount). The Senate held hearings that expressly addressed the matter of extending the Antideficiency Act provisions to encompass the funds of independent corporations. *See* Hearings, *supra*, at 3–14. Both Houses considered whether the amendments might effectively limit or be construed to limit the powers and duties of independent agencies. *See* 96 Cong. Rec. 11780–86 (1950) (amendment of Sen. Johnson proposing to exempt certain appropriations for the Civil Aeronautics Board from requirements of proposed bill); 96 Cong. Rec. 6725–31 (1950) (remarks of Reps. Eberharter and Keefe) (fear that Antideficiency

Act amendments would negate corporations' enabling statutes). Congress in enacting the 1950 amendments clearly intended that the Antideficiency Act apply to funds of independent corporations.

Moreover, there is at best a minor distinction between the substantive legislation and the "appropriations" legislation in this particular instance. The provision in the FSLIC's substantive legislation, 12 U.S.C. § 1725(c)(5), is a minor amendment that was adopted during the course of other major revisions without extensive, if any, comment. The "appropriations" measure, however, was not simply an authorization for funding due to expire at the end of the year, but a permanent, substantial change in the budget procedure that attracted congressional attention and was the focus of much debate.

In addition, the arguments that apportionment is futile, insofar as the FSLIC may well encounter unanticipated expenses, and that the FSLIC's "fiduciary duties" to the private party insureds are incompatible with the normal budget process, are objections that Congress addressed to its satisfaction by providing for mandatory and permissive exemptions in the Antideficiency Act itself. At the time Congress was considering the 1950 amendments, independent agencies claimed that the revisions would interfere, even if unintentionally, with their existing statutory powers and duties. *See* 96 Cong. Rec. 11780–86 (1935) (offering amendment, on behalf of the Civil Aeronautics Board, to exempt appropriations for the transportation of mail from the Antideficiency Act). Similarly, Congress was concerned that the amendments might hamper the government's obligation to match the state's payments for social security or to meet comparable statutory entitlements. *See* 96 Cong. Rec. 6730–31 (1950) (remarks of Reps. Forand and Rabaut). Congress took care to clarify that the designated apportioning official could exempt from apportionment, *inter alia*, appropriations for expenditures which are paid in accordance with formulae prescribed by law. *See* 31 U.S.C. § 1516 (previously 31 U.S.C. § 665(f)); Hearings, *supra*, at 10, 18. Significant for present purposes is that Congress chose to resolve problems of flexibility and accommodation between budget oversight and corporate authority primarily by permissive exemptions rather than absolute exclusions from the Antideficiency Act.[17]

Furthermore, there is no evidence of any long-settled or congressionally ratified practice under 12 U.S.C. § 1725(c)(5) of holding the FSLIC exempt from all laws governing the expenditure of public funds. To the contrary, from the time of the First Deficiency Appropriation Act, Act of June 22, 1936, ch. 687, § 7, 49 Stat. 1597, 1647, which required that "notwithstanding any other provision of law," the FSLIC, among others, shall not "incur any obligations for administrative expenses, except pursuant to an annual appropriation specifically therefor," the FSLIC has submitted, and Congress has acted upon, annual estimates for the FSLIC's administrative expenses. Since 1945, the FSLIC has submitted annual estimates of its administrative expenses to Congress pursuant to the requirements of the Government Corporation Control

[17] As noted above, the FSLIC does not fall within the limited mandatory exemptions from the Act 31 U.S.C. § 1511(b). The permissive exemptions, however, may well apply to FSLIC funds.

Act, Act of Dec. 6, 1945, ch. 557, § 2, 59 Stat. 597 (codified at 31 U.S.C. §§ 9101 *et seq.*).[18] Although compliance with the above statutes may not, as a practical matter, affect the FSLIC's ability to determine its necessary expenses as it sees fit, the FSLIC has not refused to comply with these laws governing the expenditure of public funds or otherwise asserted that 12 U.S.C. § 1725(c)(5) confers a sufficient exemption from their application.

Unless the FSLIC is to argue that necessary expenses include nonadministrative expenses but not administrative expenses, its own past practices undermine its present position. Yet the statute itself — both on its face and in the legislative history — does not define necessary expenditures in terms of nonadministrative or administrative expenses. Absent a congressional determination that administrative expenses are somehow less necessary, we presume that Congress intended necessary expenditures to include both types of expenses. Just as it is ordinarily inferred that a statute "carries with it all means necessary and proper to carry out properly the purposes of the law," any administrative expenses incurred in the actions taken to prevent a default of insured institutions must be viewed as necessary expenditures necessary to effectuate the statutory obligations of the FSLIC. *United States* v. *Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966) (three judge court), *aff'd*, 386 U.S. 270 (1967).

Of equal importance, in the 1950 revisions to the Antideficiency Act, Congress expressly declined to distinguish between administrative and nonadministrative expenses for purposes of that Act. If 12 U.S.C. § 1725(c)(5) does not insulate FSLIC administrative expenses from the requirements of the Act, then it cannot provide a basis for exempting nonadministrative expenses from the Antideficiency Act. Indeed, we presume that the distinction itself arose in the days when the Antideficiency Act applied to annual appropriations for the administrative expenses of corporations but not to indefinite or permanent funds. Although the distinction may continue to have some meaning in the context of other statutes, *see, e.g.*, 31 U.S.C. § 9104(a)(3), it has no significance in a statute that has abandoned any recognition of a difference between administrative and nonadministrative funds.

D. Exercise of Apportionment Authority

Having determined that the nonadministrative funds of the FSLIC are subject to the apportionment requirements of the Antideficiency Act does not end the matter. A subsequent consideration, as you noted in your letter to us, is how that authority is to be exercised. At the time of the 1950 amendments, which brought all corporate funds within the coverage of the Antideficiency Act,

[18] 31 U S.C. § 9104(a) empowers Congress to make appropriations authorized by law and to make corporate financial resources available for operating and administrative expenses. Admittedly, 31 U.S C. § 9104(b) expressly accommodates the powers and duties of corporations to a greater extent than the Antideficiency Act, it states that its provisions do not "prevent a wholly owned Government corporation from carrying out or financing its activities as authorized under another law." Nevertheless, Congress' appropriations power necessarily restricts to some degree the discretion of the FSLIC to determine the manner in which expenditures will be made.

some members of Congress expressed concern that in adopting the amendments Congress "would negative every act . . . passed setting up these corporations . . . , would take control over every legislative committee on matters already passed on by the House, and in this appropriation bill forbid [these corporations] to obligate the Government contrary to the laws of Congress." 96 Cong. Rec. 6727 (1950) (remarks of Rep. Eberharter). In response, representatives knowledgeable about the proposed revisions offered assurances that the purpose of the amendments was simply to give the Appropriations Committee the authority "to check and be sure the fiscal policies of these corporations are such that they do not spend all the money Congress grants them in the first few months." 96 Cong. Rec. 6727 (1950) (remarks of Rep. Brown). Significantly, it was emphasized that "[i]f this authority is given, it does not mean that the Committee on Appropriations can change any basic law or activity which has been granted to the corporation." 96 Cong. Rec. 6728 (1950) (remarks of Rep. Keefe). Thus, in subjecting corporations to budgetary supervision, Congress did not intend to alter the duties and obligations of those corporations as set forth in their enabling acts.

We recognize that the power to authorize apportionments indicating a necessity for a deficiency and the power to make exemptions from apportionment are discretionary powers, resting in the President or the official having administrative control of an appropriation available to the legislative or judicial branch. *See* 31 U.S.C. §§ 1515, 1516. Moreover, we have not been specifically asked whether expenses incurred by the FSLIC pursuant to statutory authority to avert the default of an insured institution would constitute "an emergency involving ... the protection of property, or the immediate welfare of individuals," 31 U.S.C. § 1515(b)(1)(B), or whether the FSLIC's insurance assessments qualify as a "trust or working fund" which may be exempted from apportionment. *See id.* § 1516. We point out, though, that because the FSLIC is both authorized, in its discretion, to incur expenses to avoid the default of insured institutions and ultimately is obligated to make payment on each insured account in the event of a default by an insured institution, these statutory powers and obligations should be weighed appropriately in the apportionment process.

Conclusion

Accordingly, we conclude that OMB, acting on behalf of the President, has the authority to apportion FSLIC nonadministrative funds. We express no opinion on how that authority should be exercised.

RALPH W. TARR
Deputy Assistant Attorney General
Office of Legal Counsel

Application of 31 U.S.C. § 3302(b) to Settlement of Suit Brought by the United States

The requirement in 31 U.S.C. § 3302(b) that money received for the Government be deposited in the United States Treasury does not apply in a case in which the United States asserted no claim for money damages or penalties, and will receive no money from a health care program managed for private plaintiffs.

February 18, 1983

MEMORANDUM OPINION FOR THE CHIEF, ENVIRONMENTAL ENFORCEMENT SECTION, LAND AND NATURAL RESOURCES DIVISION

You have requested the views of this Office regarding the proposed settlement in *United States* v. *Olin Corp.*, a civil action now pending in the District Court for the Northern District of Alabama. The action was brought for equitable relief, including an injunction ordering remedial action, and for recovery of costs and expenses as a result of the unlawful discharge by Olin of DDT into the waters of the United States and into a federal wildlife refuge. The first amended complaint alleged causes of action based upon the Refuse Act, 33 U.S.C. 407; the Resource Conservation and Recovery Act, 42 U.S.C. 6973a; the Clean Water Act, 33 U.S.C. § 1364; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9606; the common law of nuisance; and restitution.

With regard to the CERCLA count in particular, the complaint alleged that "[t]here is or may be an imminent and substantial endangerment to the public health or the environment because of the actual or threatened release of hazardous substances from the [defendant's] chemical plant site and drainage ditch." On the basis of this and the other allegations, the complaint prayed for entry of a mandatory permanent injunction requiring, among other things, that Olin restore the environment in the vicinity of its chemical plant. The prayer for relief also included a requirement that Olin assure the performance of comprehensive health studies on the residents living in the vicinity of its plant and long-term monitoring of their health. The Government sought no monetary damages or penalties.

A number of private plaintiffs brought separate actions against Olin. Although the cases were never consolidated with the Government's action, one settlement was proposed in satisfaction of all claims. On December 16, 1982, the court set forth the terms on which all parties had tentatively agreed to settle the litigation. The private damages claims would be settled for a total of $24 million, to be paid by Olin over a period of five years. In satisfaction of the Government's claim relating to health care, the proposed settlement provides that out of each annual payment to the private plaintiffs, $1 million would be paid into a trust fund established and managed to provide medical monitoring and assistance to all claimants over a period of ten years. The proposed settlement further provides that "[t]he details of the program will be established by the federal government and the plaintiffs;" that "[a]ny impasse will be resolved in favor of the federal government position;" and that "[a]ny money left in the fund at the end of 10 years will be returned to the settling plaintiffs." Finally, the proposed settlement provides that medical monitoring would be available to any person in the immediate area of Traina, Alabama, near Olin's chemical plant, upon that person's executing a full release to the United States and to Olin.

You have asked whether the proposed settlement is consistent with 31 U.S.C. § 3302(b) (former § 484),[1] which provides:

> An official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

This Office has previously considered the effect of 31 U.S.C. § 484,[2] the predecessor to § 3302(b), in the context of a settlement in *In the Matter of Steuart Transportation Co.*, a civil action brought by the United States and the State of Virginia following an oil spill in the Chesapeake Bay. In that case, each plaintiff sought damages for the death of waterfowl, statutory penalties, and cleanup costs. The settlement provided that Steuart Transportation would pay damages of $115,000, which would be donated to a waterfowl preservation organization designated jointly by the State of Virginia and the Department of the Interior. In 1980, this Office concluded that Federal participation in accepting and directing the payment would violate 31 U.S.C. § 484. We reasoned that under the facts of that case, it could not be concluded that the money was not "received" or that it was not received "for the use of the United States" on the theory that it was received in trust for the people of Virginia and the citizens of the United States. "Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General," 4B Op. O.L.C. 684 (1980).[3]

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[1] By Pub. L. No. 97-258, 96 Stat. 877 (1982), Congress enacted Title 31, United States Code, into law. Former § 484 was codified as § 3302(b).

[2] Former § 484 provided in pertinent part·

> The gross amount of all moneys from whatever source shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. . . .

No substantive change was intended by the enactment of former § 484 as § 3302(b). *See* Pub. L. No. 97-258, § 4, 96 Stat. 877, 948 (1982); H.R. Rep. No. 97-751, 97th Cong., 2d Sess. 2 (1982).

[3] The relevant language under current § 3302(b) is "receiv[ed] . . . for the Government." The House Report accompanying the bill indicates that the change was made "to eliminate unnecessary words." H.R. Rep. No. 97-651, *supra*, at 98. No substantive change was intended. *See supra* note 2.

In our view, the proposed settlement in the *Olin* case presents no problem under § 3302(b). Because the Government asserted no claim for money damages or penalties, we do not believe that any portion of the $24 million is appropriately viewed as "receiv[ed] . . . for the Government" within the meaning of § 3302(b). The entitlement to the funds belongs solely to the private plaintiffs who asserted monetary claims against Olin. The Government's specific request that the court earmark $5 million of the $24 million general settlement to be used in satisfaction of its health-care claim does not change the entitlement to or receipt of the funds. The proposed settlement, in fact, specifically reflects that any money remaining in the trust fund at the end of ten years will be returned to the settling private plaintiffs.

The Government's prayer for a health care remedy would undoubtedly have entailed a financial cost to Olin, but the monetary expenditure required of a defendant in order to comply with a court injunction does not constitute money received for the Government by an official or agent of the Government. Section 3302(b) is a statutory aid to the control by Congress over public expenditures, committed to the Legislative Branch by Article I, § 8, cl. 1 of the Constitution. The earliest version of the statute was proposed to curb unlimited discretion previously enjoyed by the Executive to take deductions from revenue collections. According to the bill's sponsor, the provision required that all money received as revenue be paid into the Treasury and thereafter be expended only upon appropriation by Congress. *See* 18 Cong. Globe 46364 (1848) (remarks of Rep. McKay). An equitable remedy obtained by the Government in litigation, albeit one with financial cost to the defendant, is simply not within the purview of § 3302, either by its terms or its purpose.

Similarly, we do not believe that federal participation in working out the details of the health care program implicates the restrictions of § 3302(b). This participation is not appropriately equated with the designation of the waterfowl preservation organization that was at issue in *Steuart Transportation Co.* Because no money is received by the Government as a result of the settlement, no Government money is redirected or expended simply by the Government's participation in the administration of the health care program.

RALPH W. TARR
Deputy Assistant Attorney General
Office of Legal Counsel

Agency Rules as Constraints on the Exercise of an Agency's Statutory Discretion

When an agency exercises discretion vested in it by statute by issuing a rule, the rule assumes the force and effect of law, and must be followed by the agency until it is amended or revoked. This principle applies notwithstanding an amendment to the authorizing statute affording greater discretion to the agency than is reflected in the existing rule.

When a statute grants discretion to an agency, the agency is usually free to exercise that discretion on a case-by-case basis, rather than through the adoption of general rules, unless either the statute itself or the requirements of due process make the adoption of general rules mandatory.

March 4, 1983

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

This responds to your request for advice regarding the effect of an agency's rules as a constraint upon, and a condition for, the exercise of authority conferred by statute. Your specific inquiry is whether a particular rule providing ceilings on insured federal mortgages must be amended before new statutory authority may be exercised. Your general inquiry is whether an agency is under any broad obligation to issue rules before taking action pursuant to a grant of statutory authority.

We discuss the specific issue in Part I below, and the general question in Part II. With regard to your specific inquiry, we believe that the Secretary of Housing and Urban Development (HUD) should amend the existing mortgage insurance rule establishing a ceiling on insured mortgages before exceeding the ceiling stated in the rule. The former Secretary of HUD exercised discretion by promulgating the existing rule creating a ceiling on insured mortgages (which ceiling corresponded to the old statutory ceiling). If the present Secretary wishes to exercise his discretion to approve larger mortgages, he can do so up to the limits of the new statutory authority. Before doing so, however, he should first amend the existing rule. There are, of course, statutory grounds for expediting such a rulemaking process so that the process of bringing the rule into line with the new statutory ceiling on insured mortgages should not be inordinately time consuming or disruptive of agency policymaking. *See* 5 U.S.C. § 553.

In response to your general question, we explain in Part II the basic factors to be taken into account by an agency in determining whether to issue rules pursuant to statutory authority. We must stress, however, that it is difficult to give reliable guidance about such a broad subject, which must be approached on a case-by-case basis in light of the governing law.

I. The Status of Existing Rules as a Constraint on the Secretary's Discretion

Your specific inquiry involves the Secretary's authority relating to federal mortgage insurance. In pertinent part, the relevant statute provided (until recently amended):

> To be eligible for insurance under this section a mortgage on any property or project shall involve a principal obligation in an amount —
>
> * * *
>
> (3) Not to exceed, for such part of the property or project as may be attributable to dwelling use . . . $19,500 per family unit without a bedroom, $21,600 per family unit with one bedroom, $25,800 per family unit with two bedrooms, $31,800 per family unit with three bedrooms, and $36,000 per family unit with four or more bedrooms, . . . *except that the Secretary may, by regulation, increase any of the foregoing dollar amount limitations contained in this paragraph by not to exceed 75 per centum in any geographical area where he finds that cost levels so require, except that, where the Secretary determines it necessary on a project by project basis, the foregoing dollar amount limitations contained in this paragraph may be exceeded by not to exceed 90 per centum in such area. . . .*

12 U.S.C. § 1713(c)(3) (Supp. V 1981) (emphasis added). *See* Pub. L. No. 96153, § 314, 93 Stat. 1101, 1117 (1979) (the "Housing and Community Development Amendments of 1979"). To recapitulate, under the foregoing authority the Secretary "may, by regulation," exceed the stated dollar amount limitations by up to 75 percent in a high-cost area. In addition, on a project-by-project basis, he may exceed the limitations by up to 90 percent.

Pursuant to this authority, on January 21, 1980, HUD published a final rule in the Federal Register to amend then existing rules.[1] The effect of the final rule, as explained in the agency's summary, was:

> to increase from 50 percent to 75 percent the maximum percentage by which mortgage amount limitations may be increased in high cost areas. In addition, this rule adds a provision to each of those sections permitting the [Federal Housing] Commissioner, on a case-by-case basis, to increase the mortgage amount limitations *by up to 90 percent.*

[1] HUD's rulemaking authority in this context derives from 12 U.S.C. § 1715b, which provides that the "Secretary is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter." That subchapter deals with federal mortgage insurance.

45 Fed. Reg. 3903 (1980) (emphasis added). In the "supplementary information" furnished regarding the rule, HUD noted that the statute provided that the Secretary "may" increase mortgage amounts up to certain new statutory limits, and that the final rule "implements the statutory change by making parallel revisions in the regulations governing the affected mortgage insurance programs." *Id.* In explaining the reasons for proceeding directly with final rulemaking, rather than issuing a notice of proposed rulemaking and inviting public comments, HUD stated:

> The Secretary has determined that, in light of the current economic situation, *it is urgent that the benefits afforded by these amendments be made available as soon as possible.* Publishing a notice of proposed rulemaking and giving the public an opportunity to comment on these amendments would cause a substantial delay in making the benefits available. Therefore, the Secretary finds that notice and public procedure on these amendments would be contrary to the public interest. Since *these amendments relieve restrictions contained in the present regulations,* it is not necessary to delay the effective date of these amendments for the 30 day period provided in 5 U.S.C. 553(d).

Id. (emphasis added). Accordingly, HUD's explanation accompanying the final rule makes plain that, in the agency's view, the 1980 amendment was necessary to "relieve" existing regulatory restrictions, and such relief was required immediately.[2]

More recently, in the continuing resolution making appropriations for FY 1983, adopted in December 1982, the 97th Congress amended the underlying statute. As amended, the statute provides that, in certain circumstances on a project-by-project basis, the stated dollar limits may be exceeded by 140 percent, rather than by 90 percent as previously allowed.[3] You have asked whether it is now necessary for HUD once again to amend its rule, which presently does not provide for mortgages that exceed the stated project by project limit by more than 90 percent, before the Secretary may authorize mortgages on a project by project basis up to 140 percent.

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[2] As published in the Code of Federal Regulations, the rule provides.

> In any geographical area where the Commissioner finds that cost levels so require, the Commissioner may increase, *by not to exceed 75 percent,* the dollar amount limitations set forth in paragraphs (a)(2) and (b) of this section. In such high cost areas, where the Commissioner determines it necessary on a project-by-project basis, the Commissioner may increase these dollar amount limitations *by not to exceed 90 percent.*

24 C.F.R. § 207.4(c)(1) (emphasis added).

[3] The pertinent language is contained in Senate Amendment 32 to H.R.J. Res No. 631, 128 Cong. Rec. 31324 (1982), which inserted after "90 per centum" in 12 U.S.C. § 1713(c)(3) the following parenthetical phrase: "(by not to exceed 140 per centum where the Secretary determines that a mortgage other than one purchased or to be purchased under section 305 of this title by the Government National Mortgage Association in implementing its special assistance functions is involved)."

The statute in question does not impose a specific, self-executing and mandatory limit on insured mortgages. Instead, it provides authority and discretion for the Secretary to allow mortgages up to a stated limit; thus, under the statute as amended, the Secretary has authority and discretion to set a figure for mortgages below the upper limit.[4] In short, the Secretary has the discretion to determine what the limit actually will be. In this case, a determination has been made and embodied in the existing rule, providing that insured mortgages under the provision shall not in any event exceed 90 percent of the stated amounts. This rule acts as a separate constraint on the Secretary's discretion. Unless the Secretary changes the rule to make it conform with the new statute (which he has authority to do), any mortgage above the regulatory ceiling would violate the agency's own rule, although not the statute itself.

The applicable legal precept here is that when an agency exercises statutory discretion by issuing a rule, the rule assumes the force and effect of law, and must be followed by the agency until it is changed by some subsequent exercise of discretion. This precept has been expressed in unmistakable terms by the courts.

One of the leading cases is *United States* v. *Nixon*, 418 U.S. 683, 694–96 (1974), which involved a regulation issued by the Attorney General that conferred on a Special Prosecutor the power to contest the invocation of executive privilege. The Court stated:

> [I]t is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. *So long as this regulation remains in force the Executive Branch is bound by it*, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.

Id. at 696 (emphasis added). The Court in *Nixon* cited as authority for its analysis a number of other decisions in which agency regulations that are "legislative" in character, in the sense that they implement grants of statutory discretion, were considered binding on agencies.[5] If an agency wishes not to comply with one of its own rules, the courts have indicated, the agency would have to amend or revoke the rule first. Otherwise, there would be a violation of

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[4] In this case, it is clear from the statute's language and legislative history that Congress granted HUD a maximum range of discretion, and left the agency to decide whether to exercise all of the discretion granted:

> The House bill contained a provision to amend the National Housing Act to allow the maximum mortgage limits for high cost areas to exceed statutory limits up to 75 percent, while the Senate amendment allowed the mortgage limits for those areas to exceed the statutory limits up to 90 percent. The conference report contains the Senate provisions, with an amendment which provides that mortgage limits may exceed the statutory limits *up to 75 percent* in any geographical area. In addition, where determined by the Secretary on a project-by-project basis, the maximum mortgage limits for high cost areas may exceed the statutory limits *up to 90 percent*.

H.R. Rep. No. 706, 96th Cong., 1st Sess. 65 (1979) (emphasis added).

[5] *See United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959).

the principle that the Government, no less than private citizens, is obliged to comply with the law.[6]

These cases compel the conclusion that the existing HUD rule setting the maximum limit of 90 percent above the stated amounts for insured mortgages should be amended before the 90 percent maximum is exceeded. Even though the agency's statute recently has been amended to permit mortgages in some cases up to 140 percent above the stated amounts, the existing rule constitutes a separate constraint. We would add that when the existing rule was promulgated in 1980, the process was expedited through exceptions in the Administrative Procedure Act to the usual notice and comment requirements. *See* 5 U.S.C. § 553. Those exceptions might be invoked again to help assure that there will be no undue delay in amending the existing rule.[7]

We conclude that HUD must amend the existing rule in pertinent part before exercising its newly granted discretion to increase the limits of certain insured mortgages by up to 140 percent.

II. The Status of Agency Rules as a Condition for the Exercise of Agency Discretion

Your general inquiry is distinguished from your specific question in that it deals with the situation facing an agency before any rule has been issued pursuant to statute. As you have expressed the issue, must the Secretary "feel himself constrained from acting upon statutorily granted authority until he also has promulgated a regulation that . . . permits him to do it" or, put another way, must the Secretary "consider the statutory authority somehow unperfected until there is a regulation"?

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[6] *See Vitarelli* v. *Seaton*, 359 U.S. 535, 546–47 (1959) (Frankfurter, J., concurring in part and dissenting in part). For the principle that rules which implement grants of statutory discretion have the force and effect of law, *see, e.g.*, *United States* v. *Nixon*, 418 U.S 683, 695 (1974); *United States* v. *Mersky*, 361 U.S. 431, 438 (1960); *Rodway* v. *United States Dep't of Agriculture*, 514 F.2d 809, 814 (D.C. Cir. 1975). For the principle that rules bind agencies until modified or amended, in addition to the authorities cited *supra* note 5, *see Hellin* v. *United States*, 374 U.S. 109 (1963); *Bonita* v. *Wirtz*, 369 F.2d 208 (1966); *United States* v. *Short*, 240 F.2d 292, 298 (9th Cir. 1956); *American Broadcasting Co.* v. *FCC*, 179 F.2d 437 (1947), *Nader* v. *Bork*, 366 F. Supp. 104 (D.D.C. 1973); *United States* v. *Chapman*, 179 F. Supp. 447 (E.D.N.Y. 1959).

[7] We must caution, however, that courts are often careful to indicate that mere administrative convenience, without more, will not suffice to bring a particular situation within the terms of the statutory exceptions to notice and comment procedures. *See, e.g.*, *Council of the Southern Mountains, Inc.* v. *Donovan*, 653 F.2d 573, 580–81 (D.C. Cir. 1981).

HUD remains bound by its own rule even though few if any private parties might actually be harmed by the agency's decision not to comply with the rule. There is a distinction between questions of standing (who is harmed by failure to comply with a rule?) and legal responsibility (is there a rule binding an agency?). Legal responsibility may exist regardless of whether any private party would necessarily be in a position to secure a judicial judgment regarding the legality of the agency's action.

We also note that there is a distinction between rules that implement grants of statutory discretion and thus bind an agency until altered or repealed, such as the rule at issue here, and statements of policy that are only precatory and do not create definite duties or responsibilities. *Cf. Thorpe* v *Housing Authority of City of Durham*, 393 U.S. 268, 275 (1969) (in holding that certain circulars in HUD's low rent manuals imposed a mandatory obligation, the Court indicated that some "handbooks" or "booklets" containing general instructions or items of consideration may not impose such a mandatory obligation). The present case does not raise any serious doubt as to whether HUD is bound by the terms of the rule in question.

The answer to your question will generally turn on the nature of the applicable statutory requirements. Absent statutory language to the contrary, agencies are free to decide whether to implement a grant of discretion by means of rules, which provide prospective standards of behavior, or by means of case-by-case decisionmaking (or adjudication).[8] In some situations, however, an agency's statute may specifically require that, before discretion is exercised, an agency must promulgate rules to guide the use of discretion.

An example of a situation in which rulemaking is a prerequisite for the exercise of discretion is provided by the leading case of *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), which involved a provision of the Fair Labor Standards Act exempting from its requirements employees "within the area of production (*as defined by the Administrator*), engaged in canning of agricultural . . . commodities for market." *Id.* at 608 (emphasis added). Under the terms of this statute, the phrase "area of production" was not defined, but was left to be defined by the relevant agency head. Without such a definition — which would be a prospective standard constituting a rule — the statutory provision could not be fully operative on its own terms.[9]

Other statutes more generally direct an agency to promulgate regulations providing certain standards pursuant to particular authorities. For instance, the National Traffic and Motor Vehicle Safety Act provides in part that the "Secretary of Transportation shall establish appropriate motor vehicle safety standards." *See* 15 U.S.C. § 1392(a). Of course, one cannot assume, merely on the basis of such broad mandatory language, that any particular type of standards must be promulgated. Even when a statute declares that an agency "shall" issue regulations, a host of questions remain concerning the degree of specificity, the breadth and the particular contents of any given regulatory scheme; these questions must be resolved in the first instance by the responsible agency.

To be sure, there are many situations in which controlling statutes do not require an agency to issue regulations, and in which no claim can be made that due process dictates that an agency promulgate some general rules to structure and regularize its discretion under law.[10] In these cases, agencies generally are

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[8] *See, e.g., NAACP* v. *Federal Power Comm'n*, 425 U.S. 662, 668 (1976) ("As a general proposition it is clear that the Commission has the discretion to decide whether to approach these problems through the process of rulemaking, individual adjudication, or a combination of the two procedures."). Of course, the suitability of rulemaking or adjudicatory procedures in given situations will depend on a detailed examination of what exactly the agency is seeking to do, and under what authority. *See NLRB* v. *Wyman Gordon Co.*, 394 U.S. 759 (1969); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

[9] A rule is defined in the Administrative Procedure Act in broad terms as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). In *Addison* itself, a regulation was promulgated and published in the Code of Federal Regulations by the Administrator of the Fair Labor Standards Act to define an "area of production" as including, *inter alia*, an individual engaged in canning "if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven." 322 U S. at 609

[10] Courts have sometimes, though not often, held that due process requires the enunciation of general rules or standards governing the exercise of an agency's discretion in order to avert the possibility of a wholly arbitrary decisionmaking process. *See, e.g., Holmes* v. *New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968); *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964).

free to decide whether to exercise their statutory authority by means of regulations. The decision whether to issue regulations in such instances turns on complex issues of policy, which must be addressed by those most familiar with a given statutory and administrative scheme.

Among the central considerations supporting an agency's decision to promulgate rules are that the rules may provide prospective standards to guide the conduct of the agency and others, and supply answers to questions engendered by the agency's authorizing legislation.[11] Moreover, rulemaking provides special benefits to the affected public, for it is a public process that provides notice to interested groups about an agency's course of action. *See, e.g., National Petroleum Refiners Ass'n* v. *FTC*, 482 F.2d 672, 681–83 (D.C. Cir. 1973). In the end, however, the actual decision about how to implement a statute granting discretion ultimately remains with the agency itself, subject to judicial review in an appropriate case.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[11] *See, e.g., Morton* v *Ruiz*, 415 U S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

Termination of an Assistant United States Attorney on Grounds Related to His Acknowledged Homosexuality

An Assistant United States Attorney (AUSA), a federal employee in the "excepted" service, may not be terminated solely on the basis of his homosexuality, in the absence of a reasonable showing that his homosexuality has adversely affected his job performance.

The burden would be on the Department of Justice to demonstrate a nexus between the AUSA's homosexuality and an adverse effect on his job performance. In this case, it is doubtful whether the Department could meet its burden, because the AUSA has consistently received superior ratings and has been granted a security clearance. Although it may be argued that a prosecutor who violates a state criminal law prohibiting homosexual acts demonstrates a disrespect for the law inconsistent with the Department's standard of prosecutorial conduct, the Department would have difficulty establishing the required nexus as a matter of law, because the state law is only enforced against public conduct.

March 11, 1983

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This responds to your request for advice on the legal implications of failing to retain an Assistant United States Attorney (AUSA) who is an acknowledged homosexual.

As set forth in more detail below, we have concluded that it would be permissible for the Department to refuse to retain an AUSA upon a determination that his homosexual conduct would, because it violates state criminal law, adversely affect his performance by calling into question his and, therefore, the Department's, commitment to upholding the law. We must advise, however, that the facts in this case are such that it would be very difficult under existing judicial decisions to prove that there is a nexus between his conduct and an adverse effect on job performance. Because the burden of proof would be on the Government to prove that such a nexus exists once the AUSA has established that he was dismissed for homosexual conduct, we would suggest consultations with the Civil Division and the Office of Personnel Management (OPM) before making a final decision not to retain a person under these circumstances. Both the Civil Division and OPM have informally expressed concern over our ability to defend successfully any suit that might be filed.

The AUSA in question has freely admitted his sexual preference, and that he has engaged in and intends to continue to engage in private consensual homosexual conduct. As we understand the facts, the only reason the Department would not retain the AUSA is because of his homosexual conduct, and that reason would, under the Department regulations, be reflected in the letter of termination. We also assume that the letter would note that homosexual acts are a crime under law of the state in which the AUSA is stationed, and that the Department believes that any such violations of local criminal law reflect adversely on the AUSA's fitness to represent the Government as a prosecutor.[1]

I. Limitations on Terminating an AUSA

AUSAs are in what is known as the "excepted service." 5 U.S.C. § 2103(a). The Attorney General's authority to remove them, *see* 28 U.S.C. § 542(b),[2] is tempered, however, in several ways, two of which are relevant here: statute and OPM regulation.[3] The statute and regulation that protect AUSAs from prohibited personnel practices are 5 U.S.C. § 2302(b)(10) and OPM/FPM Supp. 731-1, subchap. 3–2(a)(3)(c).

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[1] We do not address the constitutional validity of such laws. *Compare Baker* v. *Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982); *People* v. *Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981); *Commonwealth* v *Bonadio*, 415 A.2d 47 (Pa. 1980); and *State* v *Pilcher*, 242 N.W.2d 348 (Iowa 1976) *with United States* v. *Lemons*, 697 F.2d 832 (8th Cir. 1983), *Doe* v. *Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); and *Stewart* v. *United States*, 364 A.2d 1205 (D.C. Ct. App. 1976).

[2] The section states, "Each assistant United States Attorney is subject to removal by the Attorney General." There are no reported cases under this section. Department of Justice regulations provide that attorneys in the excepted service who are being removed are only entitled to a letter of termination. DOJ Order No. 1752.1A (Apr. 27, 1981). The Order states:

> GENERAL. The rights of excepted service employees are strictly limited when discipline, including separation, is to be imposed However, some service employees have the same protections as competitive service employees because of Veterans' Preference or prior competitive status.
>
> PROCESSING DISCIPLINE. a. An excepted service employee who is protected under law and the regulations of the Office of Personnel Management [because of veterans' preference] is entitled to the procedures [governing regular civil service employees].
>
> b. An excepted service employee with no protection under law or regulation should be given a letter advising him or her of the action being taken (suspension, separation, etc) prior to the effective date of the action.

Id. at 19, 20.

[3] The limitations on the Attorney General's authority may be categorized as: (1) OPM regulations governing employment of those in the excepted service, *see* 5 C.F.R. §§ 302.101 *et seq.*; (2) statutes and OPM regulations governing employment of veterans in the excepted service; (3) Department regulations; and (4) any Department handbooks or informal understandings that may establish a reasonable expectation of continued employment. *See Ashton* v. *Civiletti*, 613 F 2d 923 (D C. Cir. 1979).

A veteran, 5 U.S.C. § 2108(1)(B), (3)(B), who has served for one year in the excepted service, *id* § 7511(a)(1)(B), is afforded civil service protection, and action may be taken against him "only for such cause as will promote the efficiency of the service." *Id.* § 7513(a). Whether the Attorney General's authority in 28 U.S.C. § 542(b) prevails over the veterans' preference statute is a question on which this Office expressed considerable doubt some years ago. Memorandum for William D. Ruckelshaus, Assistant Attorney General, Civil Division from Assistant Attorney General Rehnquist, Office of Legal Counsel (Sept. 10, 1970); Memorandum for Assistant Attorney General Rehnquist from Leon Ulman and Herman Marcuse (Sept. 4, 1970).

A. Statutory and Regulatory Constraints

The decision not to retain the AUSA may be made for any number of reasons — for example, budget factors or employment ceilings — but it may not be made for a reason prohibited by statute or regulation. The Department is prohibited by statute

> from discriminat[ing] . . . against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others.

5 U.S.C. § 2302(b)(10).[4] In addition, OPM has issued guidelines covering suitability for employment in the federal government.[5] Although applicants for employment in the excepted service may be disqualified if they engage in "infamous, . . . immoral or notoriously disgraceful conduct," 5 C.F.R. § 302.203, the courts have held that neither the status of being a homosexual nor homosexual conduct which does not adversely affect job performance falls within this provision. In reversing a decision by the Civil Service Commission (now OPM) to disqualify an applicant for employment because of alleged immoral conduct, the U.S. Court of Appeals for the District of Columbia Circuit said over fifteen years ago:

> The Commission may not rely on a determination of "immoral conduct," based only on such vague labels as "homosexual" and "homosexual conduct," as a ground for disqualifying appellant for Government employment.

Scott v. *Macy*, 349 F.2d 182, 185 (D.C. Cir. 1965).[6] As a result of cases such as this, *e.g.*, *Norton* v. *Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Society for Individual Rights* v. *Hampton*, 63 F.R.D. 399 (N.D. Ca. 1973), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975); and *Baker* v. *Hampton*, 6 Empl. Prac. Dec. (CCH) I 9043 (D.D.C. 1973), OPM issued a Bulletin on December 21, 1973, placing the following gloss on the regulation:

> [Y]ou may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service

[4] The statute covers appointments in the excepted service. 5 U.S.C. § 2302(a)(2)(A)(i), (B). AUSA positions do not fall within Schedule C, 5 C.F.R. § 213.3301, and are not, therefore, within any of the exceptions to the coverage of this statute. 5 U.S.C. § 2302(a)(2)(B)(i).

[5] OPM administers the regulations governing the civil service. 5 U.S.C. § 1103(a)(5) The civil service includes the excepted service. 5 U.S.C. § 2101(1).

[6] After the decision in *Scott*, the Civil Service Commission again disqualified the applicant, and was again reversed. *Scott* v. *Macy*, 402 F.2d 644 (D.C. Cir. 1968).

> into public contempt. You, are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness — excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal Service.

Ashton v. *Civiletti*, 613 F.2d 923, 927 (D.C. Cir. 1980) (quoting Bulletin). In November 1975, OPM issued FPM Supplement 731–1, *Determining Suitability for Federal Employment.* Subchapter 3–2(a)(3)(c), which discusses infamous or notoriously disgraceful conduct, states:

> Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. OPM and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is a homosexual or has engaged in homosexual acts. Based upon these court decisions and outstanding injunction[s], while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal Service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness.

Thus, it is improper to deny employment to or to terminate anyone on the basis either of sexual preference or of conduct that does not adversely affect job performance. In short, there must be a reasonable showing that the homosexual conduct adversely affects the job performance.

B. Case Law

1. The Nexus Test

An examination of recent case law indicates that the burden is on the Government to demonstrate that the AUSA's homosexual conduct has adversely affected or will adversely affect his performance or that of others, and that it will be difficult for the Government to do so. *Hoska* v. *United States*, 677 F.2d 131, 136–38 (D.C. Cir. 1982). The U.S. Court of Appeals for the District of Columbia Circuit has articulated four ways in which homosexual conduct might adversely affect job performance: (1) if it jeopardizes the security of classified information through potential blackmail; (2) if it constitutes evidence of an unstable personality unsuited for certain kinds of work; (3) if it causes the employee to make offensive overtures at work; or (4) if it constitutes the basis of "notorious" activities that trigger negative reactions from fellow employees or the public. *Norton* v. *Macy*, 417 F.2d 1161, 1166 (D.C. Cir.

1969).[7] As in *Norton*, we believe that it be difficult for the Department to convince a court that the particular employee at issue failed any of these tests. *Id.* at 1166.[8] Given his record, it would appear that the only way his ability to function successfully might be jeopardized would be through hostility from the public or his fellow workers, but there is no evidence of any negative reactions. Nor is the AUSA, as an overt homosexual, apparently considered to be a security risk through a blackmail threat. The Department has given him a security clearance, and there is no evidence that the AUSA has an unstable personality: rather, his work is described as consistently superior. His current supervisor has stated that the AUSA's work continues to be excellent, and there are no allegations that he has made offensive overtures at work.[9] We are not aware of any evidence that he has engaged in the kind of notorious conduct that was found to be sufficient for termination in *Singer* v. *United States Civil Service Comm'n*, 530 F.2d 247 (9th Cir. 1976), *vacated and remanded*, 429 U.S. 1034 (1981), and *Childers* v. *Dallas Police Dep't*, 513 F. Supp. 134, 140–42 (N.D. Tex. 1981).[10] Rather, the AUSA has apparently been so discreet that the fact of his homosexuality came as a surprise to his superiors. Like the employee in *Norton*, the AUSA could successfully argue that he is a satisfactory worker who suffered an adverse employment action because of a general policy decision.[11]

[7] *Norton* involved a veteran who could only be dismissed for "such cause as will promote the efficiency of the service." 5 U.S.C. § 7512(a) (Supp 1965). The nexus test, however, has been carried over in subsequent cases to disputes involving those in the excepted service. *Ashton* v. *Civiletti*, 613 F.2d 923 (D.C. Cir. 1979). Not all circuits use the nexus test, *see, e.g.*, *Vigil* v. *Post Office Dep't*, 406 F.2d 921 (10th Cir. 1969), but it is the test employed in the circuits in which it is most likely that the AUSA, if he were so inclined, would bring suit.

[8] *Norton* involved an otherwise competent NASA budget analyst dismissed because of a homosexual advance he made one evening while in a car. 417 F.2d at 1162–63. He was arrested for a traffic violation by members of the Morals Squad who had observed the incident. He was then interrogated about his conduct by the Morals Squad and NASA security officers. Although sodomy was a violation of the local law, D.C. Code § 22–3502 (1967), the court did not raise the issue of whether such a violation might automatically establish the nexus. The government's brief did, however, note that sodomy was a crime and that the police had probable cause to arrest Mr. Norton on that charge, although they chose not to. Appellee's Brief at 14 n.9, 31 & n.25, *Norton* v *Macy*, 417 F.2d 1161 (D.C. Cir. 1969). Thus, the Court of Appeals implicitly rejected the proposition that conduct violative of the local ordinance was sufficient, standing alone, to establish a nexus between that conduct and the job performance required in Mr. Norton's job.

[9] *See, e.g.*, *Safransky* v. *State Personnel Board*, 215 N.W.2d 379, 381, 385 (Wisc. 1974).

[10] *Compare Singer*, 530 F.2d at 249, 252–55, *McConnell* v. *Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); *Childers*, 513 F. Supp. at 140–41 *with Aumiller* v. *University of Delaware*, 434 F. Supp. 1273 (D. Del. 1977). *See also Ross* v. *Springfield School Dist. No. 19*, 641 P.2d 600, 608 (Or. Ct. App. 1982) (teacher properly dismissed where public practice of homosexuality resulted in "notoriety" which impaired his teaching ability).

[11] In *ben Shalom* v. *Secretary of Army*, 489 F. Supp. 964 (E.D. Wisc. 1980), the court found that the dismissal of an otherwise suitable soldier because of her homosexuality violated the soldier's substantive due process rights under the Fifth Amendment. *Id.* Given that the soldier had received high marks on her military performance, the court found that there was no nexus between her status as homosexual and her suitability for service. "It was, therefore, arbitrary, capricious and unreasonable for the Army to conclude that the petitioner was anything other than a 'suitable' soldier under its regulations." *Id.* at 977. *See also Martinez* v. *Brown*, 449 F. Supp. 207 (N.D. Ca. 1978) (same; Navy regulations). *But see Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir.) (rejecting same analysis when applied to Navy regulation), *pet'n for reh'g en banc denied sub nom. Miller* v. *Rumsfeld*, 647 F.2d 80 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). The denial of the petition for rehearing *en banc* elicited a long dissent. *Miller*, 647 F.2d at 80–90.

We are aware of two cases in which the Government has dismissed homosexual employees and defended the dismissals successfully: *Singer*, *supra*, and *Dew* v. *Halaby*, 317 F.2d 582 (D.C. Cir. 1963), *cert. dismissed*, 379 U.S. 951 (1964). *Dew* occurred prior to the issuance of the pertinent OPM regulation. *Singer* involved the kind of "notorious" conduct faulted in *Norton*: Mr. Singer was a clerk typist whose work was satisfactory but whose off-duty conduct included kissing and embracing another man on federal property, discussing gay rights on TV shows in which he identified himself as a federal employee, applying for a marriage license to be married to another man, and receiving "extensive" publicity because of his attempt to obtain a marriage license. 530 F.2d at 249. In both *Dew* and *Singer*, the Government received adverse publicity because of the dismissals and eventually reversed its policy, reinstating both employees with back pay.

Because the AUSA has stated that he intends to continue to engage in homosexual conduct, and this is now public knowledge, the Department might take the position that an AUSA who habitually engaged in a violation of state criminal law brings discredit upon the Department sufficient to establish the kind of nexus required by current case law. We could argue that the willingness to engage in such acts in violation of local law demonstrates a disrespect for the law that is not consistent with the standard of conduct demanded by the Department of someone who is engaged in prosecuting others for violations of the law. We could also note that the local legal community, represented by the state bar, has condemned at least the public practice of homosexuality.

On the other hand, OPM's regulation forbids the federal government from discriminating against those who engage in homosexual conduct, absent a nexus between the conduct and job performance. The AUSA could argue that OPM's regulation forbids the taking into account of state laws, especially if the AUSA would probably not be prosecuted for private consensual homosexual acts under the state's current enforcement policy. OPM was presumably aware in 1973 that homosexuality violated the laws of many states and did not intend its standard an adverse effect on job performance to be met by merely showing that the conduct violates state law.

2. Law Enforcement Exception

The only justification in the case law which might support a decision to refuse to retain the AUSA in this context would be to convince the court that private homosexual conduct is, once it is public knowledge, detrimental to the performance of the AUSA's job in states where it violates the criminal law. Proving the nexus between questioned behavior and job performance, especially when the behavior occurs outside the work place, is, however, often difficult.[12] Courts seem reluctant to find a nexus if the behavior does not occur

[12] *See Bonet* v. *United States Postal Service*, 661 F.2d 1071 (5th Cir. 1981) (indictment for child molestation, standing alone, insufficient); *Young* v. *Hampton*, 568 F.2d 1253 (7th Cir. 1977) (conviction for drug use,

Continued

during official work hours, and have stated that it is the agency's obligation to spell out how the conduct will affect performance or promote the efficiency of the service. *Phillips* v. *Bergland*, 586 F.2d 1007, 1012–13 (4th Cir. 1978).

The most effective way to prove adverse effect on job performance would be to prove that the special nature of a prosecutor's job — his public representation of the entire Department, his duty to uphold the law, and the potential for accusations of hypocrisy for hiring a lawbreaker to enforce the law — requires that there be no taint of criminality. 28 C.F.R. § 45.735–2(a). Some cases have emphasized that law enforcement officers can, because of their particularly sensitive positions, be held to a stricter standard of behavior, even in their private lives, than might otherwise be the case. For example, in *Masino* v. *United States*, 589 F.2d 1048 (Ct. Cl. 1978), the court approved the dismissal of a United States customs officer because of his voluntary statements that he had smoked marijuana on several occasions:

> Masino in his position as a Customs Inspector was specifically charged with enforcing the laws concerning contraband, including marijuana. Since possession and/or use of marijuana is a violation of federal criminal statutes, he was clearly not conducting himself in a manner to be expected of a Government employee engaged in law enforcement duties. This was what the appeals authority said, and we agree. Further, in addition to the language of the appeals authority, the transportation and use of the very contraband which a law enforcement officer is sworn to interdict, is clearly misconduct which "speaks for itself." Obviously, the disciplinary action of termination taken against Masino to "promote the efficiency of the service" cannot be said to be without a rational basis. His discharge was neither arbitrary nor capricious.

589 F.2d at 1056. A district court has upheld a state law barring all felons, even those who had received pardons, from being policemen. *Dixon* v. *McMullen*,

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[12](. . . continued)
standing alone, insufficient); *Tygrett* v. *Barry*, 627 F.2d 1279 (D.C. Cir. 1980) (reaffirming analysis in *Tygrett* v. *Washington*, 543 F.2d 840 (D C. Cir. 1974)) (probationary policeman's advocacy of illegal "sick out" insufficient); *Grebosz* v. *United States Civil Service Comm'n*, 472 F. Supp. 1081 (S D.N.Y. 1979) (convictions for possession of marijuana and sale of cocaine insufficient). Even questionable conduct while at work does not automatically provide the nexus. In *Phillips* v. *Bergland*, 586 F.2d 1007 (4th Cir. 1978), the court declined to find that assaulting a fellow employee in the stairwell, albeit during the lunch hour, was facially sufficient to prove the nexus:

> Typical of conduct, which carries on its face prejudice to the service as contemplated in § 7501(a), are falsification of work records or expense accounts, theft of government property, assault on one's supervisor at work, and insubordination. All of these . . . are quite different from misconduct which is entirely unrelated to the employee's work and which occurs when the employee is off duty. And the courts have recognized that distinction and have made plain the greater burden which rests on the agency to justify its action in the latter case.

Id. at 1011 (footnotes and citations omitted). *But see Yacovone* v. *Bolger*, 645 F 2d 1028 (D.C. Cir.), *cert denied*, 454 U.S. 844 (1981) ($8 theft by Postmaster sufficient because of fiduciary responsibilities); *Wathen* v. *United States*, 527 F.2d 1191 (Ct. Cl.) (murder committed in public sufficient), *cert. denied*, 429 U.S. 821 (1976); *Gueroy* v. *Hampton*, 510 F.2d 1222 (D.C Cir 1974) (manslaughter conviction sufficient).

527 F. Supp. 715 (N.D. Tex. 1981). The court said that it was permissible for the state to examine the individual's prior history and to deny employment to those with a background of lawbreaking in order to insure "that those persons publicly employed in emergency or dangerous situations are sober and alert, and possess qualities such as honesty, integrity, reliability and obedience to the law." *Id.* at 721. Noting that policemen are acting on behalf of "people at large," the court said:

> Policemen are just simply a special category. Integrity and trust are prerequisites. The law clothes an officer with authority to handle many critical situations, including those that occur in a lightning moment and which can never be reenacted or reversed. . . . A state's legitimate concern for maintaining high standards of professional conduct extends far beyond the initial licensing.

Id. See also Upshaw v. *McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970); *Macchi* v. *Waley*, 586 S.W.2d 70, 72–74 (Mo. Ct. App. 1979); *Vegas* v. *Schechter*, 178 N.Y.S.2d 67, 68–69 (Sup. Ct. 1958).[13] Even those whose connections to law enforcement appear more tenuous have come within the sweep of these statements. In upholding the denial of employment to a homosexual who sought work as a property room clerk in the police department, *Childers* v. *Dallas Police Department*, *supra*, the court said:

> No one can disagree that the character and activities of those to whom we entrust the enforcement of our laws must be beyond reproach. The activities of an employee of a law enforcement agency are of paramount interest to that agency, as the police department as a whole must reflect the values of a majority of society.

Childers, 513 F. Supp. at 140–41.[14] Likewise, it could certainly be argued that public prosecutors must be trustworthy and law abiding, or else the public's confidence in the justice system will erode. Persons deciding whether to bring or decline prosecutions should not be lawbreakers themselves.[15]

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[13] *But see Smith* v. *Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977) (law barring all felons from work as private security guards struck down as overbroad).

[14] However, *Childers* offers less support for the decision not to retain the AUSA than at first appears. First, the case involved a property room clerk, the same kind of low-level job involved in *Ashton*, *supra*, in which the D.C. Circuit came to the opposite conclusion about an FBI mailroom clerk. Second, *Childers* involved a homosexual who, as in *Singer*, was not discreet and who openly advocated homosexuality while identifying himself as a public employee. The notoriety led the Court to conclude that the applicant failed one of the tests laid out in *Norton*, *supra*. *Childers*, 513 F. Supp. at 142 n.11.

[15] Law enforcement is not the only profession the courts have recognized as being one in which the public's confidence in the employee is important. An air controller's job has been described by courts as a "a sensitive one" in which misconduct may erode the public's faith in reliability of the national air control system. *Dew* v. *Halaby*, 317 F 2d 582, 587 n.11 (D.C Cir. 1963) (homosexual acts), *cert. dismissed*, 379 U.S. 951 (1964); *McDowell* v. *Goldschmidt*, 498 F. Supp. 598, 605 (D. Conn 1980) (conviction for possession of marijuana). *Dew*'s continued validity has been undercut by *Norton*, decided five years later, in which the D.C. Circuit was much more willing to question and overrule OPM's rationale.

We must emphasize, however, that none of these cases is dispositive. Furthermore, the fact that the AUSA has apparently, according to those who have evaluated him, continued to perform effectively in his job even after his homosexuality became public knowledge in the United States Attorney's Office will seriously undercut the crucial argument that his homosexual conduct is adversely affecting his job performance. In order to prevail, the Department may well have to convince the courts to accept the argument that the continuing violation of local laws that make private consensual homosexual conduct criminal establishes the required nexus as a matter of law even though that local law probably would not be enforced against the AUSA and even though such a legal "presumption" might be said to run counter to the pertinent statute and regulations.

III. Constitutional Protections

The AUSA might attempt to argue that failing to retain him would violate certain of his constitutional rights, but we do not believe such arguments would be successful. It is true that federal employees do not give up their constitutional rights upon accepting employment and the federal government may not condition a job upon the waiver of those rights. However, the issue whether the right to privacy, which the courts have determined to be protected by the Constitution, encompasses the right to practice private consensual homosexuality is still a matter of serious dispute. *See Berg* v. *Claytor*, 436 F. Supp. 76, 79 (D.D.C. 1977), *vacated*, 591 F.2d 849 (D.C. Cir. 1978). Although some courts have found protection for homosexuals for certain activities in the First Amendment either in the freedom to speak,[16] the freedom to associate,[17] or the right to

[16] *See Aumillier* v. *University of Delaware*, 434 F. Supp. 1273, 131112 (D. Del. 1977); *Acanfora* v *Bd. of Education*, 491 F.2d 498, 501 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974). In *Aumillier*, the court awarded punitive damages in an action brought under 42 U.S.C. § 1983 against a university president who refused to rehire an untenured teacher because the teacher had discussed his homosexuality in public. *But see Suddarth* v. *Slane*, 539 F. Supp. 612, 616 (W.D. Va. 1982) (denied recovery under § 1983 on ground that participation in illegal act — adultery — precluded recovery for allegedly wrongful dismissal). Damages were also awarded in *Johnson* v. *San Jacinto Junior College*, 498 F. Supp. 555, 57779 (S.D. Tex. 1980) (adultery punished by summary demotion without a hearing).

[17] *See Gay Lib* v. *University of Missouri*, 558 F.2d 848 (8th Cir. 1977) (freedom of speech and association protects homosexual students), *cert denied*, 434 U.S. 1080 (1978); *Gay Alliance* v. *Mathews*, 544 F.2d 162 (4th Cir. 1976) (same); *Gay Students Org.* v. *Bonner*, 509 F.2d 652 (1st Cir. 1974) (same); *Lesbian/Gay Freedom Day Committee, Inc.* v. *INS*, 541 F Supp 569 (N.D. Cal. 1982) (holding unconstitutional *per se* exclusion of homosexual aliens as violative of First Amendment associational rights of homosexual citizens); *Fricke* v. *Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (homosexual high school student's rights to freedom of speech and association covered bringing homosexual date to high school prom); *Student Coalition for Gay Rights* v. *Austin Peay State University*, 477 F Supp. 1267 (M.D. Tenn. 1979); *Toward a Gayer Bicentennial Committee* v. *Rhode Island Bicentennial Foundation*, 417 F. Supp. 632 (D.R.I. 1976) (upholding right of access to public forum); *Gay Activists Alliance* v. *Board of Regents*, 638 P.2d 1116 (Okla. 1981); *Alaska Gay Coalition* v. *Sullivan*, 578 P.2d 951 (Ala. 1978). *See also Nemetz* v. *INS*, 647 F.2d 432 (4th Cir. 1981) (private homosexual conduct does not preclude finding of "good moral character" necessary for naturalization). Even the military's *per se* exclusion of homosexuals has been successfully attacked in some cases despite the traditional deference given to arguments about discipline and upholding the law. *ben Shalom* v. *Secretary of Army*, 489 F. Supp. 964 (E.D. Wisc 1980) (discharge for homosexuality violated rights of association and personal privacy). *See also Bruns* v. *Pomerleau*, 319 F. Supp. 58 (D. Md. 1970) (refusal to accept employment application from practicing nudist violated his right to freedom of association). Some courts have also found protection in state constitutions. *Gay Law Students Ass'n* v. *Pacific Tel. & Tel.*, 595 P.2d 592, 597 (Cal. 1979)

conduct one's private life free from government surveillance, *see Cyr* v. *Walls*, 439 F. Supp. 697 (N.D. Tex. 1977) (police surveillance of homosexual groups violated right to privacy),[18] we do not believe that failing to retain the AUSA would violate these rights. The Department has not invaded the AUSA's privacy by making impermissible inquiries, because the background check is required of all applicants and there has been no further inquiry. Failure to retain the AUSA would not be because he associates with homosexuals or has spoken out about his status but solely because of a determination that knowing, continuing violations of a local criminal law are sufficient to disqualify him from a job as a federal prosecutor.

III. Conclusion

The Department has the right to decline to retain the AUSA if his conduct or intended conduct are adversely affecting his job performance or the performance of those around him. In this particular case, the individual involved apparently has an excellent record as a litigator and is, according to his present superior, functioning in a satisfactory manner. It would be difficult, given this record, to show that his homosexual conduct in fact adversely affects his job performance. Rather, we believe that on these facts it would be likely that he would meet the tests articulated in *Norton*, *supra*, especially in view of the fact that the Department is willing to give him the security clearance necessary for his work. The state criminal law he is apparently violating is, we understand, only enforced against public conduct. The Department does not have a policy of dismissing people for conduct that violates other similar state criminal laws.

Staff members at both the Civil Division, which will be called upon to defend any suit, and OPM, whose regulation we are interpreting, have been informally consulted and have stated that they believe the facts of this case will make it difficult to establish a sufficient nexus between the conduct and the job performance, and we tend to agree with their judgment. As long as the OPM regulation remains in force, we also believe it would be difficult to establish the proposition that the violation of local laws on the facts of this case establishes a nexus as a matter of law sufficient to support a decision to dismiss.

We must reiterate that the case law makes it clear that potential embarrassment to the Department is not enough to justify a refusal to retain an AUSA: there must be a supportable judgment made by the appropriate officials that the AUSA's actions are adversely affecting his performance. Unless the Department can reasonably expect to maintain the burden of proof on this issue, it is

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[18] *See also Shuman* v. *City of Philadelphia*, 470 F. Supp. 449, 459 (E.D. Pa 1979) (inquiry into off-duty personal activities — affair with an 18-year-old — violated right of privacy in the absence of any showing of impact on job performance); *Major* v. *Hampton*, 413 F. Supp. 66 (E.D. La. 1976) (dismissal of IRS officer who rented apartment for off-duty, extramarital affairs impermissible); *Mindel* v. *United States Civil Service Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970) (termination of postal clerk for cohabiting violated Ninth Amendment right to privacy). *But see Suddarth* v. *Slane*, 539 F. Supp 612 (W.D. Va. 1982) (adultery not protected by the First Amendment); *Hollenbaugh* v. *Carnegie Free Library*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir.) (employees' open adultery not protected by right of privacy), *cert. denied*, 439 U.S. 1052 (1978).

not reasonable to expect that the Department would prevail. Without stronger evidence that this particular individual's homosexuality is adversely affecting his performance, we believe that it would be difficult to overcome charges of discrimination on the basis of conduct that apparently does not adversely affect the performance of the employee or those around him.

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Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities

In general, the Attorney General has plenary authority over the supervision and conduct of litigation to which the United States is a party. Courts have narrowly construed statutory grants of litigation authority to agencies to permit the exercise of such power only when the authorizing statutes are sufficiently clear and specific to ensure that Congress intended an exception to the general rule.

The litigation authority of the Equal Employment Opportunity Corporation (EEOC) is limited by statute to suits brought on behalf of private sector employees. 42 U.S.C. §§ 2000e-4 to 2000e-6. Furthermore, litigation authority for Title VII "pattern or practice" suits against State and local government entities is specifically vested in the Attorney General.

To permit the EEOC, an executive agency subject to the authority of the President, to represent on its own behalf a position in court independent of or contrary to the position of the United States, would be inconsistent with the constitutional principle of the unitary executive.

March 13, 1983

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

This responds to your request for the opinion of this Office regarding the litigation authority of the Equal Employment Opportunity Commission (EEOC) in suits brought against state or local governmental entities to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), as amended. Your question arises in the context of litigation brought in the United States District Court in Louisiana by a class of black applicants and members of the New Orleans Police Department against the City of New Orleans, the New Orleans Civil Service Commission (CSC) and various municipal and CSC officials, seeking redress from injuries suffered due to alleged racially discriminatory policies in the selection, training and promotion of city police officers.[1] Following pretrial settlement discussions, the parties moved jointly for the court's approval of a proposed consent decree in settlement of the plaintiffs' claims. The district court denied approval of the decree on the ground that "the proposed quota exceeds its remedial objectives while seriously jeopardizing the career interests of nonblack officers," and encouraged the parties to resub-

[1] *See Williams* v. *City of New Orleans*, 543 F Supp 662 (E.D. La. 1982), *rev'd and remanded*, 694 F.2d 987 (5th Cir. 1982).

mit a decree "propos[ing] further measures that the parties deem appropriate, so long as they are precise, remedial in nature, and attentive to the interests of third parties." 543 F. Supp. at 686.

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed, holding that the district court's rejection of the proposed consent decree on the stated grounds constituted an abuse of the court's discretion, and remanded with instructions to enter the decree. We understand that, pursuant to 42 U.S.C. §§ 2000e-5(f)(1)[2] and 2000h-2,[3] the Attorney General has certified that this case is "of general public importance" and has moved the Court of Appeals for permission to intervene, on behalf of the United States, as a party-appellee, for the purpose of filing a suggestion for rehearing en banc. We understand further that the EEOC is prepared to petition the court for leave to present, in some capacity,[4] views of the Commission which are independent of, and possibly contrary to, those presented by the Attorney General. You now seek the advice of this Office as to whether the EEOC has authority to make such an appearance.

We believe that, as the following discussion makes clear, the EEOC's litigating authority under Title VII of the Civil Rights Act is limited to the enforcement of claims against private sector employees. This conclusion is supported by the very terms of the enforcement provisions of Title VII, 42 U.S.C. §§ 2000e-5, 6, as well as the legislative history of those provisions. In addition, the more general constitutional and statutory considerations investing the Attorney General with the responsibility for the conduct of all litigation on behalf of the United States, would, in any event, counsel against a construction of the EEOC's litigating authority that would permit it, as an Executive Branch agency subject to the supervision and control of the President, to appear independently and on its own behalf, in opposition to positions advanced by the Attorney General, on behalf of the United States.

I. General Considerations

All questions of the litigating authority of Executive Branch agencies and departments must begin with a recognition of the Attorney General's plenary authority over the supervision and conduct of litigation to which the United

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[2] Section 2000e-5(f)(1) provides in pertinent part:

> Upon timely application, the court may, in its discretion, permit the Commission, *or the Attorney General in a case involving a government, governmental agency, or political subdivision*, to intervene in such civil action upon certification that the case is of general public importance.

(Emphasis added.)

[3] Section 2000h-2 provides:

> Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, sex or national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

[4] It is unclear whether the Commission seeks to present its views as an *amicus curiae* or as an intervening party-appellant. Because we conclude that the Commission lacks the authority to appear on its own behalf in any public sector Title VII litigation, the distinction between intervention and *amicus* appearances is without significance to the consideration and resolution of this issue.

States, its agencies and departments, or officers thereof, is party. This plenary 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* 28 U.S.C. §§ 516, 519.[5] *See generally United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888). The rationales underlying this grant of plenary authority to the Attorney General are many, the most significant of which is the need to centralize the federal litigation functions under one authority to ensure: (1) coordination in the development of positions taken by the Government in litigation, and consideration of the potential impact of litigation upon the Government as a whole; and (2) the ability of the President, as head of the Executive Branch, to supervise, through the Attorney General, the various policies of Executive Branch agencies and departments as they are implicated in litigation. Because of his government-wide perspective on matters affecting the conduct of litigation in the Executive Branch, the Attorney General is uniquely suited to carry out these functions. *See United States* v. *San Jacinto Tin Co.*, 125 U.S. at 27880. *See also Report of the Attorney General's Task Force on Litigating Authority* (Oct. 28, 1982)); *Memorandum for the Attorney General re: The Attorney General's role as Chief Litigator for the United States*, 6 Op. O.L.C. 47 (1982).

Notwithstanding Congress' determination that the litigating functions of the Executive Branch be generally centralized in the Attorney General, the Attorney General's "plenary" authority over litigation involving the United States is limited to some extent by the "except as otherwise authorized by law" provisions contained in §§ 516 and 519. Nevertheless, mindful of the considerations supporting such centralization, the courts have narrowly construed statutory grants of litigation authority to agencies in derogation of the responsibilities and functions vested in the Attorney General to permit the exercise of litigating authority by agencies only when the authorizing statutes are sufficiently clear and specific to ensure that Congress indeed intended an exception to the general rule. *See, e.g., Case* v. *Bowles*, 327 U.S. 92 (1946); *ICC* v. *Southern Ry. Co.*, 543 F.2d 534 (5th Cir. 1976); *Federal Trade Comm'n* v. *Guignon*, 390 F.2d 323 (8th Cir. 1968). *See generally Report of the Attorney General's Task Force on Litigating Authority, supra*; *Memorandum for the Attorney General, supra*.[6]

[5] 28 U.S.C. § 516 provides:

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

28 U.S.C. § 519 provides:

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

[6] The Task Force Report and the 1982 Office of Legal Counsel Memorandum together provide an extensive and thorough discussion of the Attorney General's litigating authority for the Executive Branch, including its historical origins and development since 1789, the judicial construction of various "litigating authority" statutes, and the Memoranda of Understanding entered into by the Department of Justice to share litigating functions with "client" agencies.

A. The EEOC's Litigating Authority

The EEOC's general litigating authority is found in the Commission's authorizing statute, 42 U.S.C. § 2000e-4. Subsection (b) of that section, which governs the appointment and functions of the Commission's General Counsel, provides in pertinent part:

> (b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation *as provided in sections 2000e-5 and 2000e-6 of this title.*
>
> (2) *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.*

(Emphasis added.) In addition, subsection (g)(6) of § 2000e-4 authorizes the Commission

> to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party *against a respondent other than a governmental agency or political subdivision.*

(Emphasis added.)

Sections 2000e-5 and 2000e-6, which constitute the enforcement provisions for Title VII of the Act, set forth the functions and responsibilities of the EEOC and the Attorney General, respectively, for enforcement of the Act. Section 2000e-5 outlines the various procedures for filing charges of alleged discrimination with the Commission and the Commission's responsibilities for timely investigation and attempted conciliation of those charges. Subsection (f)(1) provides that if, after a given period of time, the Commission is unable to secure an acceptable conciliation agreement,

> the Commission may bring a civil action against any respondent *not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision,* if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, *the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action* against the respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a

civil action brought by the Commission or the Attorney General in a case involving a governmental agency, or political subdivision.

(Emphasis added.) If, after investigation, the Commission dismisses the charge or fails to file a civil action after the statutory period of reference has expired, or "the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision," the complainant is entitled to bring suit in his or her individual capacity. In such cases, upon timely application, the court may, in its discretion, permit the Commission, *or the Attorney General in a case involving a government, governmental agency, or political subdivision*, to intervene . . . upon certification that the case is of general public importance. 42 U.S.C. § 2000e-5(f)(1) (emphasis added).

The enforcement provisions contained in § 2000e-5 clearly limit the EEOC's authority to bring civil actions on behalf of Title VII complainants, or to intervene in such proceedings, to cases involving nongovernmental defendants. That is, by its very terms, the EEOC's litigation authority is limited to suits brought on behalf of private sector employees. *See General Telephone Co. of the Northwest* v. *EEOC*, 446 U.S. 318, 324 & n.6 (1980) (in describing the statutory scheme of Title VII, the Court stated that § 2000e-5(f)(1) "specifically authorizes the EEOC to bring a civil action against any respondent *not a governmental entity* upon failure to secure an acceptable conciliation agreement," and added that "[t]he Attorney General is authorized to bring suit against a governmental entity"). (emphasis added).[7] *See also United States* v. *Fresno Unified School Dist.*, 592 F.2d 1088 (9th Cir.), *cert. denied*, 444 U.S. 832 (1979).

This limitation, and those contained in § 2000e-6 discussed below, are incorporated into the general grant of litigating authority to the Commission in § 2000e-4(b).[8] Thus, to the extent that the Commission bases its claim of authority to appear in Title VII litigation against public sector employees on § 2000e-4(b)(2), it, in effect, claims that EEOC attorneys are not bound by the constraints imposed on the litigating authority of the General Counsel, under whose supervision they work. Such a construction would be contrary to Congressional intent,[9] the rule that exceptions to the Attorney General's plenary

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[7] The Court further stated that the 1972 amendments to the Act expanded the Commission's enforcement powers beyond the conciliation authority granted to it in 1964 by "authorizing the EEOC to bring a civil action in federal district court *against private employers* reasonably suspected of violating Title VII." 446 U.S. at 325 (emphasis added).

[8] As indicated above, §§ 2000e-4(b)(1) and (2) grant the General Counsel "responsibility for the conduct of litigation *as provided in sections 2000e-5 and 2000e-6*," and attorneys "appointed under this section" the authority to, "at the direction of the Commission, appear for and represent the Commission in any case in court," except the Supreme Court. (Emphasis added.)

[9] The Conference Report to the 1972 amendments to Title VII of the Civil Rights Act indicates that:

> Both the House bill and the Senate amendment authorized the bringing of civil actions in Federal district courts in cases involving unlawful employment practices.
>
> *The Senate amendment provided that the Attorney General bring actions against state and local governments. As to other respondents, suits were to be brought by the Commission.* The Senate amendment permitted suits by the Commission or the Attorney General if the Commis-

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litigating authority are to be narrowly construed, and the plain language of the statute.

The second provision outlining the scope of the EEOC's authority to litigate Title VII suits, § 2000e-6, relates to the prosecution of "pattern or practice" suits.[10] That provision, as amended by § 5 of the President's Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19809, 92 Stat. 3781 (Feb. 23, 1978), vests the authority for "initiation of litigation with respect to State or local government, or political subdivisions under . . . [42 U.S.C. § 2000e-6] and all necessary functions related thereto, including investigations, findings, notice and an opportunity to resolve the matter without contested litigation" in the Attorney General. *See* 42 U.S.C. § 2000e-4 note (Supp. IV 1980).

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[9] (. . . continued)

> sion was unable to secure from respondent "a conciliation agreement acceptable to the Commission" while the House bill permitted the Commission to sue if it is unable to obtain "voluntary compliance." The Senate amendment permitted aggrieved persons to intervene in suits and allowed a private action if no case is brought by the Commission or Attorney General within 150 days. The House bill permitted a private action after 180 days. The Senate amendment allowed the General Counsel or Attorney General to intervene in private actions; the House bill permitted only the Attorney General to intervene. The Senate amendment permitted a private action in a case where the Commission entered into a conciliation agreement to which the aggrieved person was not a party (*i.e.* a signatory).
>
> The conferees adopted a provision allowing the Commission *or the Attorney General in a case against a state or local government agency*, to bring an action in Federal district courts if the Commission is unable to secure from the respondent "a conciliation agreement acceptable to the Commission." Aggrieved parties are permitted to intervene. They may bring a private action if the Commission or Attorney General has not brought suit within 180 days or the Commission has entered into a conciliation agreement to which such aggrieved party is not signatory. The Commission, or the Attorney General in a case involving state and local governments, may intervene in such private action.

H.R. Conf. Rep. No. 899, 92d Cong , 2d Sess. 17–18 (1972) (emphasis added).

[10] 42 U.S.C. § 2000e-6, as originally enacted in 1964, Pub. L. No. 88352, 78 Stat. 261 (July 2, 1964), provided that:

> (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

In 1972 the Act was amended, Pub. L. No. 92–261, 86 Stat. 107 (Mar 24, 1972), to provide that:

> (c) Effective two years after [March 24, 1972], the functions of the Attorney General under this section shall be transferred to the [Equal Employment Opportunity] Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

42 U.S.C. § 2000e-6 (Supp. IV 1974).

In 1978, pursuant to the President's Reorganization Plan No. 1, 92 Stat. 3781 (1978), the authority for prosecuting "pattern or practice" suits against governmental defendants under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-6, was transferred back to the Attorney General. Section 5 of the Reorganization Plan provides that:

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In his Message to Congress conveying the Reorganization Plan, the President stated that the Plan was designed to "consolidate Federal equal employment opportunity activities" by reducing the number of federal agencies with enforcement responsibilities from fifteen to three,[11] and to "bring coherence to the equal employment enforcement effort." *Id.* With respect to the Attorney General's responsibility for public sector "pattern or practice" litigation, the President stated:

> The Plan I am proposing will not affect the Attorney General's responsibility to enforce Title VII against State or local governments or to represent the Federal government in suits against Federal contractors and grant recipients. *In 1972, the Congress determined that the Attorney General should be involved in suits against State and local governments. This proposal reinforces that judgment and clarifies the Attorney General's authority to initiate litigation against State or local governments engaged in a "pattern or practice" of discrimination.* This in no way diminishes the EEOC's existing authority to investigate complaints filed against State or local governments and, where appropriate, to refer them to the Attorney General. The Justice Department and the EEOC will cooperate so that the Department sues on valid referrals, as well as on its own or "pattern or practice" cases.

Id. (emphasis added). On June 30, 1978, the President signed Executive Order No. 12068, 43 Fed. Reg. 28971 (1978), implementing § 5 of the Plan to transfer

[10] (. continued)

Section 5. *Transfer of Public Sector 707 Functions*

> Any function of the Equal Employment Opportunity Commission concerning initiation of litigation with respect to State or local government, or political subdivisions under Section 707 of Title VII of the Civil Rights Act of 1964, as amended, (42 U S C. 2000e-6) and all necessary functions related thereto, including investigations, findings, notice and an opportunity to resolve the matter without contested litigation, are hereby transferred to the Attorney General, to be exercised by him in accordance with procedures consistent with said Title VII. The Attorney General is authorized to delegate any function under Section 707 of said Title VII to any officer or employee of the Department of Justice.

42 U.S C. § 2000e-4 note (Supp. IV 1980). There has been considerable disagreement in the courts as to whether the 1972 amendments, which transferred the Attorney General's functions regarding "pattern or practice" litigation to the EEOC (effective 1974), stripped the Attorney General of his authority to file "pattern or practice" suits against state and local governments until enactment of the 1978 Reorganization Plan. *See, e.g., United States* v. *City of Miami*, 664 F 2d 435, 437 & n.1 (5th Cir. 1981) (en banc); *United States* v. *Fresno Unified School District*, 592 F.2d at 1093. There is uniform agreement, however, on the proposition that the EEOC no longer has authority to file "pattern or practice" suits against state and local governments.

[11] The three agencies which retained Equal Employment Opportunity Enforcement responsibilities under the Reorganization Plan are the EEOC, the Labor Department and the Department of Justice. The respective enforcement functions of the agencies are clearly delineated in the Plan to prevent needless duplication and overlap. See 42 U.S.C. § 2000e-4 note (Supp. IV 1980).

to the Attorney General the authority, previously exercised by the EEOC, to prosecute "pattern or practice" suits against public sector defendants.[12]

As is evident from the foregoing analysis, a construction of § 2000e-6 that would grant the EEOC authority to litigate "pattern or practice" suits against State or local governments is contrary to the plain language of the 1978 amendments to the provision. That the EEOC's independent litigating authority in Title VII suits brought under §§ 2000e-5, 6 is limited to private sector suits is a position that is supported by the Department of Justice as well as the courts. *See United States* v. *City of Miami*, 664 F.2d 435, 437 (5th Cir. 1981) (en banc) ("[Defendants] contend[] that, after 1974, only the EEOC could institute . . . ["pattern or practice"] actions against public employers; however, Congress has now explicitly authorized only the Attorney General to do so.") (footnote omitted). *See also United States* v. *Commonwealth of Virginia*, 620 F.2d 1018, 1022 (4th Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States* v. *Fresno Unified School District*, 592 F.2d at 109293; *United States* v. *State of North Carolina*, 587 F.2d 625 (4th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979).[13]

III. Constitutional Considerations

Apart from the foregoing statutory analysis, which we believe demonstrates conclusively that the EEOC lacks authority to prosecute, intervene in, or otherwise appear in, public sector Title VII litigation on its own behalf, the constitutional considerations which bear on the issues raised by your request require such a result. These considerations stem from the fundamental premise that the whole of the Executive power, created by Article II of the Constitution, is vested exclusively in the President. *Myers* v. *United States*, 272 U.S. 52, 161–64 (1926). Included within the Executive power is the obligation to "take care that the laws be faithfully executed," art. II, § 3, which necessarily encompasses the authority to exert "general administrative control of those

[12] Executive Order No. 12068 provides:

Transfer of Certain Functions to Attorney General.

By virtue of the authority vested in me as President of the United States by the Constitution and laws of the United States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 FR 19807), in order to clarify the Attorney General's authority to initiate public sector litigation under Section 707 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-6), it is ordered as follows:

1.1. *Section 707 Functions of the Attorney General.*

1–101. Section 5 of Reorganization Plan Number 1 of 1978 (43 FR 19807) shall become effective on July 1, 1978.

1–102. The functions transferred to the Attorney General by Section 5 of Reorganization Plan Number 1 of 1978 shall, consistent with Section 707 of Title VII of the Civil Rights Act of 1964, as amended, be performed in accordance with Department of Justice procedures heretofore followed under Section 707.

See 42 U.S.C. § 2000e-6 note (Supp. IV 1980).

[13] Although these decisions do not explicitly limit the Commission's authority to private sector suits, they stand for the proposition that the 1978 Reorganization Plan transferred to the Attorney General the full and complete authority to initiate Title VII litigation against state and local governments, leaving the EEOC with whatever Title VII litigation authority remained after the transfer, *i.e.*, suits against private employees.

executing the law," *i.e.*, the Executive officers. *Myers*, 272 U.S. at 164. There is no doubt that the EEOC, which performs functions that are "predominantly"[14] executive in nature — conciliation and the prosecution of civil law suits — is an Executive Branch agency whose members serve at the pleasure of the President and are removable without cause.[15] *See* "Reorganization Plan No. 1 of 1978 — Equal Employment Opportunity Comm'n," 2 Op. O.L.C. 69, 69 n.1 (1978).

Because it is an executive agency subject to the authority of the President, to permit the Commission to appear in a judicial proceeding in which the United States has exercised its authority to appear as a party (or has otherwise presented its views, *e.g.*, as an amicus), and present views on its own behalf which are independent of or contrary to those presented by the United States, would be inconsistent with the integrity of the Executive in the exercise of his Article II powers and responsibilities. Such a circumstance would, literally, put the Executive in the untenable position of speaking with two conflicting voices, abdicating his constitutional responsibility to "take Care that the Laws [are] faithfully executed."

In 1979, President Carter signed Executive Order No. 12146, by which he delegated to the Attorney General the Executive's authority for solving intra-branch disputes regarding legal matters. That order provides:

> 1–401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.
>
> 1–402. *Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court*, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

Executive Order No. 12146 (July 18, 1979), *reprinted in* 28 U.S.C. § 509 note (emphasis added). The EEOC, which is an agency "whose head[s] serve at the pleasure of the President," is prohibited by § 1–402 from proceeding in any action, whether public sector or private sector litigation, in which the Attorney General has, in the exercise of the dispute resolution function delegated to him by the Executive, determined that the position of the United States is contrary to that represented by the Commission.

[14] *See Humphrey's Executor* v. *United States*, 295 U.S. 602, 624 (1935) (proposing a "functional" test for determining whether for purposes of the President's power of removal, an agency is independent, and therefore the President's power of removal of its member may be limited, or a part of the Executive Branch, in which case the members serve at the pleasure of the President). *See also Wiener* v. *United States*, 357 U.S. 349 (1958).

[15] Members of the Commission are appointed by the President, by and with the advice and consent of the Senate, for a term of five years 42 U.S.C. § 2000e-4(a) The General Counsel is appointed by the President, by and with the advice and consent of the Senate, for a term of four years. 42 U.S.C. § 2000e-4(b)(1).

III. Conclusion

The EEOC's statutory litigating authority for the enforcement of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-5, 6, is, by its very terms, limited to civil actions against private sector employers, the responsibility for enforcement litigation against "government[s], governmental agenc[ies], or political subdivision[s]" having been vested in the Attorney General. This being the case, the Commission lacks litigation authority with respect to *Williams* v. *City of New Orleans*, which is a Title VII enforcement action against a governmental entity. As envisioned by the statutory scheme, the Attorney General has petitioned the court to present the views of the United States in this litigation.

Apparently the EEOC seeks to present its views to the court in the *Williams* case because it disagrees with the position taken by the Attorney General on behalf of the United States in the litigation; it is equally evident that as an executive agency subject to the supervision and control of the President, the Commission may not represent on its own behalf a position in court that is contrary to that taken by the Executive, through his delegee, the Attorney General. To permit otherwise would raise serious constitutional issues concerning the unity and integrity of the Executive. Accordingly, we conclude that the EEOC lacks authority to petition the court of appeals in *Williams* v. *City of Vew Orleans* for leave to file a brief or otherwise make an appearance.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Special Deputations of Private Citizens Providing Security to a Former Cabinet Member

The United States Marshals Service may not grant special deputy status to private citizens hired by a former cabinet member. By regulation, the Director of the Service may confer such status only upon selected federal officers or employees or state and local law enforcement officers.

Although the Attorney General may deputize private citizens, such appointments must further federal law enforcement functions within the authority of the Marshals Service. 28 U.S.C. § 569(c).

A federal law enforcement function sufficient to justify the appointment of special deputy marshals should be determined by the Marshals Service in the first instance, on the facts of each case in light of a number of different factors. In this case, no sufficient federal law enforcement function exists to permit the Attorney General to deputize these private security personnel.

March 18, 1983

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

You have asked that we examine the authority of the United States Marshals Service to provide special deputations to security personnel of a former cabinet member, Mr. A. In addition, you have requested our advice regarding the issuance of special deputy badges and credentials to the specially deputized security personnel. For the reasons set forth below, we have concluded that the Marshals Service lacks the authority to appoint the former cabinet member's staff as special deputies. We further conclude that on the facts as we understand them the Attorney General also lacks the authority to make the appointments. Accordingly, the issuance of badges and credentials need not be considered further.

I. Factual Background

In 1978, the Marshals Service, at the direction of the Deputy Attorney General, granted special deputy authority to four private citizens employed by Mr. A for the purpose of providing him with personal security. According to the Deputy Director of the Marshals Service, the deputations have been renewed annually with the concurrence of the Department of Justice.

In 1982, Mr. A's assistant sent two letters to the Deputy Director. The first letter requested that three members of the former cabinet member's staff be deputized as special deputy United States marshals. One of the proposed deputations is for the purpose of replacing a previously designated special deputy who has left his position. The other two are in addition to the four positions previously approved for Mr. A's staff. The letter states that "deputation of these three employees will considerably augment our ability to cope with a relatively new security problem that was the subject of discussions between [Department officials and Mr. A]."[1]

The second letter requested that the Marshals Service issue credentials, including photographs and imbedded badges, for Mr. A's security personnel. Currently, these special deputies use their oath of office document to identify themselves. According to Mr. A's assistant, this form of identification "is met by degrees of dubiousness ranging from skepticism to outright rejection." In order to avoid a situation of embarrassment to the Marshals Service or to Mr. A, as well as confusion and delays that are alleged to create potentially hazardous security situations, Mr. A's assistant requested the issuance of credentials to be used for identification purposes.

The Deputy Director of the Marshals Service directed this correspondence to your Office. In a memorandum, the Deputy Director has indicated that on the occasion of each annual renewal, the Marshals Service has expressed reservations regarding the propriety of the deputations and what they regard as "questionable legal authority" for their issuance. The memorandum further states that the Marshals Service knows of no other circumstance in which the deputation authority has been interpreted to allow the commissioning of private citizens for the purpose of providing personal protection to a private citizen.[2]

The Marshals Service has requested your direction in responding to the request for the issuance of badges and credentials. This determination seems necessarily to involve the issue whether the special deputations are appropriately granted in the first instance. You have referred these two issues to this Office.

III. Legal Issues

A United States marshal has been described as a "national peace officer." *In re Neagle*, 39 F. 833, 854–55 (C.C. Cal. 1889), *aff'd*, 135 U.S. 1 (1890). In general terms, his duties include the "enforcement, maintenance and administration of the federal authority." *See United States* v. *Krapf*, 285 F.2d 647, 649 (3d Cir. 1960). More specifically, the marshal's duties include, among others, providing courtroom security for the federal judiciary;[3] providing personal

[1] We understand that the "new security problem" involves harassment of Mr. A by a group that is alleged to have disrupted his schedule by sending false communications to the parties with whom he had appointments. We are unaware of any allegations of direct threats to Mr. A's personal security from the group. An FBI investigation is currently underway in this matter, and the FBI is also investigating a separate incident involving a bomb threat from an unknown source.

[2] The Marshals Service claims to recognize the "uniqueness" of Mr. A's circumstances and to understand the considerations which have resulted in the decision to grant the deputations. The Service also states, however, that it is unaware of the actual occurrence of any direct physical incident which required the intervention of the former cabinet member's security personnel under color of their authority as United States marshals. We are similarly unaware of any direct physical threats.

[3] 28 U.S.C. § 569(a); *see* 28 C.F.R. § 0.111(d).

protection to prevent disruption of the federal judicial process by criminal intimidation;[4] assisting in the protection of federal buildings and property;[5] executing writs, process, and orders;[6] disbursing certain salaries and moneys;[7] collecting and accounting for fees;[8] custody of prisoners;[9] and protecting certain Government witnesses.[10]

Significant powers are conferred upon United States marshals and deputy marshals so that they may carry out their functions:

> United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

18 U.S.C. § 3053. Moreover, "in executing the laws of the United States within a State," they "may exercise the same powers which a sheriff of the state may exercise in executing the laws thereof." 28 U.S.C. § 570.

Most important, for purposes of the issue you have raised, United States marshals may "command all necessary assistance to execute their duties." 28 U.S.C. § 569(b). This section is but the latest version of the authority first contained in § 27 of the Judiciary Act of 1789, which itself merely reflected the common law rule that the sheriff had the power to summon the *posse comitatus* and that the citizen had the duty to participate if called upon:

> It is the duty and the right not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country.

In re Quarles, 158 U.S. 532, 535 (1895). *See also In re Neagle*, 135 U.S. 1, 56–61 (1890); *Ex parte Siebold*, 100 U.S. 371, 394–96 (1880); 6 Op. Att'y Gen. 466, 471 (1854).

By statute, the Attorney General is specifically empowered to supervise and direct the marshals in the performance of public duties.[11] The Attorney General

[4] *See* 28 C.F.R. § 0.111(e).

[5] *See* 28 C.F.R. § 0.111(f).

[6] 28 U.S.C. § 569(b).

[7] 28 U.S.C. § 571 provides that the marshals shall pay the salaries, office expenses, and allowances of United States attorneys, their assistants, clerks, and messengers; the marshals, their deputies, and clerical assistants; the United States trustees, their assistants, staff, and other employees; and circuit and district judges, clerks and deputy clerks of court, court reporters, and other court personnel.

[8] 28 U.S.C. § 572.

[9] *Id.* § 573.

[10] 18 U.S.C. note prec. § 3481; *see* 28 C.F.R. § 0.111(c).

[11] 28 U.S.C. § 569(c).

is also specifically empowered to authorize appointment of deputy marshals.[12] These powers have been delegated to the Director of the United States Marshals Service.[13] The Executive's common law and statutory power to summon a *posse comitatus* has, by regulation, been conferred as a power to appoint special deputy marshals. The Attorney General has also delegated to the Director of the Marshals Service the authority "to deputize selected officers or employees of the United States to perform the functions of a U.S. deputy marshal in any district designated by the Director, and to deputize whenever the needs of the U.S. Marshals Service so require selected State or local law enforcement officers to perform the functions in any district designated by the Director." 28 C.F.R. § 0.112.

III. Discussion

A. Historical Practice

The Marshals Service regularly receives requests for special deputations. The authority of a United States marshal is the easiest and possibly the only practical legal means to carry firearms interstate or through airport security checkpoints and on board commercial airline flights. The Marshals Service has repeatedly taken the position that the use of the special deputation authority should be limited to those circumstances where the United States marshal needs the deputations in order to accomplish his or her specific mission. This philosophy is reflected in the current regulation which authorizes deputation only of selected officers or employees of the United States or selected State or local law enforcement officers when the needs of the Marshals Service so require. *See* 28 C.F.R. § 0.111.

These legal and policy considerations have been the basis for a number of refusals to grant or extend special deputy authority. A prior opinion of this Office considered the issue whether the Attorney General has authority to deputize privately employed security guards to facilitate protection of a private individual. That opinion reasoned that a deputy marshal has lawful authority only when he is performing a federal function, and thus the Attorney General could assign the marshal to protect an individual only when a federal function was involved. Finding none in the case of a private citizen, at least when he was not a prospective witness in a federal proceeding, we concluded that no statutory authority existed.

There have been requests from others for deputation, which were denied in instances where the Marshals Service had no enforcement authority, notwithstanding that some federal law enforcement function or federal official was involved. In 1979, the Department received a request from a Congressman, inquiring whether private security officers for a Presidential candidate might

[12] Title 28 U.S.C. § 562 provides in pertinent part that "[t]he Attorney General may authorize a United States marshal to appoint deputies."

[13] 28 C.F.R. § 0.112.

be designated as federal marshals in order to obviate the problem of obtaining state permits to carry firearms. This Office advised the Congressman on behalf of the Department that under the regulations and policy of the Department there was no authority to deputize the security officers because the Marshals Service had no role in protecting Presidential candidates.

Similarly, in 1978, the Marshals Service determined not to renew the special deputations of officials of fourteen federal departments and agencies. Generally, such special deputy authority was used to provide personal protection for the head of the department or agency. At the time, most heads of executive departments and agencies were not covered by the federal assault statute, 18 U.S.C. § 1114.[14] It was thus not a federal crime, in most circumstances, to threaten or harm them, and thus, in the view of the Marshals Service, not a federal law enforcement function to protect them.

The determination of the Marshal's Service was endorsed by the Deputy Attorney General, who stated:

> The Marshals Service had correctly observed that the applicable statutes and regulations by their terms limited such deputations to circumstances where the special deputy was performing the duties of a deputy marshal and "the needs of the U.S. Marshals Service" required the deputation.

The Deputy Attorney General also expressed concern that the special deputations might be viewed as directly contravening the intent of Congress by providing authority to make arrests and carry firearms to officers to whom Congress specifically had chosen not to grant those powers. Finally, the Marshals Service had found that it was impossible to control or review the use of the special deputy authority if it was widely conferred. The Service was concerned that it not be held liable for actions over which it has little or no control.

B. The Present Request

The Marshals Service has advised us that the four special deputations provided to the former cabinet member's staff are the only ones out of 637 currently in force that have been granted for "private persons . . . to provide private security to a private person."[15] In the view of the Marshals Service:

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[14] Such coverage is now effectively provided by Pub. L. No. 97-285, 96 Stat. 1219 (1982), which amended 18 U.S.C. § 351 to make it a federal crime to kill certain Executive Branch officials and members of the President's staff.

[15] In fact, these deputations appear to be the only ones currently granted to anyone to protect a private person other than in the general course of the marshal's duties, for example, the protection of witnesses. With the limited exception of federal contractor employees at certain military sites, these deputations appear also to be the only ones currently conferred upon anyone other than a federal, state, or local law enforcement officer. Even within this limited exception, there is a specific federal law enforcement function being performed.

> the request to deputize a citizen's bodyguards does not meet any of the requirements for special deputation. This is not a law enforcement function of the United States and would clearly provide law enforcement authority to private citizens for private purposes not clearly intended by statute or regulation.

We agree that the Marshals Service is without explicit authority to grant special deputations to Mr. A's staff. Pursuant to 28 C.F.R. § 0.112, the Director of the Marshals Service is expressly authorized to confer special deputy status only upon selected federal officers or employees or state and local law enforcement officers. The members of Mr. A's staff do not meet this qualification.

A separate question is whether the Attorney General himself has statutory authority to grant special deputations to private citizens. By statute, the Attorney General may authorize appointment of deputy marshals; there is no restriction to federal, state, or local officials. Notwithstanding the delegation of authority to the Director of the Marshals Service, the Attorney General retains at least as much of the statutory authority as he has not expressly delegated. He could, if the other conditions were satisfied, deputize a private citizen. Such a power merely reflects that the power to designate special deputy marshals originated in the power to summon a *posse comitatus*, which was, of course, composed of private citizens.

The relevant limitation on the Attorney General's power to appoint special deputies is that such appointments must be in furtherance of the marshal's "performance of public duties." 28 U.S.C. § 569(c). We believe that the marshal's "public duties" are appropriately construed to mean federal law enforcement functions within the authority of the Marshals Service. The Marshals Service has consistently given this interpretation to the scope of its authority. A similar construction is reflected in 28 C.F.R. § 0.112 itself, which limits appointment of special deputies to circumstances in which "the needs of the Marshals Service so require." The interpretation is compelled, we believe, by the nature of the marshal's authority. A careful reading of cases such as *In re Neagle*, *supra*, and *Ex parte Siebold*, *supra*, indicates that the Attorney General's authority to assign United States marshals to enforce federal law, including the performance of protective services, is limited to circumstances in which the marshal has lawful authority, that is, where he or she is performing a federal law enforcement function.

It is difficult for us to define with precision what constitutes a sufficient federal law enforcement interest that will justify the use of the special deputy authority. The answer in many, if not most or all, cases will depend on the particular facts. Moreover, we think that the question of sufficiency should be addressed by the Marshals Service in the first instance, given the Service's familiarity with its functions and allocation of resources. The Service, for example, has defined the condition expressed in 28 C.F.R. § 0.112, restricting deputations to circumstances in which "the needs of the U.S. Marshals Service so require" to mean when the marshal requires the deputations to accomplish his or her specific mission. Thus it seems to us that the determination when deputation authority is properly conferred must be made with reference to the particular duties of the marshal in practice and his or her ability to perform those duties without further assistance.

Although we cannot draw firm conclusions in the abstract, we think that the following factors are relevant in determining the sufficiency of the federal law enforcement function: (1) whether, as a matter of law, the marshal has the authority to perform the function that the special deputy will perform; (2) whether, as a matter of policy, the function is of sufficient importance to federal law enforcement efforts generally and to the Marshals Service in particular that the marshal would normally undertake to perform the function; (3) whether the marshal is unable to perform the function personally because of an emergency situation or an unusual demand on the marshal's resources; (4) whether conferring special deputation authority in the particular instance contravenes expressed congressional intent as to the permissible uses of the marshal's authority, including limitations imposed through the budget process on the number of marshals and deputy marshals generally authorized; (5) whether the Marshals Service can exercise appropriate control over the special deputy marshal, given the number of deputations outstanding and the particular function to be performed; and (6) the likelihood and extent of any potential liability of the Marshals Service for the actions of the special deputy. The balancing of these and possibly other factors known to the Marshals Service will depend on the particular facts.[16]

Conclusion

As we have stated, the Marshals Service lacks authority to grant the request for three additional special deputations. Moreover, based upon our understanding of the facts, no sufficient federal law enforcement function exists such that the Attorney General would have the authority to grant the request. In the absence of some additional federal purpose of which we are not aware, we recommend that the Marshal's Service advise the former cabinet member that his requests have been denied. As far as the three outstanding deputations are concerned, our conclusions herein require at a minimum that the deputations not be renewed upon their expiration. We suggest, in addition, that the Marshals Service consider revoking the deputations prior to expiration, possibly

[16] We do not conclude that no federal function would ever be involved in the protection of a private citizen. Such a function exists, for example, in protecting government witnesses and possibly other participants in the federal judicial process. In response to some particular, serious threat of violation of federal law, federal law enforcement efforts might appropriately include personal protection for other persons as well. We do not believe that any particular federal law enforcement purpose has been the basis for the special deputations of Mr. A's staff in the past. We are aware of the references to the "new security problem," but it does not appear that this problem presents a sufficient federal interest to justify the requested deputations. If there is some special federal law enforcement purpose of which we are not aware, then the request for the additional deputations might be presented to the Attorney General. We are sure that policy considerations, such as the possible liability of the Marshals Service for the actions of special deputy marshals, will be taken into account in the Attorney General's decision at that time.

following a period of time during which Mr. A's staff might be able to make some alternative arrangements. Finally, if the deputations are to be continued through the end of the term for which they have been granted, we suggest that they be reauthorized by the Attorney General. It is our understanding that the special deputations were conferred by the Marshals Service, with the concurrence of the Department. As noted above, the Director of the Marshals Service does not have the authority to deputize private citizens.

RALPH W. TARR
Deputy Assistant Attorney General
Office of Legal Counsel

Authority for the Removal of Fugitive Felons Apprehended Under 18 U.S.C. § 1073

An individual charged with a violation of the Fugitive Felon Act, 18 U.S.C. § 1073, which makes it a federal offense to travel interstate to avoid a state felony prosecution, among other things, may be "prosecuted" only in the federal judicial district in which the original state crime was committed, or from which he fled, and "only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."

Under Rule 40 of the Federal Rules of Criminal Procedure, an individual who is charged with a federal offense in one district and is apprehended in another may be brought back before the court in which the federal charges are pending against him. A court's duty to order removal under Rule 40 is not dependent upon a subsequent federal prosecution.

The Department of Justice has interpreted the term "prosecution" in the Fugitive Felon Act to include all steps in the federal criminal process after a fugitive has been taken into federal custody, including removal to the district in which the federal charges against him are pending, pursuant to Rule 40. The Department has also determined that the formal approval required by 18 U.S.C. § 1073 may not be given if the federal prosecution is not to be subsequently pursued. Although nothing in the legislative history of the Fugitive Felon Act or relevant case law mandates this interpretation, it is not clear whether a court would require formal written approval before issuing a Rule 40 removal order.

Federal removal under Rule 40 has been upheld against a Fugitive Felon Act defendant's claim that he was constitutionally entitled to extradition under state law. However, the Fugitive Felon Act was not intended to supplant state extradition procedures, and federal removal procedures should not be used to accomplish a Fugitive Felon Act defendant's return for prosecution or other appropriate disposition by the State. The policy considerations involved in making such a determination underscore the wisdom of the Department's requirement for formal approval for Rule 40 removal of Fugitive Felon Act defendants.

The cost of transporting a Fugitive Felon Act defendant pursuant to a court order under Rule 40 may be paid out of funds appropriated for the authorized activities of the United States Marshal. All or part of the cost of transportation may voluntarily be borne by the State seeking the fugitive's return, although any monies received from a State must be deposited into the general fund of the Treasury.

March 21, 1983

MEMORANDUM OPINION FOR THE DIRECTOR,
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

This memorandum responds to your request for our opinion whether a fugitive apprehended by federal authorities under the Fugitive Felon Act, 18

U.S.C. § 1073, may be removed to the jurisdiction from which he fled, pursuant to Rule 40 of the Federal Rules of Criminal Procedure, if the sole purpose of removal is to return the fugitive to the custody of authorities in the State from which he fled. In the event federal removal is permissible in this situation, you wish to know the permissible source of funds to pay its costs.

Your request derives from an exchange of correspondence between the United States Attorney for the Eastern District of Pennsylvania and the Assistant Attorney General, Criminal Division. In 1982, the United States Attorney for the Eastern District of Pennsylvania wrote to the Criminal Division requesting reconsideration of the policy set forth in § 9–69.450 of the United States Attorneys Manual (Manual). That section provides that "removal proceedings under Rule 40" shall not be instituted in § 1073 cases without the written approval of the Assistant Attorney General, Criminal Division.[1] The United States Attorney stated that "the present Department policy which prohibits routine federal removal of [§ 1073] defendants is inconsistent with the Department's emphasis on federal-state law enforcement cooperation, and inhibits effective law enforcement." The Criminal Division's position is that the Department's policy of requiring written approval before removal in § 1073 cases is mandated by § 1073 itself. Furthermore, such approval may not be given where the government does not intend to pursue a federal prosecution under that statute. This latter position, as more fully developed in discussions with Criminal Division staff, is based not only upon an interpretation of the federal government's authority under the Fugitive Felon Act, as amended in 1961, but also upon a concern that a federal defendant removed under Rule 40 for the sole purpose of facilitating a state prosecution could claim some constitutional or statutory entitlement to be processed under state laws governing interstate rendition.[2]

We have examined the legislative history of § 1073 and its judicial and administrative interpretations in the half century since its original enactment. Although we find no basis on which to disagree with the Criminal Division's position with respect to its policy of requiring written approval for removal in § 1073 cases, we do not believe the situations in which such approval may be given are limited to those in which a decision has been made to pursue a federal prosecution under that statute. For reasons more fully discussed below, we believe the federal government's broad authority under § 1073 to assist local

[1] The reference in § 9–69.450 to "removal proceedings under Rule 40" does not appear to reflect the 1979 amendments to Rule 40 of the Federal Rules of Criminal Procedure. *See* Pub. L. No. 96–42, 93 Stat. 326 (1979). The 1979 amendments abolished the "warrant of removal" by which a federal court previously directed return of a defendant arrested in "a distant district," *i.e.*, on a warrant issued in another State at a place 100 miles or more from the place of arrest. Although a warrant of removal is no longer required under Rule 40 in order to accomplish the transfer of prisoners in federal custody from one district to another, the term "removal" is used throughout this memorandum to indicate the judicial procedure whereby a federal defendant is returned to the jurisdiction of the court in which the federal charges against him are pending.

[2] As we understand it, the Criminal Division's position is based upon its interpretation of federal authority under § 1073, and not upon some independent limitation upon a court's authority under Rule 40 to order removal if federal charges are not to be pursued.

law enforcement agencies in the apprehension of fugitive felons or witnesses permits it to return a fugitive to the jurisdiction from which he fled for prosecution or other appropriate disposition by the State. Furthermore, a defendant subject to removal under Rule 40 has no federal constitutional or statutory right to be extradited under state law. Federal removal should, however, be sought only in those situations where existing interstate rendition procedures cannot be relied upon to bring a fugitive to justice.

Finally, the cost of transporting a federal § 1073 defendant pursuant to a federal court order under Rule 40 may be paid from funds appropriated for the authorized activities of the United States Marshal responsible for carrying out the court's order. Although all or part of this cost may be reimbursed by the State seeking the fugitive's return, any monies received from the State must be deposited directly into the general fund of the Treasury.

I. Section 1073, Rule 40, and Current Departmental Practice in Fugitive Cases

A. *Section 1073*

Section 1073 of Title 18, the so-called Fugitive Felon Act, makes it a federal offense to travel interstate for the purpose of avoiding a state felony prosecution, or custody or confinement after conviction, or to avoid giving testimony in a state criminal prosecution or investigation.[3] Under the venue provisions of § 1073, an individual charged with a violation may be "prosecuted" only in the federal judicial district in which the original state crime was committed, or from which he fled, and "only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."

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[3] Section 1073 provides in full as follows:

§ 1073. Flight to avoid prosecution or giving testimony

> Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey, is a high misdemeanor under the laws of said State, is charged, or (3) to avoid service of, or contempt proceedings for alleged disobedience of, lawful process requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a State empowered by the law of such State to conduct investigations of alleged criminal activities, shall be fined not more then $5,000 or imprisoned not more than five years, or both.
>
> Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement, or in which an avoidance of service of process or a contempt referred to in clause (3) of the first paragraph of this section is alleged to have been committed, and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

The Fugitive Felon Act has been sustained against constitutional challenge as a valid exercise of Congress' power to regulate interstate commerce, U.S. Const. art. I, § 8, cl. 3. *See, e.g., United States* v. *Bando,* 244 F.2d 833 (2d Cir. 1957); *Barker* v. *United States,* 178 F.2d 803 (5th Cir. 1949); *Hemans* v. *United States,* 163 F.2d 228 (6th Cir.), *cert. denied,* 332 U.S. 801 (1947); *United States* v. *Brandenburg,* 144 F.2d 656 (2d Cir. 1944); *Simmons* v. *Zerbst,* 18 F. Supp. 929 (N.D. Ga. 1939). The "general purpose of the Act was to assist in the enforcement of state laws," *United States* v. *Brandenburg,* 144 F.2d at 659, and its enforcement has been held not to violate the rights of the States under the Tenth Amendment. *See United States* v. *Miller,* 17 F. Supp. 65, 68 (W.D. Ky. 1936); *Lupino* v. *United States,* 185 F. Supp. 363, 368 (D. Minn. 1960). In Miller, the district court explained that

> [Congress] may make a crime the use of interstate commerce by a fleeing criminal in order to aid the states in the apprehension of the guilty and make certain, swift, and sure the punishment of those who commit crimes against the states. If such power be not lodged in the Congress, then the unity of our people to deal with crime is destroyed and the states crippled in punishing those who violate their laws and flee to another state.

17 F. Supp. at 68.

The venue provisions of § 1073 have been interpreted consistently with this general purpose of assisting state law enforcement:

> [T]he primary purposes of the venue section of § 1073 [are] to return the felon to the state where the original flight occurred in order to assist state officials in combating organized crime there, and to vindicate the federal interest in punishing acts committed in the judicial district where the original flight took place.

United States v. Thurman, 687 F.2d 11, 13 (3d Cir. 1982).

B. Rule 40

Rule 40 of the Federal Rules of Criminal Procedure ("Commitment to Another District") describes the process whereby a person who is charged with a federal offense in one district, and is apprehended in another, may be brought back before the court in which the federal charges are pending against him. Rule 40(a) provides that "if a person is arrested in a district other than that in which the offense is alleged to have been committed, he shall be taken before the nearest available federal magistrate." Preliminary proceedings are held before the magistrate to determine that the apprehended fugitive is the individual named in the arrest warrant. If no indictment has been returned against him in the district where the warrant was issued, the magistrate must also determine that there is probable cause that he committed the crime for which he is to be "held to answer in the district court in which the prosecution is pending."[4]

Rule 40 does not explicitly provide for a federal prisoner's transportation to the jurisdiction in which the charges against him are pending. If a defendant is admitted to bail, or released on his own recognizance, he is expected to present himself in the proper court at the proper time. If the magistrate has not approved the prisoner's release, however, he remains in the custody of the U.S. Marshal, who is responsible for seeing that the magistrate's removal order is carried out by transporting the defendant to the court in which the charges against him are pending. *See* 28 U.S.C. § 567; 28 C.F.R. § 0.111(j).

The procedural protections embodied in Rule 40 are not constitutionally required, but were developed as a matter of sound judicial policy. Unlike extradition, which involves a demand of one sovereign upon another, and implicates "the protection owed by a sovereign to those within its territory," *United States ex rel. Kassin* v. *Mulligan,* 295 U.S. at 396, 400 (1935), the process by which a federal defendant is returned for trial theoretically involves only a physical transfer from one judicial district to another within a single sovereign's territory. *See United States* v. *Godwin,* 97 F. Supp. 252, 255 (W.D. Ark.), *aff'd,* 191 F.2d 932 (5th Cir. 1951) ("the several judicial districts are not foreign to each other . . . but are simply convenient subdivisions . . . of one sovereign, the United States"). The purpose of Rule 40 is "to afford defendants reasonable protection, to safeguard them against improvident removal to a distant point for trial and to curb a defendant's opportunity for delay and obstruction of prosecution." *United States* v. *McCord,* 695 F.2d 823, 826 (5th Cir.), *cert. denied,* 460 U.S. 1073 (1983). *See also* Notes of the Advisory Committee on the 1945 Rules, 18 U.S.C. app. (1976).[5]

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[4] Rule 40(a) provides in full as follows:

(a) Appearance Before Federal Magistrate

> If a person is arrested in a district other than that in which the offense is alleged to have been committed, he shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that he is the person named in the indictment, information or warrant. If the defendant is held to answer, he shall be held to answer in the district court in which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant, upon production of the warrant or a certified copy thereof.

[5] A federal court's authority and duty to effectuate a federal prisoner's commitment to the district in which federal charges against him are pending was first set forth in § 33 of the Judiciary Act of 1789. That section provided that "it shall be the duty of the judge of the district where the delinquent is imprisoned, seasonably to issue, and of the Marshal of the same district to execute a warrant for the removal of the offender, .. . to the district in which the trial is to be had." 1 Stat. 73, 91 (1789). This provision was later codified virtually unchanged in § 1014 of the Revised Statutes, and brought forward as § 591 of Title 18 of the United States Code (1940). It was repealed in 1948, three years after the Supreme Court's promulgation of Rule 40. In the early years of the Republic, it was the frequent practice for many district courts to issue a warrant of removal at the same time they issued a warrant of arrest. Upon his apprehension, the defendant was immediately returned to the district which had issued the warrant, and was thus effectively deprived of any hearing on the question of his removal. This practice was disapproved as a matter of judicial policy in such cases as *United*

Continued

Ordinarily, a court has no discretion to refuse to order removal, provided the requisite showing of identity and probable cause has been made. A removal order is not appealable. *See Galloway* v. *United States*, 302 F.2d 457 (10th Cir. 1962). Neither the sufficiency of the charges nor the constitutionality of the statute on which those charges are based can be raised in a removal hearing, though these may of course be challenged in the district court in which the charges are pending. *See United States* v. *Winston*, 267 F. Supp. 555 (S.D.N.Y. 1967); *Wright* v. *Cartier*, 10 F.R.D. 21 (D. Mass. 1950).[6]

A district court's authority and responsibility under Rule 40 and its statutory predecessors has never been held to depend upon the likelihood of subsequent federal prosecution. There is, for example, no requirement that an indictment be returned in the court to which removal is sought. *See Fetters* v. *United States*, 283 U.S. 638 (1931); *Greene* v. *Henkel*, 183 U.S. 249 (1902). This is evident on the face of the Rule, which requires that the government prosecutor establish probable cause only if no indictment has been returned or information filed in the district to which removal is sought. A court's duty to order removal is thus not conditioned upon the government prosecutor's declared willingness to seek an indictment and proceed to trial.

C. Departmental Enforcement Policy in § 1073 Cases

The Department's policy on enforcement of § 1073 is set forth in the United States Attorneys Manual at §§ 9–69.400 et seq. As stated in the Manual, that

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[5] (. . . continued)
States v. *Shepard*, 27 F. Cas. 1056 (E.D. Mich. 1870) (No. 16,273); *United States* v. *Jacobi*, 26 F. Cas. 564 (W.D. Tenn. 1871) (No. 15,460); and *United States* v. *Yarborough*, *122 F. 293 (W.D. Va. 1903)*. *In* these early cases, the courts recognized the importance of ensuring against mistaken identity or the absence of probable cause before ordering a defendant transported what might be hundreds of miles for trial. At the same time, however, they were unwilling to allow a defendant to force a trial on the merits at the removal stage, at best delaying his return and potentially frustrating prosecution entirely. In promulgating Rule 40 in 1945, the Supreme Court sought to strike a balance between these two concerns. *See generally* Holtzoff, *Removal of Defendants in Federal Criminal Procedure*, 4 F.R.D. 455 (1945); 8B *Moore's Federal Practice* ¶ 40.04 at 40–24 (1980).

As originally promulgated in 1945, Rule 40 distinguished between persons taken into federal custody in a "nearby district" (*i.e.*, on a warrant issued in the same State or within 100 miles) and persons arrested in a "distant district." Persons in the latter category could be returned for prosecution only upon the issuance of a "warrant of removal" by a district judge. No warrant of removal was necessary to return a person arrested in a "nearby district," who, like a state prisoner transported across the State for trial, was "transported by virtue of the process under which he was arrested." *See* Notes of the Advisory Committee on the 1945 Rules, Rule 40(a), 18 U.S.C. app. (1976). The 1979 amendments to Rule 40 abolished the "warrant of removal" and eliminated the distinction between the procedures applicable to arrest in "distant" and "nearby" districts. The Notes of the Advisory Committee on the 1979 amendments to the Rules explained that the preliminary proceedings previously applicable under Rule 40(a) to persons arrested in a "nearby" district were "adequate to protect the rights of an arrestee wherever he might be arrested," and would henceforth apply in all cases of commitment to another district. *See* Rule 40(a), 18 U.S.C. app. (1980).

[6] We are aware of two cases in which a district court declined to order removal on grounds that "special facts were disclosed that seemed to make questionable the propriety of removal." *United States* v. *Johnson*, 63 F. Supp. 615, 616 (D. Or. 1945); *United States* v. *Parker*, 14 F.R.D. 146 (D.D.C. 1953). In *Johnson*, the district court in Oregon refused to order the defendant's removal to the District of Columbia, declining to give the latter jurisdiction's criminal child support statute "extraterritorial application." In *Parker*, the court refused to order removal in a situation suggesting government harassment of the defendant.

policy is grounded in the theory that "the primary purpose of the [Fugitive Felon] Act is to permit the Federal Government to assist in the location and apprehension of fugitives from State justice." Accordingly, federal § 1073 charges are rarely pursued beyond the point of a fugitive's apprehension by federal law enforcement authorities.[7] Ordinarily, after the federal § 1073 prisoner has been taken before the nearest available federal magistrate pursuant to Rule 40(a), he is turned over to authorities in the State of arrest for extradition to the State from which he fled.[8]

Occasionally, however, a federal § 1073 prosecution will be pursued. In such a case, once preliminary proceedings under Rule 40 have been completed (or waived), the magistrate is requested to issue an order under Rule 40(a) directing that the apprehended fugitive be committed to the jurisdiction of the federal court in which the § 1073 charges are pending against him. It is this latter court which, under the venue provisions of § 1073, has jurisdiction over the federal criminal case.

Section 9–69.450 of the Manual restates the statutory requirement that § 1073 "prosecutions" may be "initiated" only upon the written approval of the Attorney General or an Assistant Attorney General:

> The 1961 amendment to the Act incorporated existing administrative practice by requiring approval by the Attorney General or Assistant Attorney General, in writing, before initiation of prosecution for unlawful flight to avoid prosecution, or custody or confinement after conviction, or to avoid giving testimony. Accordingly, under no circumstances should an indictment under the Act be sought nor an information be filed nor should removal proceedings under Rule 40, F. R. Crim. P., be instituted without the written approval of the Assistant Attorney General, Criminal Division.

Section 9–29.450, as interpreted by the Criminal Division, incorporates two legal conclusions: (1) The statutory term "prosecution" in the final paragraph

[7] We understand from the Criminal Division that there have been only two or three federal § 1073 prosecutions since 1961.

[8] Under Rule 40(a) it is the magistrate's responsibility to conduct preliminary proceedings to determine that the defendant is the person named in the federal arrest warrant, and that there is probable cause to believe that a violation of § 1073 was committed. *See supra* note 5. The fugitive "should remain in Federal custody or on bail or other conditions of release only so long as is necessary to permit his commitment to the authorities in the State where apprehended." *See* § 9–69.430. Asylum state authorities are generally willing to take custody of the fugitive, and the magistrate is willing to approve release from federal custody with this understanding. The demanding State may already have begun the extradition process by the time custody has shifted. The United States Attorney in the district where the federal complaint was filed then moves for its dismissal, and there is no further federal involvement. *See* § 9–69.431; *see also* 8B *Moore's Federal Practice*, ¶ 40.04 at 40–23 (1980).

The process of extradition is not always a smooth one. The Manual notes the possibility that the demanding State will be unwilling to extradite, or that extradition will be attempted but fail. *See* § 9–69.431. The same section also mentions the possible difficulties associated with the return of fugitive witnesses, to whom State extradition procedures do not apply. In addition, State courts may release the fugitive on low bail before the extradition process can be completed, providing a new occasion for interstate flight and federal involvement under § 1073.

of § 1073 for which written approval is required includes all steps in the federal criminal process after a fugitive has been taken into federal custody, including removal to the district in which the federal charges against him are pending; and (2) such approval may not lawfully be given if the federal prosecution under § 1073 is not to be subsequently pursued. Accordingly, the Criminal Division's position on the questions hereinafter considered is that § 1073 itself precludes removal of a defendant in a § 1073 case unless there has been a formal departmental decision, approved in writing by the Assistant Attorney General, to indict and bring to trial on the federal charges.

The text of § 1073 affords no clear guidance on the scope to be given the statutory term "prosecution," or more generally on the permissibility of using federal removal procedures to secure the return of § 1073 defendants in aid of a state prosecution. Accordingly, we must review the legislative history of § 1073 to determine whether the Criminal Division's position on these issues, as described above, is correct.

III. Legislative History of § 1073

A. The 1934 Act

The Fugitive Felon Act, Pub. L. No. 73–233, 48 Stat. 782 (1934), was one of a series of thirteen major crime bills proposed by the Roosevelt Administration and passed by Congress in 1934. As originally enacted, the Act made it a federal offense to travel interstate to avoid prosecution for certain specified state felonies, or to avoid giving testimony in certain state criminal proceedings. The Act originated in a series of hearings on organized crime held in 1933 in different parts of the country by a subcommittee of the Senate Committee on Commerce. *Investigation of So-Called "Rackets": Hearings Pursuant to S. Res. 74,* 73d Cong., 2d Sess. (1933) (1933 Senate Hearings). The hearings explored the difficulties which state law enforcement agencies were experiencing in dealing with interstate crime. One of the frequently mentioned problems was the complicated and inefficient process of state extradition. *See, e.g.,* 1933 Senate Hearings at 177 (statement of Hon. William M'Kay Stillman, Judge of the Criminal Court in Detroit); 210 (statement of John P. Smith, Chief of Police of Detroit, Michigan); 293 (statement of H.D. Harper, Chief of Police of Colorado Springs, Colorado).

During the course of the hearings, Harry S. Toy, the Prosecuting Attorney of Wayne County, Michigan, introduced into the hearing record a legislative proposal which would make interstate flight a federal crime. 1933 Senate Hearings at 198. Mr. Toy was particularly concerned with the problem of fugitive witnesses, to whom most state extradition procedures did not apply.[9] Senator Copeland, who chaired the subcommittee, questioned Mr. Toy closely

[9] In 1934, only ten States had enacted statutes providing for the interstate rendition of witnesses in criminal proceedings. *See* Commissioner's Prefatory Note to 1936 Revision of Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, 11 U.L.A. 2 (1974).

about the possibility whether, under the legislation he had proposed, "a witness brought back by the Federal court might then be turned over to the State court for such action as it proposes." *Id.* at 199. He was concerned that Mr. Toy's proposed legislation would be held unconstitutional because it would "evade the extradition clause of the Constitution to bring this man back into the jurisdiction of the Federal court," only to "serve the papers upon him for action in the State court." *Id.* at 204.[10] Senator Vandenburg disagreed on the constitutionality of the proposed legislation. Significantly, however, both Senators believed that the legislation would permit federal return of a fugitive felon or witness for state prosecution.

On January 11, 1934, Senator Copeland introduced Mr. Toy's proposed legislation, with certain changes in its venue provisions.[11] In his floor statement, he again expressed his reservations about the constitutionality of a bill which would permit the "circumvention" of state extradition procedures:

> [Senator Vandenburg] thinks he sees in this an opportunity to help the State courts . . . . He hopes that a witness to a crime against the State law may, by the operation of this proposed law, be brought back by the United States district court, and then, when the witness is returned and within the jurisdiction of the State court, that he may be turned over to the State court for the benefit of the State authorities in carrying on the prosecution. Of course, I do not think that can be done . . . .

78 Cong. Rec. 453 (1934). The Attorney General, in comments on the bill prepared for the House Committee on the Judiciary, appeared to explain that the bill would assist the States in providing an alternative to extradition to secure the return of fugitives:

> This bill will not prevent the States from obtaining extradition of roving criminals but the complicated process of extradition has proved to be very inefficient . . . . By an amendment in the Senate this bill was clarified to assure that the defendant shall be tried only where the 'original crime is alleged to have been committed.

H.R. Rep. No. 1458, 73d Cong., 2d Sess. 1–2 (1934).

The "amendment in the Senate" to which the Attorney General referred was an addition to the bill's venue provisions made on the floor of the Senate. Senator Steiwer had expressed concern about whether the venue provisions in

[10] It is not clear whether Senator Copeland's constitutional concern related to possible rights of States under the Extradition Clause, or to the possible right of an individual to be extradited, or to both. Charles F. Boots, Legislative Counsel to the Senate, who also commented for the record on the constitutionality of Mr. Toy's draft legislation, was concerned that "such procedure could well be challenged as withholding from the defendant the right to a speedy trial on the Federal charge." 1933 Senate Hearings at 200–03.

[11] The venue provisions in Mr. Toy's bill would have permitted federal prosecution in any federal district "from, through, or into which any person shall flee." 1933 Senate Hearings at 1989. The analogous provisions of S. 2253 limited venue to the "Federal judicial district in which the crime was committed."

the bill as originally introduced could be construed to require trial on the federal charges in the district where the fugitive was apprehended. Senator Copeland agreed to a clarifying amendment, explaining that the bill's purpose, at least in the case of fugitive witnesses, was to facilitate state prosecutions by securing their return to the jurisdiction from which they had fled:

> Of course the State could make it a felony for a witness to flee the jurisdiction of the court, but the State would have no power to bring the witness back. In this case, however, if he is an important witness to a murder, or to a gang operation, and flees to another State, he becomes guilty of a felony, *and may be brought back by the district court or by the Federal Government.* So there can be no doubt that in apprehending criminals and in bringing them to book this is an important bill, and one which should be passed.

78 Cong. Rec. 5736 (1934) (emphasis added). Senator Steiwer responded that "I think the purpose just explained by the Senator is a very proper purpose," and that "I agree thoroughly that the accused ought to go back to the State from which he flees . . . ." *Id.* at 5936–39.

The foregoing legislative history indicates that the sponsors of the 1934 Act expected that it could be used to assist state authorities by securing the return of fugitives. Although existing state rendition procedures might have been available to obtain the return of fugitives from another State's criminal justice system, those procedures were often "inefficient," and in any event did not always apply to fugitive witnesses. To be sure, there was disagreement among the sponsors of the bill as to how far federal law enforcement agencies could constitutionally go in "assisting" the States in this regard, if state extradition procedures were otherwise available. But there seems little doubt that its sponsors intended the bill which passed in 1934 to authorize federal removal to the extent constitutionally permissible.[12]

B. The 1961 Amendments to § 1073

In 1961 the Kennedy administration proposed amendments to the Fugitive Felon Act which brought within its scope all felonies or offenses punishable under state law by more than one year in prison.[13] *See* Pub. L. No. 87–368, 75 Stat. 795 (1961). The purpose of the amendments was to "permit the Federal government to give greater aid and assistance to the States." *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings*

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[12] There is no suggestion in the legislative history of the 1934 Act that Congress considered the scope of a federal court's authority and obligation to order a federal prisoner's commitment to another district under then-existing law. In 1934, federal removal was governed by the provisions of 18 U.S.C. § 591, which made it the "duty" of a federal court to execute a warrant for a prisoner's removal "to the district where the trial is to be had." *See* 18 U.S.C. § 591 (1934)

[13] As originally enacted, the Fugitive Felon Act applied only to specifically enumerated crimes. *See* S. Rep. No. 586, 87th Cong., 1st Sess. 2 (1961).

Before the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. 15 (1961) (1961 Senate Hearings) (testimony of Attorney General Kennedy). *See also Legislation Relating to Organized Crime: Hearings Before a Subcomm. of the House Comm.* on the Judiciary, 87th Cong., 1st Sess. 42 (1961) (1961 House Hearings) (the purpose of the amendments is "to help and assist the States").

The legislative history of the 1961 amendments reflects Congress' expectation that the law, as amended, would "provide either for Federal trials of the persons apprehended or their *return to the proper State jurisdiction for prosecution or other appropriate State action*." H.R. Rep. No. 827, 87th Cong., 1st Sess. at 2 (1961) (1961 House Report) (emphasis added). *See also id.* at 7 (expressing concern that, should the category of covered state crimes be expanded, "State officials would ask for Federal help in seeking the return of every one of these fugitives, especially since the request would relieve the State of costs") (minority views of Rep. Libonati).

Both the House and Senate Reports referred with approval to the Justice Department's then-existing enforcement policy. They also noted that "the Department of Justice does not anticipate that its established practice under existing law will be altered by the proposed broadening of the Fugitive Felon Act." S. Rep. No. 586, 87th Cong., 1st Sess. 2 (1961). *See also* 1961 House Report at 2. *Inter alia*, that policy "require[d] the approval of an appropriate Assistant Attorney General before an indictment or a Federal removal proceeding may be instituted." *See* Letter from Deputy Attorney General Byron R. White (Aug. 23, 1961), *reprinted in* 107 Cong. Rec. 15757 (1961) (House); *id.* at 19240 (Senate).[14]

During the debates on the bill in the House, there were several unsuccessful attempts to write certain aspects of the Department's practice into the law itself. The consensus of the House members, however, was it would unnecessarily hamper federal law enforcement efforts to attempt to legislate the details of what was regarded as a successful experiment in federal-state cooperation. Thus, for example, the House rejected an amendment which would have limited the issuance of a federal complaint under the statute to situations in

[14] It would appear that, at least prior to 1961, the Department interpreted the Fugitive Felon Act to permit the use of federal removal procedures to secure the return of a fugitive for state prosecution:

> Having once apprehended a fugitive defendant or witness the Department has solved the first problem for the local prosecutor who can then follow the well- established rendition procedure. *Should this fail for a variety of reasons the way is still open to remove the fugitive under Federal process and return him to the jurisdiction where the original crime was committed. There the federal government could turn him over to state authorities or try him under the Fugitive Felon law, or both.*
>
> From the debates in Congress it is evident that uppermost in the minds of some Senators was the thought that the Act would operate to secure the return of the fugitive felon or witness. The venue provision alone makes that plain and it was agreed that such return was a proper purpose.

Memorandum from M.H. Helter, Head, Common Crimes Unit to F.X. Walker, Chief, General Crimes Section (June 21, 1951) (emphasis added). *See also* Memorandum from Theron Caudle, Assistant Attorney General, Criminal Division to S.A. Andretta, Administrative Assistant to the Attorney General, re: "Expenses of Transporting Prisoners under Fugitive Felon Act who are Turned over to State Authorities for Prosecution" (Apr. 4, 1947). In *United States ex rel. Mills* v. *Reing*, 191 F.2d 297, 300 (3d Cir. 1951), the court referred to the government's concession during argument that "there have been cases where [§ 1073 defendants] . . have been removed to the federal district of indictment and then surrendered forthwith to state custody."

which a state prosecution had already been commenced. 107 Cong. Rec. at 15767–71 (1961).

On the other hand, Congressman Libonati was successful in adding to the venue provisions of the statute a requirement that violations of the Act could be prosecuted only upon the formal written approval of the Attorney General or Assistant Attorney General. *See* 107 Cong. Rec. 15767 (1961). The amendment by which this was effected was not the subject of any extended discussion on the floor, but appears to have been responsive to the desires of several House members to give a statutory framework to existing Justice Department enforcement policy.

During the House debates, several Congressman referred specifically to the use of federal removal procedures in § 1073 cases. Acknowledging that most fugitives apprehended under § 1073 were returned through state extradition procedures, they appear to have assumed that federal removal procedures had been, and could continue to be, used to bring back fugitives for prosecution by state authorities. For example, Rep. Corman stated:

> It appears from the committee report and the letter of the Department that the Fugitive Felon Act is used primarily as an expeditious means of apprehending fleeing criminals to be returned to the scene of their alleged crime for prosecution. It further seems apparent that in those instances when this mission is accomplished and State authorities do prosecute that the Federal Government refrains from prosecution. I see no violence to justice under such procedure.

107 Cong. Rec. at 15771 (1961). *See also id.* at 15761 (objecting to the use of § 1073 to bring back fugitive witnesses to States which had not yet adopted interstate rendition procedures for securing the return of witnesses) (remarks of Rep. Whitener). In the Senate, there was some concern expressed that States would attempt to use the federal removal process to secure the return of fugitives in cases raising civil rights issues, where extradition was not likely to succeed. *See id.* at 19242 (referring to alleged "misapplication" of the Act "in cases involving civil rights matters") (remarks of Sen. Keating).

In summary, the legislative history of the 1961 amendments to § 1073 indicates no intention on the part of Congress to remove any part of the authority given federal law enforcement agencies under the 1934 Act. And, although Congress expressed its approval of the existing Department of Justice policies on enforcement of the Act, it resisted most proposals to write those policies into the statute itself. The sole statutory limitation placed on federal enforcement activities by the 1961 amendments was the requirement of formal Department of Justice approval for "prosecution" of a violation. There is no indication in the legislative history of the 1961 amendments that Congress considered the potential applicability of this requirement to different phases of a prosecution. Nor is there any evidence that Congress intended to limit the

Department's discretionary authority to approve removal to those cases in which a federal indictment would subsequently be sought.

III. Judicial Precedents Relating to Federal Removal of a § 1073 Defendant in Aid of a State Prosecution

Although several courts have referred in dictum to the government's authority to return a § 1073 defendant in aid of a state prosecution, only two cases have directly considered and ruled upon the availability of federal removal procedures for this purpose.[15] In *Wright* v. *Cartier,* 10 F.R.D. 21 (D. Mass. 1950), an escapee from a Georgia prison was arrested in Massachusetts on a federal § 1073 warrant issued by the district court in Georgia. He was brought before a federal commissioner in Massachusetts, his identity was determined and probable cause found, and he was "ordered returned to the State of Georgia." 10 F.R.D. at 22. The defendant filed a writ of habeas corpus, charging that § 1073 was unconstitutional, "not because of its express provisions or purpose, but because of its mode of operation with regard to him." *Id.* Specifically, he charged that:

> the federal authorities never prosecute under the federal statute, but simply turn over the fugitive to the state authorities for prosecution under the state statute with the violation of which he is charged. Petitioner contends that for members of the Negro race this results in a deprivation of the opportunity at an extradition hearing to allege that the fugitive will not be given a fair trial in the state seeking extradition and to petition exercise of executive clemency in the state of refuge to prevent his return for trial.

Id. at 22–23. The court refused to rule on the statute's constitutionality in the context of a habeas proceeding, however, stating that "if this petitioner makes demand upon the United States Court in Georgia for his prosecution so that he may there test the constitutionality of the Fugitive Felon Act, the Court will be open to him." *Id.* at 23.

In *United States* v. *Love*, 425 F. Supp. 1248 (S.D.N.Y. 1977), a fugitive from a North Carolina murder charge, arrested in New York on a federal § 1073 warrant, attempted to avoid being turned over to New York authorities by invoking removal procedures himself under Rule 40. The federal magistrate

[15] *See United States* v. *Thurman,* 687 F.2d at 13 (one of "the primary purposes of the venue section of § 1073 is to return the felon to the state where the original flight occurred in order to assist state officials in combatting organized crime there"); *United States* v. *McCarthy,* 249 F. Supp. 199, 203 (E.D.N.Y. 1966) ("the 1961 amendment did not diminish the power of the federal government to return the fugitive felon for state prosecution"); *Hemans* v. *United States,* 163 F.2d at 240 ("if Congress regarded it as a duty to aid the states in bringing back to their local jurisdictions fugitives from justice, or essential witnesses, that power exists"); *United States* v. *Miller,* 17 F. Supp. at 67 ("The right of extradition guaranteed to the states by the federal government becomes too slow as a vehicle for swift punishment of criminals, and oftentimes any punishment at all.")

refused to issue the warrant, and directed the federal authorities to release the fugitive to New York authorities for extradition. On review of the magistrate's order, Judge MacMahon held that

> removal under Rule 40 is inappropriate in this case, for it would result in the circumvention of valid state extradition laws as well as unnecessary and extraordinary expense to the government in the transportation of prisoners throughout the country.

425 F. Supp. at 1250. Judge MacMahon's holding appears to be based on his reading of the 1961 amendments to § 1073, which added to the statute the requirement of written Department of Justice approval for any § 1073 prosecution. He noted that Congress had been "aware" of existing departmental enforcement practices when it amended § 1073 in 1961, and had "reinforced" them by writing into the statute itself the requirement of written approval. 425 F. Supp. at 1249.

Notwithstanding some *dicta* that suggest a somewhat broader holding,[16] the *Love* opinion holds no more than that it would be "inappropriate" for a court to order removal in a § 1073 case except in accordance with established Department of Justice policies.[17] Because in *Love* the federal defendant himself had sought to invoke Rule 40, apparently without the support of any federal official, the removal order would not be issued.[18] No court has directly ruled upon whether the requirement of formal written approval added to § 1073 in 1961 extends to removal as well as to subsequent stages in a federal prosecu-

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[16] Judge MacMahon's reference to a defendant's "right to formal extradition proceedings," 425 F. Supp. at 1250, is discussed in Part IV below.

[17] Judge MacMahon did not invoke the principle that a court may in its discretion refuse to order removal under Rule 40 whenever "special facts were disclosed that seemed to make questionable the propriety of removal." *United States* v. *Johnson*, 63 F. Supp. at 616. *See supra* note 6. However, his use of the term "inappropriate" suggests that he regarded his refusal to order removal as an exercise of discretion rather than required by law.

[18] This reading of the *Love* opinion is consistent with Judge MacMahon's citation of *Wright* v. *Cartier* and *Moore's Federal Practice*. 425 F. Supp. at 1249. At the cited page in *Moore's*, the *Wright* case is relied upon as authority for the following proposition:

> If the fugitive is willing to waive a removal hearing, or the government has sufficient evidence available to prove probable cause, the fugitive may presumably be returned to the demanding state by way of removal under Rule 40, rather than by way of extradition.

8B *Moore's Federal Practice* ¶ 40.04 at 40–23 (1980). In one recent case, a defendant convicted under § 1073 sought unsuccessfully to invoke the *Love* case in support of his argument that his removal under Rule 40 had violated his constitutional right to formal extradition under state law. *United States* v. *McCord*, 695 F.2d 823, 826 (5th Cir. 1983). He urged an interpretation of § 1073, and of Judge MacMahon's holding in *Love*, which would preclude Rule 40 removal in any § 1073 case, because the "underlying offense" is a state not a federal offense. The court of appeals rejected this interpretation of § 1073, pointing out that the "underlying offense" is a federal one, and that Rule 40 removal is accordingly "the appropriate procedure" for returning a federal § 1073 defendant to the jurisdiction from which he fled. The court of appeals contrasted McCord's case, in which "the Federal Government sought and intended to prosecute the defendant for violation of § 1073," with the situation in *Love*, in which the government did not seek removal but "merely sought to aid the state in obtaining custody of one of its prisoners." The court in *McCord* did not have before it, and accordingly did not address, the issue whether Rule 40 removal may be available at the request of the Federal Government, where the federal § 1073 charges are not to be pursued upon the defendant's return to the State from which he fled.

tion. It has, however, been interpreted by at least two courts not to extend to the issuance of a federal § 1073 complaint or warrant of arrest. *See United States* v. *Diaz*, 351 F. Supp. 1050 (D. Conn. 1972); *United States* v. *McCarthy*, 249 F. Supp. 199 (E.D.N.Y. 1966). Although neither case required the court to rule on the applicability of the requirement to federal removal, both courts remarked on that issue in *dictum*. In *Diaz*, Judge Newman rejected a construction of the statutory term "prosecution" which would have extended the requirement of written approval to "every step of the criminal process including the issuance of an arrest warrant." 351 F. Supp. at 1051. He suggested, however, that the requirement of written approval might extend beyond formal indictment to "the preliminary step of a removal proceeding." *Id.* at 1052.

In *McCarthy*, Judge Mishler took a different view of the 1961 amendment:

> It is clear that the amendment was intended to aid local law enforcement agencies apprehend fugitive felons through federal agencies [sic] and return them to the State jurisdiction for prosecution there. Implicit in the language of the report is the intention that federal prosecution for the offense was of secondary consideration. The choice of federal prosecution was therefore withdrawn from the United States District Attorney and lodged with the Attorney General. T*he 1961 amendment did not diminish the power of the federal government to return the fugitive felon for state prosecution.*

249 F. Supp. at 203 (emphasis added).

In summary, while judicial precedent confirms our conclusion that the availability of removal in § 1073 cases does not depend as a matter of law upon whether a federal indictment will subsequently be sought, it is less clear whether a court will require formal written Justice Department approval before issuing a removal order.

IV. The Extradition Clause of the Constitution

Having concluded that federal removal in aid of a state prosecution is authorized by the Fugitive Felon Act, we turn to the Criminal Division's concern that such removal might be inconsistent with some federal constitutional or statutory right of a fugitive to extradition under state law. We also discuss what federal constitutional or statutory rights, if any, the States themselves may have in connection with federal removal of a § 1073 defendant.

A. Rights of a § 1073 Defendant With Regard to Extradition

The Supreme Court has consistently interpreted the Extradition Clause of the United States Constitution, U.S. Const. art. IV, § 2, cl. 2, to confer no rights on individuals. Its sole purpose is to benefit the States. *See, e.g., Michigan* v.

Doran, 439 U.S. 282, 287 (1978); *Biddinger* v. *Commissioner of Police of New York*, 245 U.S. 128 (1917).[19] And, the procedural safeguards provided to individuals in state extradition statutes have been held by the Supreme Court to be inapplicable to persons charged with a federal crime who are otherwise properly subject to removal under Rule 40. *See United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396 (1935); *United States ex rel. Hughes* v. *Gault*, 271 U.S. 142 (1926); *United States* v. *Guy*, 456 F.2d 1157 (8th Cir. 1972).

Federal removal under Rule 40 or its statutory predecessors has been held proper in several § 1073 cases, in the face of a defendant's claim that he was constitutionally entitled to be processed under state extradition laws. *See, e.g., United States* v. *McCord*, 695 F.2d at 826 (Rule 40 removal appropriate because "underlying offense" a federal one); *Lupino* v. *United States*, 185 F. Supp. at 368 ("Congress, not the states, has established the punishable offense, and it is, therefore, federal, not state, arresting and removal process which is relevant."); *United States* v. *Miller*, 17 F. Supp. at 68 (federal removal of a § 1073 defendant does not "interfere[] with the right of extradition of a criminal from a state to which he has fled to one where the crime was committed.").

There is *dictum* in the court's opinion in *United States* v. *Love*, 425 F. Supp. at 1250, which suggests that a federal § 1073 defendant, returned to the custody of state authorities under federal process, may have some "right to formal extradition," deprivation of which could be raised by him in the context of his state prosecution. The court did not, however, indicate what the source of that right might be. It is possible that under the laws of some States, a defendant could claim an entitlement to be brought within the jurisdiction of its courts in a particular manner. *Cf. Ker* v. *Illinois*, 119 U.S. 436, 444 (1886). We have not examined that issue, and express no opinion on it.[20] However, an individual has no "right to formal extradition" under the federal Constitution or under any federal statute of which we are aware.[21]

B. Rights and Obligations of the States in Connection with Extradition

Although a § 1073 defendant can claim no entitlement to be extradited deriving from the Extradition Clause of the Constitution, the rights and obligations of the States themselves under that provision must be recognized when-

[19] The Extradition Clause provides:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[20] Perhaps the demanding State's requirements in this regard would therefore be a valid consideration for the Department in determining whether to give approval under § 1073 for removal in any particular case.

[21] The Uniform Criminal Extradition Act has been adopted by a majority of the States, but has no independent force as federal law. Where applicable, its due process protections can be enforced by suits under the Fourteenth Amendment. *See Cuyler* v. *Adams*, 449 U.S. 433 (1981). By their terms, however, the protections in the Uniform Criminal Extradition Act apply only to a person arrested on a warrant signed by the Governor of the asylum State. *See* §§ 7, 10.

ever federal removal is proposed in any § 1073 case. It is all the more important to do so whenever federal removal is intended simply to facilitate a state prosecution.

The Extradition Clause imposes upon the executive authority of each State an obligation, on the demand of another State, to "deliver up" a fugitive from that other State's justice. *See supra* note 19. The right given a State to demand is an "absolute" one, and implies a "correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled." *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66, 103 (1861). "The duty of the Governor of the State where the fugitive was found is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion." *Id.* at 104. However, the Clause and its federal implementing statute, 18 U.S.C. § 3182, have been characterized as merely "declaratory of a moral duty," because neither provides "any means to compel the execution of this duty." *Id.* at 107. *See also Taylor* v. *Taintor*, 83 U.S. (16 Wall.) 366, 370 (1872). Accordingly, the federal courts have no power to compel authorities in one State to surrender a fugitive to those of another. *See also South Dakota* v. *Brown*, 20 Cal. 3d. 765, 772, 576 P.2d 473 (1978) (state courts have no power under state extradition laws to "control executive discretion in extradition matters.").[22]

Even if, under existing law, a State's duty under the Extradition Clause cannot be enforced directly by a federal court, it does not follow that the Extradition Clause gives States an affirmative right to refuse or delay extradition. Indeed, the history of the Extradition Clause itself suggests that any such claimed right would be inconsistent with the Framers' intention "to preserve harmony between States, and order and law within their respective borders." *See Kentucky* v. *Dennison*, 65 U.S. at 101–03. Accordingly, the Extradition Clause gives a State no basis for resisting otherwise constitutional federal efforts to assist another in obtaining custody of a fugitive who has sought refuge within its borders. *Cf. Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842). The Fugitive Felon Act, with its provisions for apprehending and returning fugitives who have fled from one State to another, cannot therefore be challenged as an unconstitutional intrusion on some hypothetical "right" of one State to give asylum to another's fugitives, or otherwise control the process of extradition.[23] In fact, far from an intrusion, this statute provides, in effect, a federal means of enforcing the mandatory duty imposed upon States by the

[22] In *Kentucky* v. *Dennison*, the Supreme Court held that a federal court could not issue a writ of mandamus to compel the Governor of Ohio to surrender a fugitive indicted in Kentucky for assisting a slave to escape: "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." 65 U.S. at 107. Dissenting in *South Dakota* v. *Brown*, Justice Mosk observed that "[t]here is serious question whether the rigid federalism of *Dennison* would be followed today when a constitutional issue is involved." 20 Cal. 3d at 781 n.1 (citing *Brown* v. *Board of Education*, 349 U.S. 294 (1955) and *Green* v. *County School Bd.*, 391 U.S. 430 (1968)).

[23] In any event, we think it unlikely that a court would permit a defendant to rely upon any right belonging to the asylum State as a defense to prosecution in the demanding State. *See United States* v *Miller*, 17 F. Supp. at 68.

Extradition Clause.[24] This is not to say that the Fugitive Felon Act was intended to provide a routine substitute for state extradition procedures. The legislative history of the 1934 Act and its 1961 amendments makes clear that Congress did not intend the Act to supplant state extradition procedures. Congress was concerned not only with the possible federal intrusion in an area historically left to the States, but also with the financial burden which frequent use of federal removal procedures would place on the Federal Government. Thus, Congress appears to have contemplated that federal removal procedures would be used only in those rare situations where interstate rendition procedures would not be effective in bringing the fugitive to justice.

The statute's intended deference to state extradition procedures requires that federal removal be used very sparingly in § 1073 cases. Accordingly, federal removal of a § 1073 defendant should not be sought routinely, or when state extradition procedures are determined to be adequate to accomplish the defendant's return for prosecution or other appropriate disposition by the demanding State. The important policy considerations involved in making such a determination simply underscore the wisdom of requiring formal departmental approval of any request for removal in a § 1073 case. Factors to be considered in making this determination could include whether the extradition process will be likely to deliver the defendant to the demanding State in a timely fashion; whether the interest of the demanding State in obtaining return of the fugitive is sufficiently strong to warrant using federal resources for this purpose; and whether the federal interest in the particular case is sufficiently strong to overcome whatever interest the asylum State may have in implementing its own extradition procedures. In a case in which extradition has been refused, the Department should consider whatever findings the asylum State's Governor has made which caused him to make such a refusal.

V. Payment of Expenses of Transporting Defendants Under § 1073

The United States Marshal has the authority and responsibility to execute a federal court order directing that a prisoner in federal custody be transported to another district. 28 U.S.C. § 567; 28 C.F.R. § 0.111j. Appropriated funds are available for this purpose. *See* Pub. L. No. 96–68, Title II, 93 Stat. 416, 420 (1979). These funds are available for the court ordered transportation of § 1073

[24] If the integrity of an asylum State's extradition procedures were guaranteed by the Extradition Clause, we doubt that the venue provisions of § 1073 could have withstood constitutional challenge. Those provisions in effect require circumvention of state extradition procedures insofar as they lead, sooner or later, to the fugitive's return by federal process to the custody of authorities in the State from which he fled. Whether the government wins or loses its § 1073 prosecution, the defendant is subsequently made to answer in state court for the state crime. *See United States* v. *Miller*, 17 F. Supp. at 68. We see no reason why this constitutional issue would depend upon whether a federal prosecution preceded the fugitive's being turned over to state authorities. The federal interest would appear to be as great, and that interest would appear to be equally served, and perhaps in a fairer way to defendants, when the federal government chooses to decline prosecution for what is essentially a derivative crime, in deference to the demanding State's disposition of the fugitive under state law.

prisoners to the same extent that they are available for the transportation of other federal prisoners.

The State seeking the return of the § 1073 defendant could voluntarily reimburse the United States for expenses incurred by the U.S. Marshal in connection with transportation in this situation. *See United States* v. *Burnison*, 339 U.S. 87, 90 (1950).[25] However, the Marshal could not recoup his own expense from any such reimbursement, because an agency may not augment its appropriations without specific statutory authority. *See* 49 Comp. Gen. 572 (1970); 5 Comp. Gen. 289 (1925). *See generally* General Accounting Office, *Principles of Federal Appropriations* Law, ch. 5, subpart C (1982). With a few exceptions apparently not applicable here, any money an agency receives for the use of the United States from a source outside the agency must be deposited in full into the general fund of the Treasury. *See* 31 U.S.C. § 3302b (formerly 31 U.S.C. § 484). *See also* 46 Comp. Gen. 31 (1966). Once money has been deposited into the general fund, there must be an appropriation to permit its expenditure. *See* 3 Comp. Gen. 599, 600 (1923). The Marshal is not authorized to accept gifts of money for his own use, nor is he otherwise authorized to accept reimbursement for expenses incurred in carrying out his authorized functions. Thus, any funds received from a State for the interdistrict transportation of prisoners would therefore have to be deposited in the general fund of the Treasury.[26]

Conclusion

A federal § 1073 defendant may in appropriate circumstances be removed by federal process to the jurisdiction from which he fled in aid of a state prosecution. Accordingly, a prosecutor may seek removal, and a court may order it, even if the government does not intend to pursue the federal charges against the defendant once he has been returned. On the other hand, because § 1073 is not intended to supplant state law procedures for interstate rendition, removal

[25] We have not studied whether the State could be required to reimburse the United States for expenses incurred by the Marshal in this situation, as a condition of the Department's willingness to request removal, and express no views on that issue. We note, however, that the authority to charge a fee for services contained in 31 U.S.C. § 9701 (formerly 31 U.S.C. § 483a), the so-called "user fee statute," has been held inapplicable to state and local governments and agencies thereof. *See Beaver, Bountiful, Enterprise* v. *Andrus*, 637 F.2d 749 (10th Cir. 1980). The Intergovernmental Cooperation Act of 1968 provided a mechanism whereby governmental agencies can recover the cost of certain "specialized or technical services" provided to State and local entities. *See* 42 U.S.C. §§ 4222, 4223 (1976). These provisions were amended and reenacted in 1982 as part of Title 31. *See* 31 U.S.C. § 6505. Services may be provided, however, only if "prescribed by the President." *Id.* § 6505(b).

[26] Although the Marshal may not accept cash reimbursement without implicating the rule against augmentation of appropriations, it is possible that all or part of the personnel costs of transporting federal § 1073 prisoners could be defrayed by deputizing state law enforcement officers to assist the Marshal in carrying out this function. Under 28 C.F.R. § 0.112, the Director of the U.S. Marshals Service is authorized to make such deputations "whenever the needs of the U.S. Marshals Service so require." *See also* 28 U.S.C. § 569(b) (conferring authority on U.S. Marshals to "command all necessary assistance to execute their duties"). Although 31 U.S.C. § 665(b) prohibits the acceptance of voluntary services for the United States, this provision has been construed not to prohibit the acceptance of services that are truly "gratuitous," *i.e.*, for which no federal compensation is expected. *See* 54 Comp. Gen. 560 (1975).

should not be sought in such circumstances unless it is clear that state procedures are inadequate to the task of returning the fugitive.

Although it is unclear whether § 1073's requirement of formal written Department of Justice approval applies in connection with such removal, it is possible that a court would not be willing to issue a Rule 40 order unless such approval had been given. Accordingly, we believe the Criminal Division's policy of requiring departmental approval of all requests to remove represents the safer course.

Finally, funds appropriated for the authorized activities of the U.S. Marshal may be used to pay the cost of transporting a § 1073 defendant pursuant to a federal court order under Rule 40. All or part of the cost of transportation may voluntarily be borne by the State seeking the fugitive's return, although any monies received from a State must be deposited into the general fund of the Treasury.

RALPH W. TARR
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General Office of Legal Counsel

Removal of Members of the Commission on Federal Laws for the Northern Mariana Islands

The basic presumption underlying the general law on the President's removal authority is that the power to appoint implies the power to remove. Although Congress may alter this presumption by an express indication to limit the President's removal authority, consistent with constitutional requirements, it has not done so in establishing the Commission on Federal Laws for the Northern Mariana Islands.

Members of the Commission are appointed by the President. The covenant establishing the Commission and its legislative history indicate no intention to restrict Presidential removal power. Accordingly, in the absence of any congressional intent to the contrary, the President has the authority to remove Commission members in his discretion, even though the Commission performs no executive functions and provides services exclusively to the Legislative Branch.

April 14, 1983

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum responds to your request for our opinion whether the President may remove members of the Commission on Federal Laws for the Northern Mariana Islands (Commission). You have transmitted to us two memoranda prepared by different officials of the Department of Interior reaching conflicting conclusions on this question, and have asked us to resolve the matter. The first memorandum, which was prepared by the Assistant Solicitor to the Associate Solicitor, Division of General Law, Department of the Interior, concludes that the Commission is an adjunct of Congress and, as such, part of the Legislative Branch. This conclusion rests on a determination that the sole function of the Commission is to make recommendations to Congress about the applicability of laws of the United States to the Northern Mariana Islands, which recommendations Congress may or may not enact in legislation. This memorandum reasons that because the Commission is part of the Legislative Branch, Congress must have intended that the President would not have the authority to remove Commission members in his discretion. The second memorandum, which was prepared by the Associate Solicitor of the Interior Department, concludes that because the President has the authority to appoint Commission members, the presumption must be that Congress intended that the President also has the power to remove members at will. This presumption is not found to be overcome by any express indication of congressional intent to limit Presidential removal authority. Without specifically discussing the rationale of the first memorandum, the second memorandum tacitly accepts the possibility that the President may have plenary removal authority over advisers to the Legislative Branch, at least absent any clear indication to the contrary by Congress.

In our view, the second of these memoranda more faithfully reflects in its reasoning and conclusion the key principles concerning Presidential removal power. We believe that the President may, in his discretion, remove Commission members, even assuming *arguendo* that the Commission is an entity which performs no Executive functions whatsoever and provides services exclusively to the Legislative Branch. An important, but not necessarily dispositive principle in interpreting statutes regarding matters of removal from office, is that the power to appoint implies the power to remove absent some affirmative indication of congressional intent to the contrary. We have found no such indication in this instance. Indeed, Congress vested the appointment power over members of this entity in the President without in any way suggesting that the appointing authority did not retain the power of removal.

In Part I, we will discuss the background of this issue; in Part II, we will analyze the pertinent legal issues.

I. Background

The Commission was established pursuant to a joint resolution adopted in 1976, which approved the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" (Covenant). Pub. L. No. 94–241, 90 Stat. 263 (1976). The joint resolution approving the Covenant in general marked a new stage in the ongoing relationship between the United States and the Northern Mariana Islands (Northern Marianas). The Northern Marianas are part of the Pacific Trust Territories.[1] The trusteeship arrangement with the Northern Marianas established after World War II eventually will terminate, and the islands will become a Commonwealth in Political Union with the United States.

The function and composition of the Commission are set forth in § 504 of the Covenant, as follows:

> *The President will appoint a Commission on Federal Laws to survey the laws of the United States and to make recommendations to the United States Congress as to which laws of the United States not applicable to the Northern Mariana Islands should be made applicable and to what extent and in what manner, and which applicable laws should be made inapplicable and to what extent and in what manner.* The Commission will consist of seven persons (at least four of whom will be

[1] In addition to the Northern Mariana Islands, the Pacific Trust Territories include Palau, Truk, the Marshall Islands, Ponape and Yap. *See* S. Rep. No. 596, 94th Cong., 2d Sess. 13 (1976). The major islands of the Northern Marianas are Saipan, Tinian and Rota.

citizens of the Trust Territory of the Pacific Islands who are and have been for at least five years domiciled continuously in the Northern Mariana Islands at the time of their appointments) who will be representative of the federal, local, private and public interests in the applicability of laws of the United States to the Northern Mariana Islands. *The Commission will make its final report and recommendations to the Congress within one year after the termination of the Trusteeship Agreement,* and before that time will make such interim reports and recommendations to the Congress as it considers appropriate to facilitate the transition of the Northern Mariana Islands to its new political status. In formulating its recommendations the Commission will take into consideration the potential effect of each law on local conditions within the Northern Mariana Islands, the policies embodied in the laws and the provisions and purposes of the covenant. The United States will bear the cost of the work of the Commission.

Pub. L. No. 94–241, § 504, 90 Stat. 268 (1976) (emphasis added).[2] Thus, the President appoints the Commission members, and the Commission makes recommendations to Congress about the applicability of United States laws to the Marianas. The Commission's final report will be made not later than one year after the termination of the trusteeship arrangement with the Marianas. The Commission members are not appointed to determinate, fixed terms of service.[3]

II. Discussion

Before analyzing this particular case, we first consider the broader legal principles that have been held by the courts to be applicable to questions regarding the power of the President to remove his appointees. As we will discuss below, the fundamental principle applicable in removal cases is that the power to appoint implies the power to remove. Congress has, however, frequently sought to limit the President's power to remove and replace those whom he (or his predecessor) has appointed to particular positions. Accordingly, it is necessary to turn preliminarily to the intent of Congress and

[2] The Commission is the latest in a line of similar Commissions whose purpose has been to advise Congress on the applicability of United States laws in different areas. *See* 30 Stat. 750, 751 (1899) (Hawaii); 45 Stat. 1253 (1929) (American Samoa); 64 Stat. 390 (1950) (Guam); 68 Stat. 501 (1954) (Virgin Islands). The status of the members of the 1899 Hawaiian Commission are the subject of a House Judiciary Committee report. *See* H.R. Rep. No. 2205, 55th Cong., 3d Sess. (1899). The question addressed in that report — whether members of the Hawaiian and similar commissions were "officers" of the United States, and thus whether the constitutional bar on service as civil officers by Members of Congress (some of whom served on such advisory commissions) applied — is not germane to this opinion. In our view, the issue of the President's removal power may be settled without deciding whether the Commission members are "officers" of the United States.

[3] It is of course possible that the trusteeship agreement will not actually terminate for some years.

determine whether Congress has sought to restrict the appointing authority's removal power. If there is persuasive evidence of such a congressional intent, it is necessary to determine whether there is any constitutional limit on Congress' effort to restrict removal power in a given case.

Thus, our analysis will commence with the basic principles regarding removal, and then will focus on the question whether Congress endeavored to limit the President's removal power in this instance. Because, as we conclude, there is no sufficient basis on which to infer such an intent, we do not reach the further question whether it would be constitutional for Congress to limit the President's removal power in this context.[4]

A basic presumption, albeit rebuttable, underlying the general law on the President's removal authority is that the power to appoint implies the power to remove. This principle has been recognized by Congress and the Supreme Court since the earliest days of the Republic, and has been ratified repeatedly in modern case law. *See* 1 Annals of Cong. 469 (1789) (statement of James Madison on the floor of the House of Representatives during the Great Debates of 1789); *Matter of Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839); *Blake* v. *United States*, 103 U.S. 227, 231 (1880); *Keim* v. *United States*, 177 U.S. 290, 293–94 (1900); *Shurtleff* v. *United States*, 189 U.S. 311, 314–15 (1903); *Myers* v. *United States*, 272 U.S. 52, 119 (1926); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896–97 (1961); *Sampson* v. *Murray*, 415 U.S. 61, 70 n.17 (1974); *National Treasury Employees Union* v. *Reagan*, 663 F.2d 239, 246–48 (D.C. Cir. 1981); *Kalaris* v. *Donovan*, 697 F.2d 376, 389 (D.C. Cir. 1983); *Martin* v. *Reagan*, 525 F. Supp. 110, 112 (D. Mass. 1981).

This principle applies to the appointments by the President and by other Executive officers, such as department heads, who are appointing officials. A fundamental rationale for this principle appears to be the notion that appointing authorities necessarily have some degree of supervisory responsibility with respect to those whom they appoint. In particular, the appointing authority retains a certain duty to assure that the appointed official carries out his duties in a satisfactory manner. This idea is reflected in the Supreme Court's statement in *Shurtleff* v. *United States*, 189 U.S. at 316, that the principle recognizes an "inherent" implication of the appointing power:

> *The right of removal would exist if the statute had not contained a word upon the subject.*[5] It does not exist by virtue of the grant, but *it inheres in the right to appoint,* unless limited by Constitution or statute.

(Emphasis added.) In another passage in *Shurtleff*, 189 U.S. at 314–15, the Court explicitly drew the connection between this principle and the notion that

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[4] Because the Commission merely advises Congress and does not exercise purely Executive powers, we acknowledge that the courts are most likely to uphold restrictions on Presidential removal power with respect to this type of entity, if such restrictions are intended by Congress. *Cf. Wiener* v. *United States*, 357 U.S. 349 (1958); *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

[5] This is the case here. The statute creating this Commission contains not a word on the subject of removal.

an appointing official necessarily has a degree of supervisory responsibility with respect to those whom he appoints. The Court wrote with respect to the President's power to remove an official appointed with advice and consent:

> It cannot now be doubted that in the absence of constitutional or statutory provision the President can by virtue of his general power of appointment remove an officer, even though appointed by and with the advice and consent of the Senate. . . . Congress has regarded the office as of sufficient importance to make it proper to fill it by an appointment to be made by the President and confirmed by the Senate. It has thereby classed it as appropriately coming under the direct supervision of the President and to be administered by officers appointed by him, (and confirmed by the Senate,) with reference to his constitutional responsibility to see that the laws are faithfully executed. Article II, sec. 3.

Id. This emphasis on the appointing authority's supervisory responsibility for officials whom he appoints also appears in *Myers* v. *United States,* 272 U.S. at 119, where the Court wrote:

> The reason for the principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint.

In addition, the basic principle that the power to appoint implies the power to remove reflects a practical awareness of the need for a rule for use in cases in which the governing statute is silent on removal. Absent such a rule, it would be unclear who has the power of removal. By providing that, as a general matter, the appointed official serves at the discretion of the appointing authority, the principle also helps prevent the possibility of an official serving indefinitely in his position, a status disfavored under normal understandings of tenure of office in the United States. As the Court wrote in *Matter of Hennen,* 38 U.S. at 259:

> All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.
>
> It cannot, for a moment, be admitted, that it was the intention of the Constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision, or statutory regulation, it would

> seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.

This general principle accordingly provides the starting point for discussion: absent contrary indication in the governing legislation, the President's power to appoint members of the Commission implies the President's power to remove such members. This approach has the additional virtue of being consistent with the position that the Executive Branch has taken in case after case and legal opinion after legal opinion throughout this nation's history. Of course, it allows Congress to alter the starting point by expressing a contrary intent consistent with constitutional requirements. Our task is to determine whether any relevant indications of legislative purpose preclude or overcome the application of the general principle in this case. We find no reliable evidence of such an intent, and we therefore conclude that the President's authority to remove Presidential appointees from the Commission was not restricted by the Legislature.

First of all, the Covenant establishing the Commission and the legislative history of the Covenant contain no language indicating a specific intention to restrict Presidential removal power. The joint resolution itself is silent on the question. The legislative history, when it discusses the Commission at all, tends simply to repeat the basic provisions of § 504 of the Covenant, quoted above.[6] For example, the legislative history underscores that Congress intended the President to appoint Commission members, and it reveals no effort to require either any congressional participation in the appointing process or any limitation on the exercise of removal authority.

Furthermore, the typical indicia of congressional intention to restrict Presidential removal power that have been relied upon by the courts in the leading decisions on this subject in finding such an intention are generally not present here. For example, there is no express or implicit provision limiting removal of Commission members for stated "causes." *Cf. Humphrey's Executor* v. *United States*, 295 U.S. 602, 619 (1935). Also, there is no provision in the Covenant providing that the Commission's decisions are to be transmitted directly to Congress without any review or comment by concerned Executive officials. *Cf. Wiener* v. *United States*, 357 U.S. 349, 352–53 (1958). Nor is there language in the legislative history of which we are aware calling generally for the Commission's "independence" from Executive oversight. *Cf. Humphrey's Executor*, 295 U.S. at 624–25. Finally, the Covenant does not provide for specific, fixed-year terms of service for Commission members. *Cf. id.* at 622–23.

This last point is worthy of particular note. Although the mere presence of a statutory provision for a specific term of service has not been deemed a sufficient basis on which to infer a legislative purpose of restricting Presidential removal authority,[7] the absence of any fixed-year term of service buttresses

[6] *See* S. Rep. No. 596, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. No. 364, 94th Cong , 1st Sess. 9 (1975); 122 Cong. Rec. 4187–232 (1976); 121 Cong. Rec. 23662–73 (1975).

[7] Rather, it has been interpreted as providing a limit on the period for which an appointee can serve without reappointment. *See Parsons* v. *United States*, 167 U.S. 324, 338 (1897).

the argument that the President has removal authority in this case. Commission members are to serve not longer than one year after the termination of the trusteeship agreement with the Northern Mariana Islands.[8] Although this provision establishes some outer limit of service, it does not establish any definite, fixed term of service. To the contrary, given that the trusteeship agreement conceivably could last for a substantial length of time, the linkage between its continuance and the Commission's existence establishes that Commission members would, if not removable by someone, serve for an indefinite period. Because, as a general matter, good behavior is presumed, an official who can be removed during an indefinite term of service only by way of impeachment, or for "cause" as a result of "bad behavior," is considered to have the possibility of life tenure. *Cf. Shurtleff* v. *United States*, 189 U.S. at 316; *Matter of Hennen*, 38 U.S. at 260; *Kalaris* v. *Donovan*, 697 F.2d 376, 398 (D.C. Cir. 1983); *see also DeCastro* v. *Board of Comm'rs of San Juan*, 322 U.S. 451, 462 (1944); *Reagan* v. *United States*, 182 U.S. 419, 426–27 (1901). Accordingly, the presumption against the possibility of life tenure supports the view that the President has removal authority in this case.

Another factor which must be noted is that Congress has provided for the Commission's funding through a line item in the Department of the Interior's appropriation for territorial affairs. *See* Pub. L. No. 96–126, 93 Stat. 954, 969 (1979). The source of funding by itself is not necessarily a determinative indication of an entity's status as in the Executive or Legislative Branch. *See Eltra Corp.* v. *Ringer*, 579 F.2d 294, 301 (4th Cir. 1978). Nevertheless, the fact that Congress has provided for the Commission to receive its funds from the Interior Department's appropriation is a further indication, albeit relatively slight, that Congress did not intend to establish the kind of independence from the Executive Branch that normally accompanies restrictions on Presidential removal authority.

It might be argued that *Humphrey's Executor*, 295 U.S. at 624–25, provides support for a contrary argument. In *Humphrey's Executor*, the Court held that the President did not have unlimited removal authority with respect to members of the Federal Trade Commission. Although much of the Court's opinion dealt with the constitutional questions raised by the case, the Court did discuss the statute involved. One of the factors relied upon in its statutory construction was the fact that the FTC performed "quasi- legislative" functions, namely, rulemaking, which the Court concluded were intended by Congress to be performed by an entity independent of the President's plenary removal authority. In the present case, it might be suggested that the Northern Mariana Islands Commission's sole function is to advise Congress in aid of its legislative power, and thus it should be viewed as an arm of Congress. From this premise, it might be argued that one should infer that Congress did not intend to allow

[8] Section 504 of the Covenant establishing the Commission provides that the Commission will make its final report within one year of the termination of the trusteeship agreement. Hence, the Commission is to go out of existence after that time.

the President to remove Commission members, *i.e.*, members of a Congressional entity, in his unfettered discretion.

Although the foregoing argument is by no means frivolous, we do not believe that *Humphrey's Executor* provides support for the interpretation that the President lacks removal power over members of this Commission. The Court in *Humphrey's Executor* noted that several indicia of congressional intent, taken together, existed to support the conclusion that Congress intended to limit the President's removal authority. *See* 295 U.S. at 624–26. Not the least of these factors was an explicit statutory provision limiting the grounds for removal. In addition, the FTC Commissioners served for a specified term of years, and according to the Court, the legislative history made clear that Congress expected them to act independently of Executive Branch influence. Furthermore, unlike the FTC, the Commission here does not exercise quasi-legislative powers. It performs merely an advisory function. A body such as this might provide advice to any branch of government. Its function, therefore, does not by itself suggest the need for its separateness from the Executive Branch. *See id.*; *see also Martin* v. *Reagan*, 525 F. Supp. 110, 112–13 (D. Mass. 1981). Thus, the situation in *Humphrey's Executor* is fundamentally distinguishable from the situation in this case.[9]

Even if we grant that the Commission is an arm of Congress, and thus entirely part of the Legislative Branch (a conclusion which we do not reach and do not intend by anything articulated herein to prejudge), it does not follow that the President cannot remove the Commissioners in his discretion.[10] If the Commission is entirely part of the Legislative Branch, Congress did not have to vest appointment power in the President. But it did so nonetheless. This grant of the appointment power has two key implications.

First, because the appointment power by itself is by no means an insignificant power with respect to appointed officials, Congress clearly acceded at least to a significant degree of Presidential supervision of Commission members. *See Shurtleff* v. *United States,* 189 U.S. 311, 315 (1903).[11] Second,

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[9] We also believe that this case is clearly distinguishable from *Wiener* v. *United States*, 357 U.S. 349 (1958). That case involved an adjudicatory body, the War Claims Commission, whose statute provided that its decisions were to be free from review by any other official of the United States. *See id.* at 354–55 In contrast, no adjudicatory functions such as those in *Wiener* are performed by the Commission and no concomitant need exists for "independence" from the Executive. In addition, there is no similar statutory provision in this case indicating an intent to shield the Commission's decisions from review by other officials. *Cf. Borders* v. *Reagan*, 518 F. Supp. 250 (D D.C. 1981); *Lewis* v. *Carter*, 436 F. Supp. 958 (D.D.C. 1977).

We add that the argument based on the functions of the Commission is more central with respect to the constitutional question whether Congress can limit Presidential removal power. *Cf Humphrey's Executor*, 295 U.S. at 631–32. As noted at the outset, we do not need to reach this issue, given that we are able to resolve the question on the basis of an analysis of the statute and the principle that the power to appoint implies the power to remove.

[10] We note that, in a different context, the Comptroller General has concluded that the Commission is a Legislative Branch entity. *See* Comp. Gen. Op. No. B-202206 (June 16, 1981).

[11] As the Court noted in *Keim* v. *United States*, 177 U.S. 290, 293 (1900): "The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position."

because the law is that the power to appoint implies as a basic underlying proposition the power to remove, and because we must assume that Congress was aware of the law, Congress may reasonably be said to have taken for granted in this case that the President would have the power to remove Commission members appointed by him or a previous President. If Congress had rejected these implications, it easily could have provided for some other method of appointment or specifically limited the President's power to remove the Commissioners.

Conclusion

To summarize, we believe that the Congress is undoubtedly aware that the power to appoint has been held throughout this nation's history to imply the power to remove, and that Congress has within its control the ability to overcome this presumption, at least as a statutory matter. In construing the relevant statutory materials in this case, we have found no intent to restrict the President's removal power and some slight indication that potential removal by the President actually was intended (no term specified, the failure to designate someone else to exercise removal authority, and other factors discussed herein). We conclude that the President has the authority to remove Commission members in his discretion.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

The President's Authority to Adjust Sugar Quotas

The President, pursuant to an executive agreement codified in the Tariff Schedules of the United States, Schedule 1, Part 10, Subpart A, Headnote 2, may reduce Nicaragua's share of the annual quota of imported sugar on the basis of foreign policy concerns, if he finds that it is in the best interests of the United States and he gives "due consideration," as defined by law, to Nicaragua's interests in the United States sugar market.

April 25, 1983

MEMORANDUM OPINION FOR THE COUNCIL TO THE PRESIDENT

Recent events in Nicaragua have led the President to consider reducing the amount of sugar which may be imported into the United States from that nation. This memorandum addresses whether the President has the legal authority to reduce Nicaragua's present share of the United States sugar quota using the authority of a specific provision of an Executive Agreement.[1] Our review of this Executive Agreement in the context of prior practice under it, the case law construing it, and the history of Presidential activity related to the imposition of export controls similar to the pending proposal, persuades us that the President has the requisite legal authority. We should note that this memorandum does not address questions that have been raised about the validity of the proposed action under various international agreements to which the United States and Nicaragua are parties.[2] We understand that the Office of the Legal Adviser at the Department of State will be giving you its views directly on these issues, and we anticipate reviewing its analysis in the near future in connection with our customary review of a proposed proclamation.

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[1] We have also examined several other sources of authority for the contemplated action· § 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862; § 22 of the Agricultural Adjustment Act, 7 U.S C. § 624; and the International Emergency Economic Powers Act (IEEPA), 50 U S.C. §§ 1701 *et seq.* Of these, we have rejected the first two as being inappropriate bases for the proposed action and have concluded that only IEEPA would be a clear source of authority. We understand that there are policy reasons which argue persuasively against use of IEEPA. The only other potential source of authority of which we are aware is the Executive Agreement.

[2] Article XVI of the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Nicaragua, 9 U.S.T. 450, T.I.A.S. 4024 (1956), forbids either party to impose discriminatory import restrictions. Article XIII of the General Agreement on Tariffs and Trade, discussed below, obliges contracting parties to apply quotas in a non-discriminatory fashion. Article 58 of the International Sugar Agreement, T.I.A.S. 9644, obligates every importing member to guarantee "access" to its markets for exporting members.

I. History of Presidential Authority

In 1962, Congress authorized the President to negotiate trade agreements with foreign countries for the reduction or modification of existing duties or import restrictions. Trade Expansion Act of 1962 (Act), § 201 (codified at 19 U.S.C. § 1821).[3] These agreements were to help promote the Act's listed purposes.[4] During rounds of talks involving the General Agreement on Tariffs and Trade (GATT),[5] the President, using the authority of the Act, negotiated an Executive Agreement permitting him to set and adjust quotas for sugar imported into the United States.[6] Executive agreements have the force of law unless overridden by Congress.

The opening paragraph of the Agreement was originally negotiated as part of the 1949 round of GATT negotiations held in Annecy, France. 64 Stat. B139, B145. In 1951, during the round held in Torquay, England, the United States

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[3] The statute provides in pertinent part:

> (a) Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that any of the purposes stated in section 1801 of this title will be promoted thereby, the President may —
>
> (1) after June 30, 1962, and before July 1, 1967, enter into trade agreements with foreign countries or instrumentalities thereof; and
>
> (2) proclaim such modification or continuance of any existing duty or other import restriction, such continuance of existing duty free or excise treatment, or such additional import restrictions, as he determines to be required or appropriate to carry out any such trade agreement.

[4] These purposes are listed in 19 U.S.C. § 1801:

The purposes of this chapter are, through trade agreements affording mutual trade benefits —

> (1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce;
>
> (2) to strengthen economic relations with foreign countries through the development of open and nondiscriminatory trading in the free world; and
>
> (3) to prevent Communist economic penetration.

[5] The GATT is a multilateral trade agreement encompassing most of the major trading countries Although GATT's General Articles, which set out the basic trade policy commitments of the contracting parties, were negotiated in the late nineteen-forties, seven other rounds of negotiations have led to many further agreements and revisions, all of which are subsumed within references to "the GATT."

[6] The full text of the agreement provides:

> The rates in the tariff schedule shall be effective only during such time as title II of the Sugar Act of 1948 or substantially equivalent legislation is in effect in the United States, whether or not the quotas, or any of them, authorized by such legislation, are being applied or are suspended: *Provided,*
>
> (i) *That, if the President finds that a particular rate* not lower than such January 1, 1968, rate, limited by a particular quota, *may be established for any articles* provided for in item 155.20 or 155.30, which will give *due consideration to the interests in the United States sugar market of domestic producers and materially affected contracting parties to the General Agreement on Tariffs and Trade,* he shall proclaim such particular rate and such quota limitation, to be effective not later than the 90th day following the termination of the effectiveness of such legislation;
>
> (ii) *That any rate and quota limitation so established shall be modified if the President finds and proclaims that such modification is required or appropriate to give effect to the above considerations;* and
>
> (iii) That the January 1, 1968, rates shall resume full effectiveness, subject to the provisions of this headnote, if legislation substantially equivalent to title II of the Sugar Act of 1948 should subsequently become effective

(Emphasis added.)

negotiated subparagraphs (i)-(iii), *see* 3 U.S.T. 586, 615, 1171 (1951), which were proclaimed as part of domestic law twice, first in 1951, *see* Proclamation 2929, 3 C.F.R. 111 (1949–1953 Comp.), and again in 1967 after they had been the subject of further negotiations in the Kennedy Round. Proclamation 3822, 3 C.F.R. 167, 175 (1966–1970 Comp.). This latter Proclamation added the agreement to the Tariff Schedules of the United States (TSUS) as a headnote to the schedules on sugar. TSUS, Schedule 1, Part 10, Subpart A, Headnote 2. The codification of the Agreement as a headnote to the sugar tariff has led to its being referred to as the Headnote authority, and it will be referred to as such during the rest of this memorandum.

The Headnote authority was negotiated pursuant to § 201 of the Trade Expansion Act of 1962 which, of course, specifically provided for the negotiation of trade agreements providing for the establishment of import quotas and, more pertinent here, for the "modification" of such quotas "as [the President] determines to be . . . appropriate to carry out any such trade agreement." *See supra* note 3. One of the principle purposes of the Act was "to prevent Communist economic penetration." 19 U.S.C. § 1801(3).[7]

Subparagraphs (i)-(iii) of the Headnote were negotiated as contingent authority for the President for the time when the Sugar Act of 1948, 7 U.S.C. §§ 1100–1123 (1970 & Supp. I 1971), which had been given several extensions, would expire.[8] Therefore, when the Sugar Act expired in 1974, the President was able to use his authority under the Headnote to proclaim a duty and quota on imported sugar. Both the duty and the quota have been extensively modified in subsequent Proclamations.[9] The most recent modification occurred last spring, when the President reduced the annual global sugar quota from 6,900,000 short tons to approximately 2,800,000, allocating the quota on a country-by-country basis that reflected each country's average percentage of imports over a period of years.[10] Proclamation 4941, 47 Fed. Reg. 19961, 19962 (1982).[11]

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[7] The statutory basis for the Headnote was recently confirmed in *United States Cane Sugar Refiners' Ass'n v. Block*, 683 F.2d 399, 402–03 (C.C.P.A. 1982).

[8] At the time the Headnote was negotiated, and until the Sugar Act expired in 1974, the President had explicit authority under the Sugar Act to adjust quotas on imported sugar "whenever and to the extent that the President finds that the establishment or continuation of a quota or any part thereof for any foreign country would be contrary to the national interest of the United States." Pub. L. No 89–331, 79 Stat. 1271, 1273 (1965) (codified at 7 U.S.C. § 1112(d)(1)(B) (Supp. II 1965–66)). *See also* 7 U.S.C. § 1112(d)(1)(B) (Supp. IV 1974). In negotiating an Executive Agreement designed to replace the Sugar Act when it expired, the President evidenced no desire to deny himself this authority to take foreign policy concerns into account when adjusting sugar quotas, an authority that the courts had confirmed as belonging to the President under the Sugar Act even before Congress made it explicit. *See South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S 964 (1965).

[9] *See* Proclamation 4888, 3 C.F.R. 77 (1982); Proclamation 4770, 3 C.F.R. 81 (1981); Proclamation 4720, 3 C.F.R. 14 (1981); Proclamation 4663, 3 C.F.R. 40 (1980); Proclamation 4610, 3 C.F.R. 67 (1978); Proclamation 4539, 3 C.F.R. 62 (1978); Proclamation 4463, 3 C.F.R. 56 (1976); Proclamation 4334, 3 C.F.R 420 (1971–1975 Comp.).

[10] This reduction was substantial because the 6,900,000 short-ton quota had been purposefully set so high that it was never reached. Thus, the United States had effectively had no quota on sugar prior to this action.

[11] The President took this action after Congress had intervened in the sugar market by enacting Pub. L. No. 97–98, 95 Stat. 1213, 1257 (1981), which raised support prices for domestic sugar producers The President

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Domestic importers challenged the quota established in 1982 by Proclamation 4941 as being beyond the President's authority, but the Court of International Trade found that the imposition of quotas was legal because the Headnote, on which the action was based, was a valid exercise of the authority granted to the President under § 201 and the President had taken the procedural steps required by the Headnote. *United States Cane Sugar Refiners' Ass'n* v. *Block (Sugar Cane I)*, 544 F. Supp. 883 (Ct. Int'l Trade), aff'd, *United States Cane Sugar Refiners' Ass'n* v. *Block (Sugar Cane II)*, 683 F.2d 399 (C.C.P.A. 1982).[12]

II. Analysis

The President would now like to reduce the 2.1% share of the annual quota allocated last spring to Nicaragua because he believes that Nicaragua is using the hard currency derived from sugar sales to buy arms for anti-government guerrillas in El Salvador. The President would like to revise Proclamation 4941 to reduce Nicaragua's percentage from 2.1% of the annual quota — now about 2,800,000 tons — to .21%, resulting in the importation from Nicaragua of about 6000 tons rather than almost 60,000. The legal issue is whether the Headnote permits the President to reduce Nicaragua's percentage of the quota to this level. Because the President, in making this adjustment, would not be lowering the overall import quota or otherwise affecting domestic producers of sugar, and because the action would presumptively have a negative effect on Nicaragua, which is the only affected GATT member, the proposed action would appear not to be authorized by the Headnote's language unless the Headnote can be read to permit this action on the basis of the President's foreign policy concerns after giving the interests of Nicaragua the "due consideration" required by the Headnote.

The Headnote authorizes the President to modify sugar quotas — such as the one established for Nicaragua last spring — whenever he finds:

> that such modification is required or appropriate to give effect to the [interests in the United States sugar market of domestic producers and materially affected contracting parties to the GATT].

Headnote, subparagraph (ii). As noted above, Presidents have been modifying sugar quotas since 1974. They have couched their findings in the language of subparagraph (i) of the Headnote under which the original quota was established — i.e., they have made a finding that the quota will give "due consider-

[11] (. . . continued)
thereafter exercised his authority under § 22 of the Agricultural Adjustment Act, 7 U.S.C. § 624, to impose fees on imported sugar in December 1981, and, on May 5, 1982, used the Headnote to adjust the quota on imported sugar by issuing Proclamation 4941, *supra*.

[12] The Court of International Trade, 28 U.S.C. § 251(a) (Supp. V 1981), is an Article III court with exclusive jurisdiction over certain trade matters. *Id.* § 1581. Its decisions are reviewed by the Court of Customs and Patent Appeals. *Id.* § 1541(a).

ation" to these interests. *Id. See supra* note 9.[13] Because Presidents since 1974 have read the standard under subparagraph (ii) to be identical to that imposed originally by subparagraph (i), we believe that the appropriate question is what "due consideration" means.

As summarized in the Headnote's legislative history, a quota could be proclaimed under subparagraph (i) "provided that the President, *after giving due consideration* to the interests of both domestic producers and materially affected contracting parties in the United States sugar market, should find that such rate and duty should be established." *Analysis of Torquay Protocol of Accession, Schedules, and Related Documents* 317, 347 (1951) (emphasis added). This provision appears to establish a standard that is essentially procedural, rather than substantive, requiring merely that the President consider, before acting, the effect the new quota will have on these two interests rather than setting a standard under which the President can only act if the new quota would arguably protect or advance the interests of domestic producers or of affected GATT members in the United States sugar market.[14] In short, "due consideration" means "fitting or appropriate" consideration,[15] — a finding that is committed to the President's discretion.[16] As a legal matter, we believe that the President's determination that this proposed action would be in our national interest after his consideration of its potential, and presumptively negative, impact on Nicaragua, would be fully authorized by the Headnote and would specifically advance one of the original purposes of the Trade Expansion Act of 1962, "to prevent Communist economic penetration." 19 U.S.C. § 1801(3).[17] Indeed, a contrary conclusion would require us to take the position that Congress and the President, in the series of legislative and executive actions discussed in note 8, *supra,* intended to strip the Executive of his acknowledged power to adjust sugar quotas and duties on the basis of our national interest. We therefore believe that the Headnote authorizes modification of sugar quotas and

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[13] Subparagraph (i) by its terms only authorized action during the 90 days after the Sugar Act of 1948 expired. *See supra* note 6. Thereafter, modifications of the quota established under subparagraph (i) were done under the authority of subparagraph (ii).

[14] The Proclamations issued under the Headnote since 1974 do not resolve the issue, because the quotas put in place were so high that the issue of whether a particular quota failed to give "due consideration" to a GATT member's interests has apparently never arisen. *See supra* note 10.

[15] *The American Heritage Dictionary of the English Language* 403 (1976). *See also Webster's New International Dictionary* (2nd ed.) 796.

[16] In exercising that discretion, the President may consider foreign policy concerns. Congress is generally presumed to be aware that foreign policy concerns influence Presidential decisionmaking when it grants the kind of broad power found in § 201 of the Trade Expansion Act of 1962. *See Farr Man & Co.* v. *United States,* 544 F. Supp. 908, 910 (Ct. Int'l Trade 1982); *South Puerto Rico Sugar Co. Trading Corp.* v. *United States,* 334 F.2d 622 (Ct. Cl. 1964), *cert. denied,* 379 U.S. 964 (1965). *See also United States* v. *Yoshida Int'l Inc.,* 526 F.2d 560 (C.C.P.A. 1975); *supra* note 8.

[17] We note that the reduction in Nicaragua's quota, some 54,000 short tons, is scheduled to be redistributed to Honduras, El Salvador and Costa Rica, three countries that may be threatened by actions taken by the government of Nicaragua. Thus, in cutting Nicaragua's quota, the President will both diminish Nicaragua's ability to penetrate the market for sugar in the United States and presumably diminish Nicaragua's ability to interfere in the economies of those three countries. Both of these effects would appear to advance the purpose of the Trade Expansion Act of 1962 as declared in 19 U.S.C. § 1801(3).

that the President may modify Proclamation 4941 to reduce Nicaragua's percentage of our sugar quota if he makes the required findings.

Conclusion

The Headnote authorizes the President to adjust sugar quotas. *Sugar Cane I* and *Sugar Cane II* hold that he may modify the quotas on a country-by-country basis. If the President finds that reducing Nicaragua's percentage of our annual quota is in this Nation's best interest and if he finds that the quota will give "appropriate" consideration to Nicaragua's interests in our sugar market, we believe that his action in reducing the quota will be authorized by the Headnote.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Applicability of Section 504 of the Rehabilitation Act to Certain Governmental Entities

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against qualified handicapped individuals in any program or activity conducted by any "Executive agency." The legislative history of the 1978 Amendments to the Act makes clear that Congress intended § 504 to apply to all "agencies and instrumentalities" in "the Executive branch," including independent regulatory agencies performing functions constitutionally committed to the Executive Branch. The term "Executive agency" as used in § 504 must be construed broadly to include all government entities which are not within either the legislative or judicial branches.

All of the entities listed in the memorandum are "Executive agencies" under § 504. These are: the Architectural and Transportation Barriers Compliance Board, the Civil Aeronautics Board, the Commission of Fine Arts, the Federal Deposit Insurance Corporation, the Federal Labor Relations Authority, the Federal Maritime Commission, the National Transportation Safety Board, the National Labor Relations Board, the Railroad Retirement Board, the Securities and Exchange Commission, the Federal Communications Commission, and the Administrative Conference of the United States.

May 3, 1983

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

You have requested the views of this Office with respect to whether certain entities are "Executive agencies" covered by § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Act).[1] Section 504 prohibits, *inter alia,* discrimination against qualified handicapped individuals in any program or activity conducted by any "Executive agency." Each such agency is required by § 504 to promulgate regulations to carry out these provisions. Your inquiry arises in the context of your development of prototype regulations for the use of Executive agencies in fulfilling their responsibilities under § 504.[2] For the

[1] These entities are: the Architectural and Transportation Barriers Compliance Board, the Civil Aeronautics Board, the Commission of Fine Arts, the Federal Deposit Insurance Corporation, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Reserve System, the Interstate Commerce Commission, the National Transportation Safety Board, the National Labor Relations Board, the Railroad Retirement Board, the Securities and Exchange Commission, the Federal Communications Commission, and the Administrative Conference of the United States.

[2] Under Executive Order No. 12250, 45 Fed. Reg. 72995 (1980), the Attorney General has general authority to coordinate the implementation by "Executive agencies" of various laws prohibiting discrimination, including § 504. Because you have decided, as a policy matter, to assist agencies in developing their own regulations by issuing a prototype set, rather than by issuing a set of regulations purporting to bind them, we need not address the more difficult questions which would be raised were the regulations to have been made mandatory.

reasons which follow, we believe that all of the named entities are "Executive agencies" under § 504.[3]

We begin with a general analysis of the intended scope of the statutory term "Executive agency" whose programs and activities are covered by § 504. We then apply this analysis to the named entities, to determine whether they should be regarded as falling within that category.

I

Section 504 of the Rehabilitation Act of 1973, as amended, provides in pertinent part that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, 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 *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.*

29 U.S.C. § 794 (emphasis added). The underscored language was added to § 504 by § 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95–602, 92 Stat. 2955, 2982 (1978 Amendments). Although neither § 504 nor any other section of the Act defines the "Executive agencies" to which § 504 applies, the legislative history of the 1978 Amendments contains clear evidence of Congress' intent in this regard.

As passed by the House, § 119 of H.R. 12467, the Rehabilitation Amendments of 1973, would have extended the nondiscrimination provisions of § 504 to "any program or activity conducted by any Executive agency (as defined in section 105 of title 5, United States Code)." 124 Cong. Rec. 13892 (1982). Congressman Brademas, Chairman of the Subcommittee on Select Education of the reporting Committee on Education and Labor, described this provision as extending the antidiscrimination provisions of § 504 to "all activities and programs of the executive branch of the Federal government." *Id.* at 13897. Congressman Jeffords, who claimed responsibility for adding § 119 to the bill,

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[3] You have asked for our views with respect to whether the named agencies should be regarded as "Executive agencies" as that term is employed in Executive Order No. 12250. In subsequent discussions with the staff of your Coordination and Review Section, it was agreed that the advisory nature of the prototype § 504 regulations made it more appropriate at this point for us simply to address the question of statutory coverage. We note, however, that we believe it was the President's intent in issuing the Executive Order to delegate to the Attorney General his authority over all "Executive agencies" covered by the various nondiscrimination laws mentioned in the Order, including the so-called "independent" agencies

described it as "extend[ing] the coverage of section 504 to include any function or activity of any department or agency of the Federal government." *Id.* at 13901.[4] He explained that "[w]hen the original legislation was developed it was intended to apply to every phase of American life," but that the Justice Department had since ruled that "the Federal Government was exempt from the statute."[5] The proposed amendment to § 504 "removes that exemption and applies section 504 to the Federal Government as well as State and local recipients of Federal dollars." *Id.*

Notwithstanding these broad statements by the House sponsors of the amendment to § 504, the House-passed version of the amendment to § 504 would by its terms have limited its coverage to "Executive agencies" as defined in 5 U.S.C. § 105. This definition explicitly excludes the United States Postal Service and the Postal Rate Commission. It includes, however, an entity ordinarily considered part of the Legislative Branch, the General Accounting Office.[6]

The Senate-passed version of H.R. 12467 contained no provision comparable to § 119 of the House-passed bill. The Senate bill contained another provision, however, which reflected a similar concern over how the Act's nondiscrimination provisions were being enforced against the Federal government. That provision added a new section to the Act making clear that individuals could sue federal agencies for violations of § 501 of the Act, 29 U.S.C. § 791, and making available to such individuals the rights and remedies applicable under Title VII of the Civil Rights Act of 1964, including attorneys fees. *See* S. Rep. No. 890, 95th Cong., 2d Sess. at 18–19 (1978).[7] Section 501(b) requires, *inter alia,* that "[e]ach department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch" must submit an affirmative action plan for the employment of handicapped individuals to the Civil Service Commission.[8]

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[4] The language amending § 504 was not contained in the bill which was reported out of the House Committee on Education and Labor. *See* H.R. Rep. No. 1149, 95th Cong., 2d Sess. (1978). It was added to H.R. 12467 at some point prior to its introduction in the House in May of 1978. 124 Cong. Rec. 13621 (1978).

[5] The Justice Department "ruling" to which Congressman Jeffords was apparently referring was an opinion issued by this Office on September 23, 1977, to the General Counsel of the Department of Health, Education and Welfare. 1 Op. O.L.C. 210 (1977). In that opinion, this Office concluded that § 504, like Title VI of the Civil Rights Act of 1964, did not prohibit discrimination by recipients of federal financial support through programs of insurance or guarantee.

[6] Section 105 defines "Executive agency" to include "Executive department[s]," "Government corporation[s]," and "Independent establishment[s]." The "Executive department[s]" are defined in 5 U.S.C. § 101 to include all Cabinet-level agencies. "Government corporation[s]" are defined in 5 U.S.C. § 103 to include both government-owned and government-controlled corporations. An "independent establishment" is defined in 5 U.S.C. § 104 to mean "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," and, in addition, the General Accounting Office. The General Accounting Office has historically been regarded as a part of the Legislative Branch both by Congress and by the Executive Branch. *See "General Accounting Office — Authority to Obtain Information in Possession of Executive Branch,"* 2 Op. O.L.C. 415, 416 (1978), and authorities cited therein.

[7] The provision was ultimately enacted as § 505(a)(1) of the Act, and is codified at 29 U.S.C. § 794a(a)(1) and (3).

[8] In hearings held during 1976 and 1977, the Subcommittee on the Handicapped of the Senate Committee on Human Resources had received evidence of the difficulties which the Civil Service Commission was

Continued

In Conference, the House conferees agreed to the Senate's proposed strengthening of § 501, and the Senate conferees agreed to the House bill's proposed extension of § 504, in a slightly modified form. As modified, the provision amending § 504 extended the antidiscrimination provisions of that section to "any program or activity conducted by any Executive agency or by the United States Postal Service." H.R. Rep. No. 1780, 95th Cong., 2d Sess. 29 (1978). According to the Conference Report, this modification was intended to make § 504's proposed new coverage of federal agencies consistent with the existing coverage of § 501(b). *See id.* at 93.[9] In short, the amended § 504 would apply, like § 501, to "each department, agency, and instrumentality . . . in the Executive branch," including the Postal Service, but would no longer apply to the General Accounting Office.[10]

Urging passage of the conference bill on the floor of the House, Congressman Jeffords again emphasized that the amended § 504 was intended to extend that section's antidiscrimination provisions to "any function or activity in every department or agency of the Federal Government." 124 Cong. Rec. 38551 (1978). *See also id.* at 38552 (legislation extends the provisions of § 504 to "each department, division, and agency of the Federal Government") (remarks of Rep. Sarasin).

With no objections to or comments on the conference amendment to § 504's new coverage, the bill passed the House by an overwhelming margin. *Id.* at

[8] (. . . continued)
encountering in trying to enforce agency compliance with § 501(b) of the Act. During those hearings, representatives of employee advocacy groups charged, and government witnesses conceded, that few federal agencies had made any progress in enhancing employment opportunities for handicapped persons. *See, e.g., Rehabilitation of the Handicapped Programs: Hearings before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess., Part 3 (1976); *Rehabilitation Extension Amendments of 1977: Hearings on S. 1712 and S. 1596 before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. at 387–415 (1977) (1977 Senate Hearings). In December of 1978, responsibility for enforcement of § 501(b) was transferred by the President to the Equal Employment Opportunity Commission, pursuant to Reorganization Plan No. 1 of 1978, 92 Stat. 3781. See Executive Order No. 12106, 44 Fed. Reg. 1053, 3 C.F.R. 263 (1978 Comp), *reprinted in* 42 U S.C. 2000e-4 note (1978).

[9] The language which appears in the Conference Report is difficult to parse, and somewhat confusing: "The Senate recedes with an amendment adding coverage of the provision covered by Section 501(b)." *Id.* In light of the purpose of both the House and Senate to facilitate the Act's enforcement against Executive Branch agencies, we think the conclusion is inescapable that this language was intended to mean that the coverage of the two sections would be coextensive.

[10] We do not believe that Congress' failure to include an explicit reference in § 504 to the Postal Rate Commission indicates an intent to exclude that entity from coverage. It is true that § 501(b) refers explicitly to both the United States Postal Service and the Postal Rate Commission. However, that reference shows that Congress regarded them both as entities already "included" as agencies or instrumentalities in the Executive Branch. *See also* § 501(a) (jurisdiction of the Interagency Committee on Handicapped Employees described in terms of "each department, agency, and instrumentality of Government," without reference to either the Postal Service or the Postal Rate Commission, although a representative of the Postal Service sits on the Committee). Accordingly, we do not believe that a failure to single out either the Postal Service or the Postal Rate Commission for special mention in § 504 would establish a legislative intent not to include those entities as "Executive agencies" for purposes of that law. Moreover, it would be anomalous to conclude that Congress intended to extend § 504 to the Postal Service but not to the Postal Rate Commission. Accordingly, we believe that the Postal Rate Commission must be regarded as an "Executive agency" for purposes of § 504.

38553. The conference bill was debated and passed by the Senate on the same day, with no discussion of the amendment to § 504. *Id.* at 37504–10.

It is clear from the legislative history of the 1978 Amendments, as set forth above, that Congress intended the amended § 504 to have the broadest possible coverage within the Executive Branch. In the House, both before and after the conference amendments, the provision's sponsors emphasized its intended application to "any" activity of "every" federal entity.[11]

More specifically, the legislative history shows that Congress intended § 504 to apply coextensively with § 501(b). Thus Congress' understanding of the intended coverage of § 504 as it emerged from conference can also be gauged by reference to its understanding of the coverage of § 501(b). This in turn is illuminated by the reports on § 501's enforcement, which Congress had received each year since 1973 from the Civil Service Commission. These reports include statistics showing the progress made in hiring the handicapped by each Executive Branch agency responsible for submitting an affirmative action plan to the Commission under § 501(b). The 1977 hearing record of the Senate Committee on Human Resources incorporates a listing of agencies which had submitted such reports, and an analysis by the Civil Service Commission of their performance in hiring the handicapped. *See* 1977 Senate Hearings, *supra* note 8, at 401–08. The agencies reporting under § 501(b) include, in addition to the Cabinet level agencies, all of the independent regulatory agencies and many boards, commissions and councils which perform only advisory functions.[12]

In sum, the legislative history of the 1978 Amendments makes clear that Congress intended § 504 to apply, like § 501(b), to all "agencies and instrumentalities" in "the Executive [B]ranch" of government. Those "agencies and instrumentalities" were understood by Congress to include independent regulatory agencies performing functions constitutionally committed to the Executive Branch, as well as entities more closely subject to the President's day-to-day supervisory authority. Accordingly, we believe that the term "Executive agency" as used in § 504 must be construed broadly to include all governmental entities which are not within either the Legislative or Judicial Branches.

III

Applying the broad construction of "Executive agency," which we believe Congress intended for § 504 to the named entities, we conclude that all of them

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[11] Notwithstanding these broad statements by the provision's sponsors, apparently no one proposed that it should apply to entities in either the Legislative or Judicial Branch.

[12] The Civil Service Commission's 1978 Report shows that all but two of the named entities had submitted affirmative action plans under § 501. *See* "Employment of Handicapped Individuals Including Disabled Veterans in the Federal Government," App. A (Sept. 30, 1978). One of the two missing agencies, the Federal Labor Relations Authority, was not established until October of 1978. See Pub. L. No. 95–454, 92 Stat. 1196 (1978). The other, the Architectual and Transportation Barriers Compliance Board, was at that time composed entirely of agency heads and staffed by personnel from the Department of Health, Education and Welfare. *See* Pub. L. No. 93–112, § 502, 87 Stat. 355, 391 (1973) (codified at 29 U.S.C. § 792(a) (1976)).

fall within that category. It is true that a number of these entities fall under the definition of "independent regulatory agencies" contained in the Paperwork Reduction Act of 1980, 44 U.S.C. § 3502(10). However, as discussed in the preceding section, in order to find these entities outside the scope of § 504's coverage, we would have to conclude either that they are within one of the other two exempted branches of government, or that they are not within the government at all. Notwithstanding the arguments that several of these entities have made in submissions to you, we do not think it constitutionally possible, in light of their clearly executive functions, to regard any of them as legislative entities. *Cf. Buckley* v. *Valeo,* 424 U.S. 1, 137–43 (1976). Nor do we understand any of the named agencies to argue that they are not governmental entities at all.[13] Consequently, we believe that all of them fall within the broad category of "Executive agencies" for purposes of § 504, and that they are therefore required to issue regulations to carry out the provisions of § 504 which apply to the programs and activities they conduct.

Although we conclude that Congress intended to bring all of the named entities within the category of "Executive agencies" covered by § 504, we have not addressed the related, but distinct question of the President's authority to direct coordination of § 504's enforcement through an Executive order. See supra note 2. We would prefer to address this question, if necessary, in the context of specific agencies, should any fail to adopt adequate regulations as required by § 504.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[13] One of the entities named in your list, the Commission of Fine Arts, concedes that it is within the Executive Branch, but argues that, because it is subject to the Federal Advisory Committee Act (FACA), it is not an "agency" and therefore not subject to § 504. It is true that the Commission would not be considered an "agency" under the Administrative Procedure Act (APA), 5 U.S C. § 551, unless it were an "authority" of the government. We do not believe, however, that an entity's status under the APA or the FACA was intended by Congress to determine its coverage by § 504. The legislative history of that Act shows that it was intended to apply to *all programs and activities conducted within the Executive Branch, not just those conducted by entities with particular statutory attributes.*

The President's Power to Remove the Board of Directors of the Pennsylvania Avenue Development Corporation

In the absence of a clear legislative intent to the contrary, the President may remove his appointees at will. The Pennsylvania Avenue Development Corporation Act of 1972, 40 U.S.C. §§ 871 *et seq.*, provides for appointment of a board of directors by the President, but is silent on removal.

Although the Act provides for a six-year term of office, a provision for a term, by itself, is not a restriction on the President's removal authority, but rather, is a limitation on the period for which an appointee may serve without reappointment.

Nothing in the statutory scheme, legislative history, or in the nature of the Board's functions, indicates an intent to restrict the President's removal power. Therefore, the board of directors may be removed by the President at will.

May 18, 1983

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum responds to your request for our opinion whether the President has the power to remove the directors of the Pennsylvania Avenue Development Corporation (PADC). We assume that your inquiry is directed to those directors who are appointed by the President pursuant to 40 U.S.C. § 872(c)(8), as opposed to those who serve *ex officio*. We conclude that the President does have the power to remove the directors of the PADC appointed by him under § 872(c)(8).

I. The Board

The Board was established pursuant to the provisions of the Pennsylvania Avenue Development Corporation Act of 1972, Pub. L. No. 92–578, 86 Stat. 1266 (codified at 40 U.S.C. §§ 871 *et seq.* (1976)) (Act). Section 872 creates the Corporation as a wholly owned government corporation, and vests its powers and management in a Board of Directors consisting of the Secretaries of the Interior, Treasury, Housing and Urban Development, and Transportation, the Administrator of General Services, the Mayor of the District of Columbia, the Chairman of the Council of the District of Columbia, and "eight [additional members], at least four of whom shall be residents and who are registered voters of the District of Columbia, appointed by the President from private life, who shall have knowledge and experience in one or more fields of history, architecture, city planning, retailing, real estate, construction, or government." 40 U.S.C. § 872(c)(8).

Section 872(e) provides in part that each member appointed pursuant to § 872(c)(8) "shall serve for a term of six years from the expiration of his predecessor's term." Subsection (e) also provides for staggered terms, and for the appointment of directors to serve out the remainder of terms. Directors may continue to serve until their successors are qualified. Subsection (f) provides that the President is to designate a Chairman and Vice Chairman from among the private members. Subsection (g) provides for eight *ex officio* non-voting members. The Act contains no provision concerning the removal of directors.[1]

II. Statutory Interpretation

The determination whether the President has the power to remove a Presidential appointee presents initially a question of statutory interpretation. If the statute is interpreted to reflect an intention to restrict the President's removal power, it is then necessary to reach the constitutional question whether the Congress had the power to do so. Here, we find it unnecessary to reach the constitutional question because we conclude that there is no persuasive evidence of a congressional intent to restrict the President's power to remove the directors of the PADC.

A. Governing Law

In the absence of a provision to the contrary, the power to appoint carries with it the power to remove.[2] Accordingly, if a statute provides for appointment by the President, but is silent on the subject of removal, the President may remove an appointee unless the statutory scheme and legislative history demonstrate that Congress intended implicitly to limit the President's removal power. A statute is silent on the subject of removal if it contains neither an express provision restricting removal nor other provisions relating to the appointee's tenure in office or terms of removal which must be interpreted as intended to restrict the removal power. Provisions for a term, such as the provision for a six-year term in the PADC Act, by themselves, have not been interpreted as intended to restrict the removal power, but rather as limitations on the period for which an appointee can serve without reappointment.[3] A provision for a term, coupled with a provision setting forth the bases for

[1] The bylaws of the Corporation, which appear at 36 C.F.R. §§ 901.1–901.7 (1982), also contain no provision concerning the removal of directors.

[2] James Madison announced this rule during the first session of the First Congress. 1 Annals of Cong. 479 (J. Gales ed. 1789). The courts have consistently upheld the applicability of the 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); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896–97 (1961); *Sampson* v. *Murray*, 415 U.S. 61, 70 n.17 (1974); *National Treasury Employees Union* v. *Reagan*, 663 F.2d 239, 246–48 (D.C. Cir. 1981); *Kalaris* v. *Donovan*, 697 F.2d 376 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983).

[3] *See e.g.*, *Parsons* v. *United States*, 167 U.S. 324, 338 (1897); *Martin* v *Tobin*, 451 F.2d 1335, 1336 (9th Cir. 1971).

removal for cause, may be interpreted as a restriction on the President's removal power.[4]

1. Quasi-judicial or Quasi-legislative Functions

If it is concluded that a statute providing for Presidential appointment is silent on the subject of removal, it is necessary next to determine whether Congress intended implicitly to restrict the President's removal power. The starting point in making this determination is an examination of the functions of the appointee's office. For example, the performance primarily of quasi-judicial functions will support the inference that Congress intended to restrict the President's removal power. *See Wiener* v. *United States,* 357 U.S. 349 (1958); *cf. Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935).[5] The *Wiener* case involved a challenge to the removal of a member of the War Claims Commission. The statute which created the Commission provided for appointment by the President with the advice and consent of the Senate, but was silent on the subject of removal. The Court said that "the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that the Congress vested in the War Claims Commission." 357 U.S. at 353. The Court referred to "the sharp line of cleavage" it had drawn in *Humphrey's Executor* "between officials who were part of the Executive establishment . . . and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government' . . . ." *Id.* at 353. In *Wiener,* the Court relied on the War Claims Commission's performance of adjudicative functions to infer that Congress intended to restrict the President's power to remove its members. 357 U.S. at 356. Because the Commission was established to adjudi-

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[4] In *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), the provision for a term was coupled with a provision for removal for cause; the Court also emphasized legislative history indicating that Congress intended the Federal Trade Commission to be independent of executive control

[5] The Supreme Court cases addressing the President's power to remove persons appointed by him consists of the trilogy of *Myers* v. *United States,* 272 U.S. 52 (1926); *Humphrey's Executor,* 295 U.S. 602 (1935); and *Wiener* v. *United States,* 357 U.S. 349 (1958). *Myers* held that Congress cannot limit the President's power to remove the persons appointed by him by and with the advice and consent of the Senate. *Humphrey's Executor* held that Congress can limit the President's power to remove quasi-judicial and quasi-legislative officers, restricted the scope of Myers to purely executive officers, and left open the question whether and to what extent Congress can limit the President's power to remove those of his appointees who perform neither quasi-judicial, quasi-legislative, nor purely executive functions: "To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise." 295 U.S. at 632. Finally, *Wiener* sustained the restriction on the President's removal power which it held could be inferred from the War Claims Commissioner's performance of adjudicative functions

The *Myers* case is limited to officers appointed by the President by and with the advice and consent of the Senate. *United States* v. *Perkins,* 116 U.S. 483 (1886) held that where Congress vests the appointment power in a Department head under Article II, § 2 of the Constitution, it may limit the removal power. *Myers* did not decide whether *Perkins* applies where the power of appointment is vested in the President alone, because the issue was not before it. It strongly suggested, however, that the question was 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 may be removed by the President at will.

cate according to law, and "one must take for granted" that the statute "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." *Id.* In *Humphrey's Executor,* the Court stated that "the very nature of the Federal Trade Commission duties" require it to "act with entire impartiality . . . . Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." 295 U.S. at 624. *Humphrey's Executor* rested its conclusion that Congress intended to restrict the President's power to remove the Commissioners only in part on the Commission's performance of those functions.

The opinions in *Wiener* and *Humphrey's Executor* do not attempt to define the terms "adjudicatory" or "quasi-judicial and quasi-legislative" with any precision. However, some functions are clearly within the scope of those terms. In *Wiener,* the Court characterized the War Claims Commission's function as "adjudicat[ion] according to law," "that is, on the merits of each claim, supported by evidence and governing legal considerations." 357 U.S. at 355. In *Humphrey's Executor,* the Court pointed to the FTC's function to "exercise the trained judgment of a body of experts 'appointed by law and informed by experience,'" its "duties as a legislative or as a judicial aid," and its responsibilities for "investigations and reports thereon" to Congress. 295 U.S. at 624, 628. The Court also discusses the FTC's adjudicative functions. *Id.* at 628. Thus, the assignment to an official of the performance of quasi-judicial and quasi-legislative functions, at least including "adjudicat[ion] according to law," supports an inference that Congress intended to restrict the President's removal power. Performance of quasi-legislative functions, including substantive rulemaking, *cf. id.* at 624, may not by itself support such an inference, but is some evidence of intent to restrict.

2. Presumption that Officer is Removable

If the statute is silent on removal and the officer performs neither quasi-judicial nor quasi-legislative functions as those terms are used in *Wiener* and *Humphrey's Executor,* the presumption that the President may remove him at will controls. Only strong and unambiguous evidence of congressional intent is an adequate basis for concluding that Congress intended implicitly to restrict the President's removal power. As the Court said in *Shurtleff* v. *United States,* 189 U.S. 311 (1903):

> It cannot now be doubted that in the absence of constitutional or statutory provision the President can by virtue of his general power of appointment remove an officer, even though appointed by and with the advice and consent of the Senate. . . . To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate,

would require very clear and explicit language. It should not be held to be taken away by mere inference or implication.

Id. at 314–15.[6]

Legislative history suggesting that Congress looked favorably on the concept that a particular official would be "independent" of executive control ordinarily will not be enough. The concept of "independence," in the abstract, has connotations that are appealing, and the term is often used in floor debates and legislative history without any specificity as to what precisely is intended. However, "independence" is less attractive if it comes at the cost of accountability. Congress presumably recognizes that an official who is not removable may act beyond the control of elected officials. Perhaps for this reason, the discussion of "independence" during legislative debates often goes no further than the abstract concept and seldom ripens into a clear specification of a legislative intent to make an appointed official non-removable.

Because Congress knows how to provide expressly for restrictions on removal if it chooses,[7] the serious constitutional questions raised by congressional attempts to restrict Presidential removal of such appointees should be avoided unless it is clear that Congress intended squarely to face the constitutional issue and affirmatively desires that an official be independent of and not accountable to the President. The burden of demonstrating intent to restrict the President's removal power is heaviest when the officer performs "purely executive" functions, and an attempt to restrict the power to remove such an officer would be unconstitutional under *Myers*. The burden is also heavy when an officer performs a mixture of executive and other functions, and his functions cannot be described as "predominantly quasi-judicial and quasi-legislative," or where his functions fall in the "field of doubt" between purely executive and quasi-judicial and quasi-legislative functions. A restriction on the President's power to remove such an officer would raise serious and unsettled questions of constitutional law under *Myers*, *Humphrey's Executor* and *Wiener*. *See supra* note 5.

B. Application of the Governing Law

The application of these principles to the PADC Board is straightforward. The Act provides for appointment by the President, but is silent on the subject of removal: there is no express restriction on removal nor is there any legislative history on the subject of removal, and the only provision relating to tenure in office is the provision for a six-year term.[8] As noted, a provision for a term,

[6] In *Shurtleff* the Court concluded that a provision for removal for cause did not constitute such language. In *Humphrey's Executor*, the Court distinguished *Shurtleff* on the ground that the statute there contained no provision for a term. 295 U.S. at 621–23.

[7] *See, e.g.*, 42 U.S.C. § 2996c(e) (Board of the Legal Services Corporation).

[8] The House Report, the only Committee Report submitted with the 1972 legislation, makes no mention of removal of members of the Board. *See* H.R. Rep. No. 1445, 92d Cong., 2d Sess. (1972).

by itself, is not a restriction on removal. Thus, nothing in the Act or its legislative history suggests an intent to restrict the removal power.

Having concluded that the statute is silent on removal, we turn next to an examination of the functions of the PADC Board to determine whether it performs quasi-judicial or quasi-legislative functions. It does neither. In establishing the PADC, Congress found "that it is in the national interest that the area adjacent to Pennsylvania Avenue between the Capitol and the White House," which has been designated a national historic site, "be developed, maintained, and used in a manner suitable to its ceremonial, physical, and historic relationship to the legislative and executive branches of the Federal Government and to the governmental buildings, monuments, memorials, and parks in or adjacent to the area." 40 U.S.C. § 871(a). Congress further found "that to insure suitable development, maintenance, and use of the area and the elimination of blight, it is essential that there be developed and carried out as an entirety plans for this area which will specify the uses, both public and private, to which property is to be put, the programming and financing of necessary acquisitions, construction, reconstruction, and other activities." *Id.* § 871(c). The two chief functions of the PADC under the statute are to develop such a plan and to carry it out. Section 874 governs the content of the redevelopment plan and the procedures for its preparation, approval and revision.[9] Section 875 sets forth the powers conferred on the corporation to carry out the development plan, including the powers to acquire land by, *inter alia*, condemnation proceedings, *id.* § 875(6); to establish by covenants, regulation and otherwise "such restrictions . . . as are necessary to assure development, maintenance, and protection of the development area in accordance with the development plan," *id.* § 875(8); to "borrow money from the Treasury of the United States" as authorized in appropriations acts, *id.* § 875(10); to "contract for and accept gifts or grants or property or other financial aid . . . from any source," governmental or other, *id.* § 875(13); and "utilize or employ the services of personnel of any agency . . . of the Federal Government." *Id.* § 875(21).

As the foregoing review demonstrates, the functions of the Board are neither quasi-judicial nor quasi-legislative within the meaning of *Humphrey's Executor* and *Wiener*. Because there is nothing in the statutory scheme or legislative history to overcome the presumption that the President has authority over such officials whom he appoints, and that the directors are therefore removable at will, we conclude that the President may remove the directors of the PADC.

III. Conclusion

The Act provides for appointment of the directors of the PADC Board by the President, but is silent on the subject of removal: no provision in the Act

[9] The plan must include, *inter alia*, the types of uses permitted, criteria for design of buildings and open spaces, an estimate of the re-use values of the properties to be acquired, a determination of the marketability of the development, and the procedures for insuring continuing conformance to the development plan. *Id.* at § 874(a).

expressly restricts the President's removal power, nor is there any provision bearing on the directors' tenure in office or terms of removal which must be interpreted as intended to restrict the President's removal power. Moreover, because the PADC Board's functions are neither quasi-judicial nor quasi-legislative as those terms are used in the Supreme Court cases addressing the President's removal power, no inference can be drawn from the functions assigned to the Board that Congress intended implicitly to restrict the removal power. In these circumstances, a presumption arises that the President may remove his appointees at will. As our discussion of the PADC Act and its legislative history have demonstrated, there is nothing in either that history or the statutory scheme to overcome this presumption. We therefore conclude that the directors of the PADC may be removed by the President at will.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Restrictions on a Federal Appointee's Continued Employment by a Private Law Firm

Federal conflict of interest laws, 18 U.S.C. §§ 202–209, and Department of Justice Standards of Conduct, 28 C.F.R. pt. 45, restrict the private practice of law by an attorney while employed by the Department of Justice.

If the attorney is hired as a "regular government employee," *i.e.*, expected to serve more than 130 days in any 365–day period, he will be prohibited from acting as an agent or attorney for anyone other than the United States in any matter in which the United States is a party or has a direct and substantial interest, and from receiving compensation for services rendered by himself or another in such matters. In addition, Department regulations prohibit the outside practice of law by Department of Justice employees, in the absence of a waiver.

If the attorney is hired as a "special government employee," *i.e.*, expected to serve 130 days or less in any 365–day period, he will be subject to representation and compensation restrictions only with respect to matters in which he has participated personally and substantially while in government or which are pending in the Department of Justice. The Department's regulation prohibiting the outside practice of law does not apply to special government employees.

Under 18 U.S.C. § 208 all government employees must disqualify themselves from participating for the government in any matters in which they or their employers, among others, have a financial interest.

August 1, 1983

Memorandum Opinion for the Associate Attorney General

We have been asked to advise you whether, from the perspective of conflict of interest and professional ethics, Mr. A may continue as a member of his law firm once he has been employed by this Department as General Counsel to the President's Commission on Organized Crime. We understand that Mr. A is presently a senior partner at a law firm, and that he proposes to remain in the employ of that firm on a salaried basis through December 1983. We understand that Mr. A expects to be working on essentially three major matters for the firm during this period. Two of those matters do not involve the United States. The third involves his continued representation of domestic steel producers in steel dumping cases. At the same time that Mr. A is handling these private matters for the law firm, he proposes to serve in the Department without federal compensation. We understand that during this period the Department would hire Mr. A as a consultant pursuant to 5 U.S.C. § 3109.[1] Mr. A's proposed employment status after December 31, 1983 has not been described to us, but we presume that he will continue to serve, in some capacity, in the Department. After December 31, 1983, Mr. A believes he will be in a position to adjust his relationship with the firm.

In general, we conclude that the ultimate decision in this matter involves findings of fact which this Office is not in a position to make. We will therefore describe to you the factual test that you should apply and the legal consequences of the two alternative factual outcomes. More specifically, our conclusions can be summarized as follows:

> (1) If Mr. A will be a regular government employee (*i.e.*, expected to serve more than 130 days in any period of 365 days), his proposed dual employment will present significant and probably insurmountable problems under the conflict of interest statutes and the Department's Standards of Conduct.
>
> (2) If Mr. A will be a "special government employee" (*i.e.*, expected to serve 130 days or less during any period of 365 days) his proposed dual employment can be accomplished without violating the statutes or regulations.
>
> (3) In either event, the Department should consider as a policy matter whether it wishes to permit an employee to serve simultaneously in a private law firm and in this Department and it should reach an understanding with Mr. A concerning various areas where issues of impropriety (actual or apparent) may arise.

I. Rules Applicable To Regular Government Employees

If Mr. A is deemed to be a regular government employee, he will be subject to the full restrictions of the Federal conflict of interest statutes, 18 U.S.C. §§ 202–209, and this Department's Standards of Conduct, 28 C.F.R. Part 45. Among other things, this will mean that Mr. A will be prohibited from acting as agent or attorney for anyone other than the United States in any particular matter in which the United States is a party or has a direct and substantial

[1] We have left it to the Justice Management Division to determine whether it is appropriate to hire Mr. A as a consultant in this context, and we will likewise leave the administrative aspects of his appointment to their charge. *See generally* Decisions of the Comptroller General, B-192406 (Oct. 12, 1978) (dealing with the hiring of lawyers under 5 U.S.C. § 3109); B-114868–18 (Feb. 10, 1978) (same).

We also have considered the legality of this Department's acceptance of Mr. A's voluntary services in light of 31 U.S.C. § 1342. In our view, it is appropriate for this Department to accept the voluntary services of Mr. A in this context because 1) he will be serving as a consultant under 5 U.S.C. § 3109, a position for which there is no minimum salary set by law and 2) he will execute a document clearly indicating that he waives any right to compensation from the United States for his services through December 1983. *See generally* "Employment Status of 'Volunteers' Connected With Federal Advisory Committees," 6 Op. O.L.C. 160 (1982). If Mr. A is unwilling to execute such a document, the Department may not accept his voluntary services.

interest. *See* 18 U.S.C. § 205. In addition, he would be prohibited from receiving compensation for services rendered by himself or another in such matters. *See* 18 U.S.C. § 203. As we see it, these provisions will effectively bar Mr. A from his proposed participation in the steel dumping cases on behalf of the private clients. *See also* 28 C.F.R. § 45.735–9 (prohibiting the outside practice of law by Department of Justice employees, absent a waiver by the Deputy Attorney General or the presence of other factors not relevant here).[2]

Although there are, of course, other conflict of interest and ethical restrictions that would apply to Mr. A as a regular government employee, we have not undertaken a full description of them in this memorandum. If you find that Mr. A will in fact be a regular government employee, and you are inclined to pursue his dual employment proposal despite the restrictions described above, we will provide you with materials that describe more fully the ethics requirements for regular Department of Justice employees.

II. Rules Applicable to Special Government Employees

The conflict of interest statutes impose fewer and less rigorous restrictions on certain short-term or intermittent employees called "special government employees." If Mr. A meets the test for special government employment described below, he would be subject only to these less rigorous restrictions and he would not be faced with statutory requirements that are necessarily and substantially inconsistent with his dual employment proposal.

As a special government employee, Mr. A would be subject to the representation and compensation restrictions of 18 U.S.C. §§ 203 and 205 only with respect to matters (1) in which he has participated personally and substantially while in government; or (2) which are pending in the Department of Justice.[3] *See* 18 U.S.C. §§ 203, 205. See also 18 U.S.C. § 209 (exempting special government employees from its restriction on private sources of compensation for services rendered to the government). Similarly, the Department's regulation restricting outside professional practice does not apply to special government employees. *See* 28 C.F.R. § 45.7359(b).

In addition to the limited application of §§ 203 and 205, as a special government employee Mr. A would also be subject to the full disqualification rule of

[2] It is not necessary at this point, regardless of the findings of fact made, for us to reach the question of whether Mr. A would qualify for a waiver of the Department's regulation. If you decide Mr. A will be a regular government employee and that the obstacles of 18 U.S.C. §§ 203 and 205 can be overcome, we would be happy to provide the Deputy Attorney General with whatever assistance he requires in considering a possible waiver.

[3] This latter restriction would not apply until Mr. A had actually served in the Department for sixty-one days. *See* 18 U.S.C. §§ 203(c) and 205. The Department has not generally viewed matters in litigation before federal courts to be pending in this Department, but we do consider investigative matters and other pre-litigation matters (such as administrative tort claim determinations) to be pending in the Department for purposes of these statutes. In light of these precedents, we would be reluctant to assert that contact by Mr. A with this Department relating to the steel cases would violate §§ 203 or 205. Nonetheless, we would encourage you as a matter of discretion to limit the extent of Mr. A's direct contact with Department officials on these cases during the tenure of his government employment.

18 U.S.C. § 208.[4] Section 208 requires employees (including special government employees) to disqualify themselves from participating for the government in any matters in which they or, among others, their employers have a financial interest. So long as Mr. A maintains an employment relationship with his law firm, he would have to disqualify himself from any government matters in which the firm has a client or other financial interest.[5] Given the limited subject matter of his proposed duties, we would not anticipate that this restriction will present any significant obstacle to Mr. A's dual employment proposal.[6]

III. Test for Special Government Employment

The term "special Government employee" is defined to include "an officer or employee of the executive or legislative branch of the United States Government . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days in any period of three hundred and sixty-five days, temporary duties either on a full time or intermittent basis." 18 U.S.C. § 202. To be so appointed, the Department must in good faith estimate in advance of appointment that the individual will serve for no more than 130 days in the succeeding 365–day period, beginning on the day of appointment. In estimating the number of days to be served, the Department must count as a full day any day (including Saturday, Sunday or holiday) during which any time is expected to be devoted to performing government duties. *See* Federal Personnel Manual, Ch. 735, Appendix C.

The test for special government employment, of course, must be applied without regard to any preferred result. In this case, you must consider Mr. A's anticipated employment *through August of 1984*. Although we understand that Mr. A's plans beyond December 1983 may be somewhat vague, this fact does not relieve you of responsibility for making a good faith estimate of his employment for the entire 365–day period.

As a general matter, employees are presumed to be regular government employees unless their appointing Department is comfortable with making an estimate that the employee will be needed to serve 130 days or less. The 130–day standard can be met because (1) the length of employee's entire tenure with the government will be less than 130 days; (2) the employee is expected to

[4] Mr. A will also be subject to the post-employment restrictions of 18 U.S.C § 207(a) and (b). These post-employment restrictions will be specific to Mr. A's work and responsibilities. In addition, he will be subject to the Department's Standards of Conduct, 28 C.F.R. Part 45 and the Code of Professional Responsibility of the American Bar Association. We will be available to provide specific ethics and post-employment advice to Mr. A upon request.

[5] This Department ordinarily requires disqualification from any matter in which the law firm represents a client having such a financial interest, even though the financial interest in the matter may actually belong to the client rather than the firm.

[6] Our anticipation in this regard must be evaluated in the context of our limited knowledge and understanding of the subject matter of Mr. A's proposed duties. Mr. A's firm is a well-known firm that represents essentially Fortune 500 companies. Your office should consider, based upon your expertise in these matters, to what extent Mr. A's clients would potentially be involved. In order to accomplish this consideration, Mr. A should probably be required to provide whatever listing of clients would be helpful.

serve only intermittently over a period of more than 130 days; or (3) some combination of the above. Although it is possible that the proposed duties will not continue for the full three years presently anticipated, we think that you must presume that they will. Accordingly, you must presume that Mr. A will be needed to serve for the full 365–day period relevant for purposes of the special government employee test. This means that Mr. A would only qualify as a special government employee, if you can estimate, in good faith, that the Department's need for his services will be so intermittent that they will not involve more than 130 days, in whole or in part, during any 365–day period. In making this factual determination you should rely on your own view of the needs of the Department, rather than on the employee's views of the time he will devote to the job. You should bring to the decision your own knowledge of the nature of the work, and the Department's expectations. You should also consult with the relevant Department officials about their expectations for the work to be preferred.

IV. Other Considerations

Assuming that you are satisfied that Mr. A's dual employment proposal can be compatible with the statutes described above, you should also consider the proposal from a policy perspective. As you know, the Department normally requires its lawyers to sever all connections with law firms. *See* 28 C.F.R. § 45.735–9. We assume that this policy represents an attempt to avoid actual and apparent conflicts of interest, and a desire to demand the undivided professional attention of the Department's lawyers. Although the latter policy may be less compelling in a case like this where the employee's services may indeed be needed only in a part-time capacity, the concern about actual or apparent impropriety persists. For this reason, we would recommend, if you go forward with the dual employment proposal, that you reach an understanding with Mr. A concerning limiting his contacts with this Department on behalf of private clients — for example, that he would not participate in settlement discussions in the steel cases nor attempt to garner the Department's support of legislation that would benefit domestic steel producers.

Although no such problems may in fact arise, it would be prudent to anticipate and avoid them to the extent feasible.[7]

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

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[7] Along the same lines, you should reach some understanding with Mr. A concerning the problem of using support services and legal research assistance from his law firm. As you know, this Department does not have statutory authority to accept gifts, and any donation of such services by the law firm would constitute an unauthorized augmentation of this Department's appropriations. *See generally* General Accounting Office, *Principles of Federal Appropriations Law* 5–62, 5–94 (1982). Moreover, use of the firm's associates and support staff would constitute a greater commingling of the firm and the Department than we have contemplated in this opinion, and may well extend the potential for conflicts of interest beyond simply those cases handled by Mr. A himself.

Proposed Legislation to Grant Additional Power to The President's Commission on Organized Crime

The President's Commission on Organized Crime, a Presidential advisory committee with members from the Legislative and Judicial Branches, may be granted subpoena power without violating the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, or the Incompatibility Clause, *id.*, art. I, § 6, cl. 2. As statutory aids to its investigation, the Commission should also seek the power to administer oaths and to have false statements punished as perjury.

Constitutional and policy concerns militate against seeking independent authority for the Commission to enforce subpoenas by holding individuals in contempt, or to grant use immunity. The power to grant use immunity raises questions about the Commission's advisory role and the propriety of service by members of the Legislative and Judicial Branches.

August 24, 1983

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

On July 28, 1983, President Reagan established the President's Commission on Organized Crime (Commission), as an advisory committee under the Federal Advisory Committee Act (FACA), 5 U.S.C. app. I. *See* Exec. Order No. 12435, 48 Fed. Reg. 34723 (1983). Its duties are purely investigatory in nature, and will culminate in a final report to the President and the Attorney General.[1] The Commission's membership includes a federal judge, two members of Congress and numerous private citizens.[2]

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[1] As stated in § 2(a) of the Executive Order:

The Commission shall make a full and complete national and region-by-region analysis of organized crime; define the nature of traditional organized crime as well as emerging organized crime groups, the sources and amounts of organized crime's income, and the uses to which organized crime puts its income; develop in-depth information on the participants in organized crime networks; and evaluate Federal laws pertinent to the effort to combat organized crime. The Commission shall advise the President and the Attorney General with respect to its findings and actions which can be undertaken to improve law enforcement efforts directed against organized crime, and make recommendations concerning appropriate administrative and legislative improvements and improvements in the administration of justice.

[2] *See* Leslie Maitland Werner, *President Chooses 20 as Members of Organized Crime Commission*, N.Y. Times, July 19, 1983, at A1, col. 2. The members include Judge Irving R. Kaufman, Senator Strom Thurmond, Representative Peter W. Rodino, Jr., former Supreme Court Justice Potter Stewart, as well as sixteen other individuals drawn from outside the federal government. As this office has stated on many occasions, member of Congress and federal judges may sit on purely advisory committees without violating either the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, or the Incompatibility Clause, *id.*, art. I, § 6, cl. 2. Membership on a purely advisory committee does not constitute holding an "Office" under the Constitution because such committees possess no enforcement authority or power to bind the Government. *See* 26 Op. Att'y Gen. 247 (1907); 24 Op. Att'y Gen. 12 (1902); 22 Op. Att'y Gen. 184 (1898); H.R. Rep. No. 2205, 55th

Continued

Pursuant to your request, this memorandum addresses the issue of what additional powers the Commission might seek from Congress as aids to its investigation. Of the five that have been suggested — the power to issue subpoenas, to administer oaths, to hold individuals in contempt, to grant individuals immunity, and to have false statements to the Commission be subject to prosecution for perjury — we believe that the Department should only seek the powers to issue subpoenas and administer oaths and to have false statements punished as perjury.

I. The Power to Issue Subpoenas and Administer Oaths

A subpoena is a formal demand that instructs an individual to produce either testimonial or documentary evidence.[3] Some have suggested that the grant of subpoena powers will in some fashion preclude the Commission from being a purely advisory body. We disagree. As discussed below, the subpoena power has been used by all three branches of the Government and by the public as an investigative tool. Issuing a subpoena is not a purely executive function which may only be exercised by officers of the Government nor is it a coercive or adjudicatory power that may only be exercised by the judiciary. Rather, it is a power that may be granted to those authorized to investigate, regardless of their other functions.

Subpoena power has been granted to groups and individuals in many contexts. These include investigations conducted by members of all three branches of the Government, *i.e.*, Congress, 2 U.S.C. § 190m, the Judiciary, 43 U.S.C. § 1619(d)(8), and Executive Branch agencies, 49 U.S.C. § 12(1), as well as civil suits where any party may request one. Fed. R. Civ. P. 45.[4] Historically, the power has also been given to some Presidential commissions.[5]

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[2] (. . . continued)
Cong., 3d Sess. 48–54 (1899); E. Corwin, *Presidential Power and the Constitution* 73–74 (R. Loss ed. 1977). For the discussion of judges serving in the Executive Branch in more than advisory capacities, *see Independence of Judges: Should They Be Used for Non-Judicial Work?*, 33 A.B.A.J. 792 (1947). *See also* 40 Op. Att'y Gen. 423 (1945); Memorandum for Ramsey Clark, Assistant Attorney General, Lands Division from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (Nov. 27, 1963) ("Whether the President should call upon Federal judges to engage in nonjudicial functions for the Federal Government is basically a matter of policy."). Ironically, the very absence of an Incompatibility Clause for judges makes them more vulnerable than Congressmen to criticism. Because they are able to accept positions in the Executive Branch, the public's attention is focused on the issue and questions are raised about whether the independence of the judiciary is being compromised.

[3] *See, e.g.*, 7 U.S.C. § 2717 (investigation of egg production by the Secretary of Agriculture) ("For the purpose of such investigation, the Secretary is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, and documents which are relevant to the inquiry.").

[4] Originally, the courts resisted congressional grants of subpoena power to agencies, *see In re Pacific Ry. Comm'n*, 32 F. 241 (N. Cir Ca. 1887), and for many years the Supreme Court read the grants restrictively. *Jones v. SEC*, 298 U.S. 1 (1936); *FTC v. Baltimore Grain*, 267 U.S. 586 (1924). This attitude began to change in the 1940s, however, and it is now firmly settled that agencies may issue investigatory subpoenas that will be enforced by the courts if the investigation is authorized and the information sought is relevant. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209 (1946). *See generally* 3 B. Mezines, J. Stein, J. Gruff, *Administrative Law* § 20.01 (1982) (Mezines); K. Davis, *Administrative Law Treatise* (1958) (Davis).

[5] Mezines, *supra* note 4, § 19.01, at 192 n.2; *infra* notes 7, 8.

The reason that subpoena powers may be granted to so many diverse groups without running afoul of either the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, or the Incompatibility Clause, *id.*, art. I, § 6, cl. 2, or the general doctrine mandating separation of powers, is two-fold. First, the subpoena power is not tied to any particular branch; it is not one of the functions described by the Supreme Court as lodged exclusively in either the Executive, the Judiciary or Congress. *Buckley* v. *Valeo,* 424 U.S. 1, 137–41 (1976). Second, the power to issue a subpoena has not been viewed as the exercise of a coercive power; thus, no matter what the issuing agent finds out, it cannot, in the absence of any other power, use the information to *do* anything, such as enact or execute a law, adjudicate a dispute, or otherwise "take any affirmative action which will affect an individual's rights." *Hannah* v. *Larche,* 363 U.S. 420, 441 (1960) (describing powers of the Civil Rights Commission). Thus, the power to issue a subpoena does not intrude upon either the powers of a particular branch or the legal rights of an individual. Although the document issued is styled as a command, the issuing authority is in fact dependent upon the courts for enforcement:

> Though often complied with — to earn good will, for other tactical reasons, or out of ignorance that no obligation has yet attached — an agency subpoena typically has no independent force . . . . The obligation to respond is determined only upon judicial review of the underlying order.

W. Gellhorn, C. Byse, P. Strauss, *Administrative Law* 553–54 (1979). It is only when we reach the issue of actually enforcing subpoenas, discussed below, that constitutional issues about functions reserved to the individual branches arise.

Therefore, this Office has, on more than one occasion, approved the grant by Congress of subpoena powers to Presidential commissions that are purely advisory in nature and that have members of the Legislative or Judicial Branch on them. For example, in 1963 this Office approved a bill establishing the Commission on Political Activity of Government Personnel, 5 U.S.C. App. § 118i note (Supp. II 1965–66), a commission composed of at least four congressmen and two members of the Executive Branch and charged with investigating federal laws that limited political activity by federal employees. Pub. L. No. 89–617, §§ 2, 7, 80 Stat. 868 (1966).[6] The Commission was granted subpoena powers, id. § 8(a), and we were specifically asked whether the presence of congressmen created any legal problems. Our response was clear: "We are not aware of any grounds, based upon legal, constitutional or policy considerations, upon which to question the provisions of § 8(a)." Memorandum for Nicholas deB. Katzenbach, Deputy Attorney General from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (Dec. 20, 1963).[7]

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[6] Memorandum for Nicholas deB. Katzenbach, Deputy Attorney General from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (May 1, 1963).

[7] In passing, we pointed out two similar commissions that had had subpoena powers — the Hoover Commission, and the Commission on Intergovernmental Relations. *See* Pub. L. No. 83–184, 2, 3, 67 Stat.

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We have reached the same conclusion where the Commission includes members of the Judiciary, such as the Warren Commission.[8] Memorandum for J. Lee Rankin, General Counsel, The President's Commission from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (Jan. 16, 1964). An earlier commission headed by a judge was the Commission to Investigate the Japanese Attack of December 7, 1941, on Hawaii, chaired by Associate Justice Owen J. Roberts. Exec. Order No. 8983, 3 C.F.R. 1046 (1938–1943 Comp.); Pub. L. No. 77–370, 55 Stat. 853 (1941) (granting subpoena powers). See also National Commission on the Causes and Prevention of Violence, Exec. Order No. 11412, 3 C.F.R. 726 (1966–70 Comp.); Pub. L. No. 90–338, 82 Stat. 176 (1968) (Judge A. Leon Higginbotham, Jr.).

We believe, therefore, that it is permissible for the Department to seek subpoena powers for the Commission. There is no difficulty with the members of the Commission also being given the power to administer oaths. This is commonly included when Congress grants the power to issue subpoenas.[9] The power to administer oaths is useful not only in creating an air of serious purpose but also in bringing perjury charges.

II. The Power to Enforce Subpoenas by Holding an Individual in Contempt

When an individual refuses to comply with a subpoena, an agency must go to court, represented either by agency lawyers or by the Attorney General, to have it enforced.[10] We do not believe that the Department should seek independent contempt authority for the Commission — *i.e.*, legislation that would permit

[7] (. . . continued)
142, 143 (1953) (Commission on the Organization of the Executive Branch of the Government); Pub. L. No. 83–185, § 2, 67 Stat. 145 (1953). *See also* President's Commission on the Accident at Three Mile Island, Exec. Order No. 12130, 3 C.F.R. 380 (1980 Comp.); Pub. L. No. 96–12, 93 Stat. 26 (1979) (granting subpoena powers); Commission on Security and Cooperation in Europe, 22 U.S.C. § 3001 (1976); National Commission on Electronic Fund Transfers, 12 U.S.C. § 2401 (1976); Commission on Federal Paperwork, 44 U.S.C. § 3501 note (1976); Commission on Government Procurement, 41 U.S.C. § 251 note (1970); Committee to Investigate Federal Expenditures, 26 U.S.C. § 3600 (1946); Temporary National Economic Committee, Pub. L. No. 75–456, 52 Stat. 705 (1938).

[8] The Warren Commission was formally known as the Commission to Report Upon the Assassination of President John F. Kennedy, Exec. Order No. 11130, 3 C.F.R. 795 (1959–63 Comp.). Subpoena powers were granted in Pub. L. No. 88–202, 77 Stat. 362 (1963).

[9] *See, e.g.*, 25 U.S.C. § 174 note (1976), where the American Indian Policy Review Commission is granted the power:

> to administer such oaths and affirmations and to take such testimony . . . as it deems advisable . . . . The Chairman of the Commission or any member thereof may administer oaths or affirmations to witnesses.

Id.; Pub. L. No. 93–580, § 3(a), 88 Stat. 1910 (1975).

[10] As a general rule, application is made to the judge for an order directing the subpoenaed individual to comply. W. Gellhorn, C. Byse, P. Strauss, *Administrative Law* 573 (1979). If that order is ignored, a separate proceeding is held to determine whether the individual should be held in contempt for failure to obey the court order. *Id.* Some statutes compress these two steps into a one-stage proceeding in which the agency certifies to the court that its subpoena has been disobeyed; then the court is supposed to hold a summary hearing to determine if this is true and, if so, to punish as for contempt of court. *Id.* at 575. "In actuality, the courts behave under these statutes just about as they do in the two-stage proceedings discussed earlier." *Id.*

the Commission to hold individuals in contempt on its own motion — because of both constitutional and policy objections.

In 1894, the Supreme Court stated that the Interstate Commerce Commission could not, consistent with due process, enforce its own subpoenas by being given the power to commit or fine people for disobedience. *ICC* v. *Brimson,* 154 U.S. 447 (1894). *Brimson* involved the issue of whether Congress had the authority to authorize the ICC to enforce its subpoenas in court. In concluding that it did, the Court appeared to say that in fact only the courts could enforce the subpoenas:

> The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administration or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson* v. *Dunn,* 6 Wheat. 204, and in *Kilbourn* v. *Thompson,* 103 U.S. 168, 190, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See *Whitcomb's Case,* 120 Mass. 118, and authorities there cited.

Id. at 485. Since then, Congress has consistently required agencies to apply to the courts for an order to compel compliance with a subpoena. It has "never" conferred the power to enforce a subpoena on an issuing agency. L. Jaffe & N. Nathanson, *Administrative Law* 439 (1976). Thus, there has been no occasion for the Court to re-examine the issue of whether the *dictum* in Brimson is still good law.

There has been continuing debate on the issue among the commentators.[11] *Brimson's* analysis appears to rest upon the idea "that the contempt power is necessarily judicial, and [yet] the Supreme Court has unanimously held that legislative bodies may punish for contempt."[12] One commentator has noted

[11] *See* Davis, *supra* note 4, at 214–15; Note, *Use of Contempt Power to Enforce Subpoenas and Orders of Administrative Agencies,* 71 Harv. L. Rev. 1541 (1958).

[12] Davis, *supra note 4, at 214 (citing Jurney* v. *MacCracken, 294 U.S. 125 (1935) and McGrain* v. *Daugherty, 273 U.S. 135 (1927)).*

that grants of contempt power to both Congress and the courts are grounded in expediency, not in the particular nature of the power:

> The power of contempt is said to inhere in courts only because they must have it to perform their functions. The judicial extension of the power to Congress was justified solely on grounds of expediency. To the extent, therefore, that the agency requires the contempt power for the proper performance of its duties, the theoretical argument seems as strong as that which justifies the existence of the contempt powers of the other branches of government.

Note, *Use of Contempt Power to Enforce Subpoenas and Orders of Administrative Agencies,* 71 Harv. L. Rev. 1541, 1551 (1958) (footnotes omitted). At least one federal court, irritated by the delay engendered by resistance to agency subpoenas, has criticized the continued denial of contempt power to federal agencies.[13] The fact remains, however, that *Brimson* is the Supreme Court's last word on the subject and in that case the Court did distinguish Congress' contempt power as being rooted in the Constitution and historical precedent.

Although modern legal theory is less hostile to agency action than when *Brimson* was decided, there is at the same time more sensitivity to arguments that due process requires that the prosecutor not also be the judge.[14] We are reluctant to advise that it is permissible to seek contempt authority for the Commission. This is especially true when there is no need to press for this extraordinary power. Other Presidential commissions, charged with equally important tasks, have been able to rely on the courts to enforce their subpoenas. Likewise, federal agencies have functioned to Congress' satisfaction for decades without this power. Moreover, there are policy objections to seeking the authority. Requesting contempt power would be very controversial, endangering the Department's ability to secure the most important part of the legislation — the subpoena power. Traditional notions of fair play and substantial justice, as well as concerns about the separation of powers, tend to militate against, at least on policy grounds, granting such a power to a Commission composed, as this one is, of members from all three branches of the federal government.

In fact, over the years Congress has decided that agencies should not have the power, perhaps in part due to a concern that agencies will misuse it, as the judiciary and legislatures themselves at times have done.[15] As Justice Frankfurter observed:

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[13] *Federal Maritime Comm'n* v. *New York Terminal Conference,* 373 F.2d 424 (2d Cir. 1967). Judge Friendly said:

> Congress might well consider whether the long record of frustrations and less restrictive modern notions of the separation of powers might not make it wise to empower at least some administrative agencies to enforce subpoenas without having to resort to the courts in every case.

Id. at 426 n.2 (citations omitted). Some states have given their agencies the power to punish for contempt while others have denied it. Davis, *supra* note 4, at 215.

[14] *See, e.g., Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972); *Morrissey* v. *Brewer,* 408 U.S. 471, 485–86 (1972).

[15] *See, e.g., Holt* v. *Virginia,* 381 U.S. 131 (1965) (state court); *Groppi* v. *Leslie,* 404 U.S. 496 (1972) (Wisconsin legislature).

Beginning with the Interstate Commerce Act in 1887, it became a conventional feature of Congressional regulatory legislation to give administrative agencies authority to issue subpoenas for relevant information. Congress has never attempted, however, to confer upon an administrative agency itself the power to compel obedience to such a subpoena. It is beside the point to consider whether Congress was deterred by constitutional difficulties. That Congress should so consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance.

Pennfield Co. v. *SEC*, 330 U.S. 585, 603–04 (1947) (Frankfurter, J., dissenting) (*dictum*). It is unlikely that Congress, having denied the power to permanent agencies — including those with quasi-judicial functions — for almost one hundred years, is going to confer such power on a temporary advisory commission. Requesting the authority would suggest to Congress either a disquieting ignorance of historical precedent or a presumptuous disregard of it. We do not believe the Department should ask Congress to grant contempt power to the Commission.

III. The Power to Grant Immunity

It has also been suggested that the Department ask that the Commission be given the power to grant "use" immunity.[16] We assume that this would be done by adding the Commission to the list of authorized agencies in 18 U.S.C. § 6001(1).[17] Authorized agencies may, with the approval of the Attorney General, issue an order to an individual who is claiming his Fifth Amendment privilege, requiring him to testify.[18] Information derived from such testimony is barred from use against the witness in any criminal case.

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[16] "Use" immunity provides immunity from prosecution based on the compelled testimony or evidence derived from that testimony, as distinguished from "transactional" immunity, which grants full immunity from prosecution of the offense to which the compelled testimony relates Use immunity was found to be coextensive with the Fifth Amendment's guarantee against self-incrimination in *Kastigar* v *United States*, 406 U.S. 441 (1972).

[17] Congress enacted the present immunity statute in 1970. 18 U.S.C. §§ 6001–6005. Authorized agencies are the basic executive and military departments, 5 U.S.C. §§ 101, 102, and about fifteen other agencies. 18 U.S.C. § 6001(1).

[18] 18 U.S.C. § 6004 provides.

> (a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination. Such order to become effective as provided in section 6002 of this part.
>
> (b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment —
>
> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination

Although the grant of use immunity to witnesses has been described as an executive function by some courts,[19] it is not clearly executive in the sense described in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), because rather than being a power committed wholly to the Executive Branch, it is a statutory creation that has also been given to Congress and its committees. 18 U.S.C. § 6005.[20] The power to grant immunity is, however, a function that raises doubts about the Commission's role and the propriety of service on it by members of the legislature. As noted above, *see supra* note 2, we have described advisory committees as those that do not have the power to bind the Government. The power to grant use immunity is the power to bind the Government not to prosecute an individual for criminal conduct revealed through his testimony. Although it may not be an executive function for Congress to grant immunity for testimony heard pursuant to a legislative investigation, it may be an executive function for the Commission to grant immunity to witnesses in the course of an Executive Branch investigation. Executive functions may be performed only by officers of the government — which Congressmen may not be. Were a court to conclude that the Congressmen were without authority either to sit on the Commission or to vote on the grants of immunity, the work of the Commission could be imperiled. A court might nullify grants of immunity or restrict the Congressmen's role on the Commission. The same arguments can be made with respect to judges because the judiciary has neither inherent nor statutory power to grant immunity for judicial investigations.

The power to grant immunity is inevitably tied to prosecutorial decisions. This is especially true when the Commission is charged with investigating an area of special concern to federal prosecutors, such as organized crime. If, as seems likely, the Commission calls as a witness someone who has evidence of a crime or is the target of an ongoing criminal investigation, there are several ways a grant of immunity by the Commission might interfere with the Department's ability to prosecute. Most obviously, granting immunity could deprive the Department of a desired conviction by immunizing the witness. Given the current trend towards complicated, multi-year undercover operations, the Attorney General's statutory veto power, 18 U.S.C. § 6004(b), does not solve the problem. Even refusing to concur may alert an individual to the fact that he is the target of an ongoing or proposed investigation. Moreover, given the Commission's advisory nature, there is much less chance that there will be effective coordination with the Department's many units, scattered across the country, in order to avoid entanglement with such investigations. That the Department may have built a complete case without the compelled testimony — and, therefore, still be able to prosecute — is small comfort

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[19] *See United States* v. *D'Aspice*, 664 F.2d 75, 77 (5th Cir. 1981) (judiciary has no inherent power to grant use immunity); *United States* v. *Lenz*, 616 F 2d 960, 962 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980)

[20] The immunity statute covers only use immunity. If the statute granted transactional immunity, there would be a serious constitutional problem. Granting transactional immunity means that the individual cannot be prosecuted for the illegal conduct. We believe that the decision to grant transactional immunity is essentially a decision not to prosecute, and the decision whether to prosecute is an executive function in the *Buckley* sense. 424 U.S. at 138.

because the individual will undoubtedly try to prove that the case is derived from the compelled testimony and the burden of proof will be on the government to show the independent derivation of the case. *See, e.g., United States* v. *Provenzano,* 620 F.2d 985, 1005 (3d Cir.), *cert. denied,* 449 U.S. 889 (1980). Thus, a straightforward prosecution could suddenly be jeopardized by the intrusion of an unnecessary hurdle. We believe that this issue should be carefully reviewed before any final decision is made.

The same policy rationale that argues against seeking contempt powers also argues against seeking immunity. The power to grant immunity is an extraordinary tool given to a small core group of Executive Branch agencies, whose use should be carefully guided by consideration of potential or ongoing investigations. Obviously, the Commission might discover more if given the right to grant immunity; nevertheless, other Presidential commissions have done their work satisfactorily without it, and its availability seems unnecessary in light of the Commission's generally phrased task. We would strongly urge that the Department not seek the power to grant immunity for the Commission.

IV. Prosecution for Perjury

There are presently two general statutes covering perjury and subornation of perjury. 18 U.S.C. §§ 1621, 1622.[21] Although these two statutes are occasionally incorporated by reference in statutes dealing with particular programs, *see, e.g.,* 30 U.S.C. § 49e; 8 U.S.C. § 1357(b), they may also be referred to by implication where, for example, a specific statute will merely say that the "person so falsely swearing shall be deemed guilty of perjury." 46 U.S.C. § 170(13). *See also* 22 U.S.C. § 4221. Other statutes set up their own punishments for false statements. See 18 U.S.C. § 1546. Which course to adopt would appear to be a policy choice but we would suggest that the litigating divisions, especially the Criminal Division, be consulted. If it is decided to rely on the general perjury statute, we are not aware of any reason why the Commission

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[21] 18 U.S.C. § 1621 states:

Whoever —

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1622 states:

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

See also 28 U.S.C. § 1746 (making unsworn statements subject to punishment for perjury).

would not fall within the category of "competent tribunal."[22] Nevertheless, we recommend that any proposed legislation include a specific provision referring to 18 U.S.C. § 1621 to eliminate any doubt that the general statute applies.[23]

V. Possible Phrasing of Legislation

Grants of subpoena power vary, both in specificity and in the limits placed upon the grants.[24] The basic grant, which also includes the administration of oaths, is often phrased in terms similar to the following:

> The Commission shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation by the Commission. The Commission or any member of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing.

The next paragraph will generally cover the contempt power.

> In case of contumacy or refusal to obey a subpoena issued to any person under the previous paragraph, any district court of the United States, upon application by the Attorney General, shall have jurisdiction to issue to such person an order requiring a witness to appear before the Commission or its members, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by the court as a contempt thereof.

This basic formula can be varied in many ways: by permitting individual Commission members, when authorized, to issue subpoenas;[25] by limiting the subpoena to witnesses only, not documents;[26] by expanding the courts to which

[22] Testimony before investigative committees has often resulted in perjury convictions. *See United States* v. *Haldeman*, 559 F.2d 31, 102–04 (D.C. Cir. 1976) (Senate Select Committee on Presidential Campaign Activities), *cert. denied*, 431 U.S. 933 (1977); *Meyers* v. *United States*, 171 F.2d 800, 811 (D.C. Cir. 1948) (Senate subcommittee), *cert. denied*, 336 U.S. 912 (1949); *Boehm* v. *United States*, 123 F.2d 791, 800–01 (8th Cir. 1941) (SEC), *cert. denied*, 315 U.S. 800 (1942); *State* v. *Reuther*, 81 So. 2d 387, 388–89 (La. 1955) (Special Citizens Investigating Committee).

[23] Competence may also be affected by procedural requirements. For example, for a legislative committee to be competent, a properly constituted quorum must be present. *See Christoffel* v. *United States*, 338 U.S. 84 (1949); *United States* v. *Reincke*, 524 F.2d 435, 437 (D.C. Cir. 1975).

[24] *Compare* 5 U.S.C. § 8126(1) (Secretary of Labor) with 22 U.S.C. § 1623(c) (Foreign Claims Settlement Commission).

[25] Pub. L. No. 96–12, § 2(a), 93 Stat. 26 (1979). Alternatively, issuance of subpoenas by the Commission could be made pursuant to a vote of two-thirds or three-quarters of the members, rather than a simple majority.

[26] 5 U.S.C. § 304(a).

the Attorney General may apply;[27] by limiting the distance witnesses may be forced to travel;[28] or by permitting witnesses to be excused by the court if the required testimony or evidence would tend to incriminate them or subject them to a criminal penalty.[29] The method of service may also vary,[30] and the payment of witness fees may be specifically included.[31] The Commission may be permitted to apply to the court for enforcement of the subpoena through its own staff attorneys, rather than through the Attorney General.[32] Which of these items to include is obviously a policy choice.[33]

Conclusion

The Commission may be given subpoena powers by Congress without casting any doubt on the propriety of the service of either Judge Kaufman, Senator Thurmond or Representative Rodino. We do not believe that the Department should seek contempt or immunity powers for the Commission. Whichever powers are sought, care should be taken that their use does not raise any suggestion that the Commission is targeting particular individuals. Courts have in various contexts been critical of the practice of parallel civil and criminal investigations because of their concern that information obtained in one context will be improperly used to aid an investigation.[34] As we understand it, the Commission's mandate is to survey the general nature of organized crime, not to uncover its members, and the prudential use of whichever powers are granted should protect against accusations that the Commission is being used as a stalking horse for the Department's own investigations.

RALPH W. TARR
Deputy Assistant Attorney General
Office of Legal Counsel

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[27] Pub. L. No. 96–12, § 2(c), 93 Stat 26 (1979) (any court of the United States); 7 U.S.C § 2917 (any court of the United States within whose jurisdiction the investigation is being carried on); Pub. L. No. 94–106, § 816(d)(2), 89 Stat. 540 (1975) (any district court for any district in which the person is found, resides or does business).

[28] 42 U.S.C. § 1975a(k) (witness may not be forced to travel outside his State unless distance is 50 miles or less).

[29] Pub. L. No. 93–556, § 6(b)(3), 88 Stat. 1789 (1974).

[30] Mezines, *supra* note 4, at 20–51.

[31] 42 U.S.C. § 2201(c).

[32] 7 U.S.C. § 2917; 42 U.S.C. § 6299(a). The obvious disadvantage of Congress granting such permission is a loss of Department control over the Commission's activities, particularly in cases in which coordination is necessary to facilitate a criminal investigation or prosecution not involved with the Commission's area of inquiry.

[33] In addition to these items, Congress may also consider adding restraints similar to those placed on the Civil Rights Commission, which must, among other things, permit witnesses to present a written statement, be represented by counsel and to answer defamatory or degrading evidence. 42 U.S.C. § 1975a(c), (e), (h).

[34] *United States* v. *Sells Eng'g, 463 U.S. 418 (1983); United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978).

Applicability of the Cargo Preference Act to the Transportation of Alaskan Oil to the Strategic Petroleum Reserve

Shipments of Alaskan oil for the Strategic Petroleum Reserve, made on commercial United States-flag ships as required by the Jones Act, 46 U.S.C. § 883, may be counted by the Department of Energy towards the 50% United States-flag cargo preference share required by the Cargo Preference Act, 46 U.S.C. § 1241(b).

The Cargo Preference Act, 46 U.S.C. § 1241(b), applies to both foreign and domestic cargoes procured by the United States, and is not limited to commerce in which United States-flag vessels face foreign competition. In addition, the Act is an "otherwise applicable Federal procurement statute" that may be waived by the Secretary of Energy under § 804(b) of the Energy Security Act, 10 U.S.C. § 7340(k).

September 15, 1983

MEMORANDUM OPINION FOR THE SECRETARY OF TRANSPORTATION AND THE SECRETARY OF ENERGY

This responds to your joint request to the Attorney General for an opinion on the following question:

> Whether commercial United States-flag oil shipments to the Strategic Petroleum Reserve from Alaska may be counted towards the 50% United States-flag cargo preference share required by the Cargo Preference Act.

Under the terms of an interagency agreement, you agreed to submit this question to the Attorney General in order to resolve a dispute between your two Departments. The Attorney General has referred your request to this Office for decision.

For the reasons set forth below, we conclude that shipments of Alaskan oil for the Strategic Petroleum Reserve, made on commercial United States-flag ships as required by the Jones Act, 46 U.S.C. § 883, may be counted towards the 50% United States- flag cargo preference share required by the Cargo Preference Act, 46 U.S.C. § 1241(b).

In addition, the Department of Energy (DOE) has asked us to address two related questions:

> Where oil produced from the Naval Petroleum Reserves is exchanged for other oil to be delivered to the Strategic Petroleum

Reserve, pursuant to § 804(b) of the Energy Security Act, 10 U.S.C. § 7430(k), may the exchange be conducted without regard to the Cargo Preference Act, and the deliveries excluded from the 50% United States-flag compliance calculation under that Act?

Does the Cargo Preference Act require that the Department of Energy and its procurement agents at the Department of Defense, in future oil deliveries to the Strategic Petroleum Reserve, make up any past year shortfalls from the Act's 50% United States-flag standard?

The Department of Transportation (DOT) takes the view that the two additional questions submitted by DOE are covered by the interagency agreement between DOT and DOE, and therefore no outstanding dispute exists between the two agencies with respect to those questions. In an effort to provide as much guidance as possible to both agencies, we address below the strictly legal issues raised by DOE's separate questions. That legal analysis, however, does not dispose of the problem, because your agencies take different views as to the scope and intent of their obligations as agreed upon in the interagency agreement. We are not in a position to interpret that agreement and do not attempt to do so here. We recommend that, if you cannot resolve your differing interpretations of the agreement, the matter be referred to appropriate higher levels in the Executive Branch.

In analyzing the questions presented to us, we have examined the views of each of your departments, the views of the Office of Management and Budget, and our independent research.

II

The questions we consider here arise out of the interplay between DOE's obligation to comply with congressional mandates to fill the Strategic Petroleum Reserve (SPR), a stockpile of crude oil intended to provide protection against interruption in energy supplies to the United States, and its obligations and authority under three other statutes: (a) the Cargo Preference Act, 46 U.S.C. § 1241(b); (b) the Jones Act, 46 U.S.C. § 883; and (c) the Energy Security Act, 10 U.S.C. § 7430(k). We outline below the relevant portions of each of those statutes.[1]

[1] The SPR was authorized by Title I, Part B, of the Energy Policy and Conservation Act, Pub. L. No. 94–163, 89 Stat. 881–90 (1975) (codified at 42 U.S.C. §§ 6231–6422). Congress has repeatedly legislated with respect to the fill rate for the SPR. *See* Pub. L. No. 97–35, Title X, 95 Stat. 619 (1981); Pub. L. No. 96–294, § 801, 94 Stat. 775 (1980); Pub. L. No. 96–514, 94 Stat. 2964 (1980). Most recently, in the Energy Emergency Preparedness Act of 1982, Pub. L. No. 97–229, § 4, 96 Stat. 250–52, Congress required the President to fill the SPR at a rate of 300,000 barrels per day unless he finds that this rate is not in the national interest, in which event the minimum required fill rate is 220,000 barrels per day if appropriations are available to achieve this rate, or the highest practicable fill rate that would fully use available appropriations. DOE is responsible for administration of the SPR, including the acquisition, transportation, and storage of crude oil. *See* 42 U.S.C. §§ 6233, 6240. Pursuant to an interagency agreement, the Defense Fuel Supply Center acts as the Department of Energy's procurement agent and actually solicits offers and awards contracts (with DOE's approval) for the acquisition of oil.

A. Cargo Preference Act

Ocean shipments of crude oil for the SPR are generally subject to the requirements of the Cargo Preference Act, Pub. L. No. 83–664, 68 Stat. 832 (1954) (codified as amended at 46 U.S.C. § 1241(b)).[2] The Act provides in pertinent part that:

> Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities . . . which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas.

Thus, the Cargo Preference Act requires DOE to take "such steps as may be necessary and practicable to assure that at least 50 per centum" of oil for the SPR that is transported on ocean vessels be transported on United States-flag commercial vessels, if such vessels are available at fair and reasonable rates for United States-flag commercial vessels.

B. Jones Act

Although most of the oil shipped to the SPR has been obtained from foreign sources, such as the Persian Gulf, the North Sea, North Africa, and the Caribbean, a substantial volume was shipped, particularly in 1981, from the Alaskan North Slope Fields via Valdez, Alaska, to SPR receiving docks in Texas and Louisiana.[3] Because these shipments of Alaskan oil took place between United States ports, they were subject to the Jones Act, Act of June 5, 1920, ch. 250, 41 Stat. 988, 999 (codified as amended at 46 U.S.C. § 883).[4] The Jones Act provides in relevant part that:

[2] The Cargo Preference Act added a new subparagraph (b) to § 901 of the Merchant Marine Act of 1936, Pub. L. No. 74–835, 49 Stat. 1985.

[3] DOE has informed us that approximately 10 7 percent of oil stored in the SPR as of December 31, 1982, was produced in Alaska.

[4] The Jones Act is one in a series of statutes, beginning in 1789, which have imposed general restrictions on the transportation of freight in coastwise traffic by vessels not owned by citizens of the United States. *See Central Vermont Co.* v. *Durning*, 294 U.S. 33, 38 & n.1 (1935).

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title.

46 U.S.C. § 883. In accordance with the terms of the Jones Act, we understand that shipments of Alaskan oil for the SPR have been made entirely in United States-flag commercial vessels.

C. Energy Security Act

The Energy Security Act (ESA), Pub. L. No. 96–294, 94 Stat. 611 (1980), was passed in the aftermath of the 1979 Iranian supply disruption, when efforts to fill the SPR fell behind the approved fill schedule and oil purchases for the SPR came to a halt. In the ESA, passed in June 1980, Congress required that the SPR oil fill be resumed and sustained at an average rate of at least 100,000 barrels per day. In order to facilitate this fill rate, Congress authorized the Secretary of Energy to store oil from the Naval Petroleum Reserves (NPR)[5] in the SPR, or to:

> (B) exchange, directly or indirectly, that petroleum [from the NPR] for other petroleum to be placed in the Strategic Petroleum Reserve under such terms and conditions and by such methods as the Secretary determines to be appropriate, without regard to otherwise applicable Federal procurement statutes and regulations.

Pub. L. No. 96–294, § 804(b), 94 Stat. 777 (1980) (codified at 10 U.S.C. § 7430(k)(1)). In 1980 and 1981 DOE used the authority in the ESA to place in the SPR a substantial amount of crude oil that had been exchanged for NPR oil.

II

A. Applicability of the Cargo Preference Act to Jones Act Cargoes

The question you have jointly referred to us for decision is whether shipments of Alaskan oil — 100 percent of which were made in United States-flag commercial vessels pursuant to the Jones Act — may be counted towards the 50 percent Cargo Preference Act share for the SPR program. DOT takes the

[5] The Naval Petroleum Reserves include several specific crude oil or petroleum reserves designated originally by executive order and now specifically authorized by 10 U.S.C. §§ 7420–7438. In general, the reserves may be used for production of petroleum only if specifically authorized by joint resolution of Congress and approved by the President. *Id.* § 7422(b).

position that the Cargo Preference Act reserves 50 percent of foreign oil transported to the SPR for United States-flag tankers, and asserts that DOE must base its Cargo Preference Act compliance calculation only on foreign shipments. DOT maintains that the purpose and legislative intent of the Cargo Preference Act is to reserve 50 percent of government-generated cargo for United States-flag vessels in commerce in which the United States vessels face competition from foreign-flag vessels, *i.e.*, import or export foreign commerce. Because foreign-flag vessels are already excluded by operation of the Jones Act from domestic trade, DOT contends that government-procured or owned cargoes shipped in such commerce should not be included in the calculation of Cargo Preference Act compliance. DOT points out that the effect of allowing Jones Act cargoes to be included in the Cargo Preference Act calculation would be to reduce the share of foreign trade that must be reserved to United States-flag commercial ships — a result DOT contends is "entirely inconsistent" with the purpose of the Cargo Preference Act.

DOE's position is that the plain language of the Cargo Preference Act covers all government-procured or owned cargoes, which would include Alaskan oil shipments, and that, while the Act may have been passed primarily to deal with foreign cargoes exported from or imported into the United States, the legislative history of the Act does not demonstrate any clear congressional intent to limit that language to foreign cargoes. As a policy matter, DOE maintains that exclusion of Alaskan oil shipments from the calculation of its Cargo Preference Act share for the SPR program would substantially increase the overall cost of acquisition of oil for the SPR, inconsistently with the goal of minimizing the cost of the SPR, *see* 42 U.S.C. § 6231,[6] particularly if DOE is required to make up shortfalls from the 50 percent level for prior years.[7]

The question is a close and novel one, and the arguments made in support of both positions have been skillfully presented and have considerable merit. After a careful review of the memoranda provided to us, an independent review of the legislative history of the Cargo Preference Act, and additional research, we conclude that DOE may include Jones Act shipments of Alaskan oil in the calculation of its overall 50 percent Cargo Preference Act compliance level for the SPR program.

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[6] Although DOE notes that "minimization of the cost of the Reserve" is an objective set forth in the Energy Policy and Conservation Act, 42 U.S.C. §§ 6231–6422, it does not assert that the SPR program itself has been exempted from the Cargo Preference Act.

[7] For calendar year 1982 alone, DOE calculates that it would be in compliance with the Cargo Preference Act, whether or not Alaskan oil shipments are counted. For the years 1981–82, DOE states that it would be in compliance with the Cargo Preference Act 50 percent share if Alaskan oil shipments were included; if such shipments were excluded, the share of SPR oil shipments carried in United States flag-commercial vessels would fall to roughly 39 percent. For the period 1977–1982, covering most of the acquisition for the SPR, the Cargo Preference Act compliance percentage including Alaskan shipments would be either 48.9 percent (if Naval Petroleum Reserve exchanges are excluded, *see* below) or 46.3 percent (if Naval Petroleum Reserve exchanges are included); without Alaskan oil shipments, the compliance figure would be 41.9 percent (excluding Naval Petroleum Reserve exchanges) or 38.6 percent (including Naval Petroleum Reserve exchanges). To the extent DOE is required to make up any shortfall from the 50 percent level, it would have to do so by using relatively expensive United States commercial vessels, which would increase the overall cost of SPR acquisitions.

Our touchstone in reaching that conclusion is "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania,* 447 U.S. 102, 108 (1980); *see also United States* v. *Turkette,* 452 U.S. 576, 580 (1981); *United States Lines, Inc.* v. *Baldridge,* 677 F.2d 940, 944 (D.C. Cir. 1982).

On its face the language of the Cargo Preference Act covers all government-procured or owned cargoes transported on ocean vessels, which would include government cargoes transported between United States ports, as well as cargoes transported to or from a foreign port. The Act applies *"[w]henever* the United States shall procure . . . equipment, materials, or commodities *within or without* the United States." 46 U.S.C. § 1241(b) (emphasis added). The Act carves out certain explicit exceptions to the 50 percent United States-flag vessel requirement, but does not make any specific exception for cargo that is subject to the Jones Act 100 percent United States-flag requirement, or any general exception for cargoes transported in trades in which there is, by operation of statute, no foreign competition.[8]

DOT urges that we must interpret that language in light of the Act's legislative history, which DOT maintains demonstrates a clear congressional intent that the 50 percent United States-flag requirement should apply only to cargoes shipped in trades in which the United States vessels face foreign competition. In order to reach the conclusion advocated by DOT, we would have to infer a further exception, in addition to the explicit exceptions in the Act, for Jones Act cargoes. DOT suggests that the implied exception would cover only cargoes that must be transported in United States vessels pursuant to the first clause of the Jones Act; DOT takes the position that domestic shipments that may be made in foreign vessels, pursuant to the third proviso of the Jones Act, would be covered by the general language of the Cargo Preference Act.[9]

In general, we find the legislative history of the Cargo Preference Act to be inconclusive on the question of congressional intent. We are unwilling on the basis of that history to infer a specific exception, from the broad language used by Congress, for government cargoes that are otherwise subject to the Jones Act.[10]

[8] Specifically, the Act does not apply to cargoes carried in vessels of the Panama Canal Company, or to certain vessels rebuilt abroad, if the owner notified the Maritime Administration prior to September 21, 1961, of its intent to document the vessel under United States registry. 46 U.S.C. § 1241(b).

[9] The third proviso of the Jones Act exempts from the exclusive United States-flag transportation requirement "merchandise transported between points within the continental United States, including Alaska, over through routes . . . recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall . . . be filed with [the ICC] when such routes are in part over Canadian rail lines and their own or other connecting water facilities." 46 U.S.C. § 883.

[10] We note that, as a general matter of statutory construction, implied exceptions are disfavored, especially if the statute contains an express exception. *See, e.g., Consumer Product Safety Comm'n* v. *GTE Sylvania,* 447 U.S. at 108; *Andrus* v. *Glover Constr. Co.,* 446 U.S. 608, 616–17 (1980); *see generally* 2A Sands, *Sutherland on Statutory Construction* (4th ed. 1973). This principle would not necessarily preclude us, in a proper case, from reading particular statutory language narrowly in order to implement clear congressional intent. However, as we discuss above, the legislative history of the Cargo Preference Act is not clear on this point, and we are therefore unwilling to infer the exception DOT suggests.

As DOT points out and DOE acknowledges, the primary impetus for passage of the Cargo Preference Act was to promote the United States shipping industry against low-cost competition from foreign flag vessels, by reserving to United States-flag vessels a "substantial portion" of cargoes over which the United States has some control. DOT notes that the congressional debates and reports on S. 3233, which became the Cargo Preference Act, contain numerous statements emphasizing that the purpose of the bill was to assure to privately owned United States merchant flag vessels a "substantial portion of the water-borne export and import foreign commerce," in which those vessels faced massive foreign competition. *See, e.g.*, S. Rep. No. 1584, 83d Cong., 2d Sess. 1 (1954); H.R. Rep. No. 2329, 83d Cong., 2d Sess. 1 (1954); 100 Cong. Rec. 4158–59 (1954) (remarks of Sen. Butler).

These statements, however, do not necessarily indicate that Congress intended that the bill, despite its broad language, would apply *only* to commerce in which United States-flag vessels face foreign competition.[11] We find it significant that the bill was intended to apply to two distinct types of cargoes: foreign-aid cargoes that are furnished or financed by the United States for the benefit of another nation, which necessarily will be "foreign" cargoes, and cargoes procured by the United States for its own use, which as a practical matter could be foreign or domestic. Most of the legislative history focuses on the first type of cargo, and therefore emphasizes that the primary applicability of the bill would be with respect to foreign- cargoes.[12]

The language used in the legislative history to describe the obligations imposed with respect to cargoes obtained by the United States for its own use, however, is not restricted to foreign cargoes. For example, the House Report states that the bill would apply in four situations:

> (1) Where the United States procures, contracts, or otherwise obtains for its own account equipment, materials, or commodities;

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[11] In support of its reading of the legislative history and purpose of the Cargo Preference Act, DOE cites recent statements made by Senator Slade Gorton, Chairman of the Senate Commerce Committee's Merchant Marine Subcommittee, during the Subcommittee's June 16, 1982 oversight hearings on administration of the Act, as well as recent correspondence from the chairman and ranking member of the House Merchant Marine and Fisheries Committee and the chairmen of the House Committee on Energy and Commerce Subcommittee on Fossil and Synthetic Fuels. Although these statements might reflect the views of those particular legislators on whether Jones Act shipments should, as a matter of *current* legislative policy, be included in Cargo Preference Act calculations, they may not be accorded significant weight in determining Congress' intent when it passed the Cargo Preference Act in 1954. Even contemporaneous remarks of individual legislators are not controlling in analyzing legislative intent. Moreover, the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Comm'n* v *GTE Sylvania*, 447 U.S. at 117 (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)).

[12] For example, the legislative history behind inclusion of the phrase "within or without the United States" emphasizes that Congress' primary purpose was to reach "off-shore procurement" foreign-aid cargoes — *i.e.*, situations in which the United States purchased or financed the purchase of cargoes in one foreign country, for shipment to another foreign country. *See, e.g.*, 100 Cong. Rec. 4158–59 (1954) (remarks of Sen. Butler). The language "*without* the United States" was intended to assure that the transportation of such cargoes would be subject to the 50 percent preference requirement. This legislative history is not, however, necessarily inconsistent with the conclusion that the 50% preference share might also apply to domestic cargoes, but rather reflects Congress' principal focus on foreign aid-type cargoes. *See generally United States Lines, Inc.* v. *Baldridge*, 677 F.2d at 944.

(2) furnishes equipment, materials, or commodities to or for the account of any foreign nation without provision for reimbursement;

(3) advances funds or credits; or

(4) guarantees the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities.

H.R. Rep. No. 2329, *supra,* at 1–2. There is no suggestion in the language used to describe government-procured or owned cargoes that the reach of the Act must be limited to *foreign* cargoes procured by the United States.

In fact, there is some indication in the legislative history that Congress was aware that the Act could apply to cargoes acquired domestically by the United States for its own use. The Senate Report notes that the bill affirmed the principle established by Congress in 1904, when it required that "vessels of the United States or belonging to the United States, and no others, shall be employed in the transportation by sea of coal, provisions, fodder, or supplies of any description, purchased pursuant to law, for the use of the Army or Navy," Act of Apr. 28, 1904, ch. 1766, 33 Stat. 518, *as amended,* 70A Stat. 146 (1956) (codified at 10 U.S.C. § 2631). *See* S. Rep. No. 1584, *supra,* at 2. The 1904 legislation, which was not repealed by the 1954 Cargo Preference Act, is clearly not limited to transportation of foreign cargoes, but applies also to cargoes acquired domestically by the Army or Navy. *See generally* 38 Cong. Rec. 2464–65 (1904) (remarks of Rep. Perkins) (*quoted in* 43 Comp. Gen. 792, 797–98 (1964)).

Our conclusion that the language of the Cargo Preference Act applies to domestic, as well as foreign, cargoes has some support in a 1964 decision of the Comptroller General with respect to application of the 1904 act cited above, the Cargo Preference Act, and the Jones Act to a proposed trainship service between the United States and Alaska, via Canada. With respect to the applicability of the Cargo Preference Act, the Comptroller General stated that:

> The 1954 Cargo Preference Act by amending section 901 of the Merchant Marine Act of 1936, 49 Stat. 2015, 46 U.S.C. § 1241, provided permanent legislation covering the transportation of a substantial portion of waterborne cargoes in United States-flag vessels. In H. Rept. No. 80, Administration of Cargo Preference Act, 84th Congress, 1st Sess., page 2, it is stated that the 50–percent provisions of the 1954 Cargo Preference Act are to apply "in four kinds of situations" the first being where the United States "procures, contracts or otherwise obtains for its own account equipment, materials, or commodities," and the remaining three covering transactions involving foreign subjects or nations. *This first situation is not restricted in terms to either foreign or domestic commerce.* In harmony with the basic maritime policy of the United States as stated in section 101 of

> the Merchant Marine Act of 1936, 46 U.S.C. § 1101, and on the basis of the language alone, *the 1954 act might be regarded as relating to Government waterborne cargo transported between points in the United States.*

43 Comp. Gen. 792, 802 (1964) (emphasis added). The Comptroller General did not, however, find it necessary in that decision to determine whether the Act covers transportation in domestic, as well as foreign commerce.

We do not find persuasive DOT's further argument that inclusion of Jones Act cargoes in the calculation of DOE's Cargo Preference Act share for the SPR program would be so inconsistent with the purpose of the Cargo Preference Act that we must imply an exception from that Act for Jones Act shipments. The purpose of both acts, however it may be characterized, is the same: to reserve cargoes for United States-flag vessels in order to promote and protect the United States shipping industry, which may be called upon in times of war or national emergency to play a vital sealift role in supplying American forces. The Cargo Preference Act achieves this purpose by requiring United States agencies to reserve a substantial portion of their cargoes for United States-flag commercial vessels. The Jones Act achieves that purpose by reserving all domestic coastwise trade to United States vessels.[13] In practical terms, we understand that allowing Jones Act cargoes of Alaskan oil to be counted in DOE's Cargo Preference Act share for the SPR program may disadvantage United States-flag tankers in the foreign crude oil trades, because inclusion of Jones Act shipments would lower the percentage of foreign oil cargoes that must be shipped on United States vessels in order to reach the 50 percent Cargo Preference Act share. However, we do not understand that the effect of inclusion of the Jones Act shipments will be so great as to undermine or frustrate the purposes served by the Cargo Preference Act, and we cannot say that this result is so contrary to Congress' intent in enacting the Cargo Preference Act that it would justify an Executive Branch revision of the statutory language. *See generally United States* v. *American Trucking Ass'n,* 310 U.S. 534, 543 (1940). DOT has also argued that, as a matter of statutory construction, the Cargo Preference Act must be interpreted to cover only cargoes transported in trades in which United States-flag ships face foreign competition, because the Act would be unnecessary in a domestic trade from which foreign-flag vessels are already excluded. Therefore, DOT contends, it would be "inconsistent with accepted norms of statutory construction to interpret the Cargo Preference Act to apply to a trade where it was unneeded." The question we address here, however, is not whether, when the United States procures cargoes that are

[13] We see no reason here to address the effect of the Attorney General's opinion in 1907 that a predecessor statute to the Jones Act did not apply to government-owned cargoes. *See* 26 Op. Att'y Gen. 415 (1907). The applicability of that opinion to the Jones Act and its continued validity is, as DOT notes, open to some question. DOE states, however, that the Alaskan oil acquired for the SPR was bought on an f.o.b. destination basis, so that title was held during the transportation by the private owner and not by the United States Government. The Jones Act clearly applies to transportation of privately owned cargoes, and therefore applied to the transportation of SPR oil.

subject to the Jones Act, it must also comply with the Cargo Preference Act. If that were the question, we might concur with DOT's analysis, because it would arguably be superfluous to require compliance with the Cargo Preference Act's 50 percent United States-flag ship requirement in a situation in which the Jones Act already requires 100 percent United States-flag ship carriage. However, the question we address is whether, when the United States engages in a program of acquisition that includes both Jones Act and non-Jones Act shipments, it may count the Jones Act shipments towards its overall Cargo Preference Act share. Seen in that light, we do not believe the Cargo Preference Act can be regarded as superfluous, because it would still require the agency to take necessary and practicable steps to reach an overall 50 percent compliance level.[14]

In sum, while the arguments made by DOT in support of its interpretation of the Cargo Preference Act have considerable merit, we believe in this case that the plain language of the statute should prevail. Therefore, it is our opinion that shipments of Alaskan oil by or on behalf of DOE for the SPR may be counted in calculation of DOE's Cargo Preference Act share for the SPR program.

B. Exchange of NPR Oil

The first of the two questions posed separately by DOE also arises out of the SPR program, but involves interpretation of the language of § 804(b) of the Energy Security Act (ESA), codified at 10 U.S.C. § 7430(k), that allows the Secretary of Energy to exchange oil from the NPR for oil to be placed in the SPR "without regard to otherwise applicable Federal procurement statutes and regulations." The question posed by DOE is whether the Cargo Preference Act may be considered to be an "otherwise applicable Federal procurement statute" within the meaning of § 804(b) of the ESA, which may therefore be waived by the Secretary of Energy.

We concur with DOE's legal conclusion that, at least for the purpose of § 804(b), the Cargo Preference Act would be an "otherwise applicable Federal procurement statute," which may be waived by the Secretary of Energy if he determines that application of the Cargo Preference Act would hamper efforts to exchange NPR oil for other oil to be placed in the SPR.[15] Although the terms of the Cargo Preference Act do not expressly characterize the Act as a "procurement" statute, the Act applies, *inter alia,* when the United States "procures" goods to be transported by ocean vessels. *See* 46 U.S.C. § 1241(b). Certainly in practical terms the Cargo Preference Act regulates the government's procurement of ocean transportation services and the transportation by vessel

[14] In fact, it appears to us to be possible that some shipments made between domestic ports could be carried on foreign-flag vessels, pursuant to the third proviso of the Jones Act or to waivers of the Jones Act requirements. DOT has noted that, upon occasion, Jones Act waivers have been granted for government-owned cargo. In that event, it would clearly not be superfluous to apply the Cargo Preference Act to those domestic cargoes, in order to assure a 50 percent overall share to United States-flag vessels.

[15] We do not suggest here that the Cargo Preference Act would necessarily also be considered a "Federal procurement statute" under a different statutory scheme.

of commodities procured by the government, and is an integral part of the acquisition process.[16]

In addition, the purpose of the waiver authority in § 804(b) supports the conclusion that the Cargo Preference Act can be considered a "procurement statute" for the purpose of exchanges of NPR oil. Although the legislative history of the ESA does not list or otherwise describe in detail what is included in the term "Federal procurement statutes and regulations," the purpose of the waiver authority is clearly to grant the Secretary of Energy sufficient flexibility to use the exchange authority effectively to meet the pressing need to increase the fill rate of the SPR. *See* H.R. Rep. No. 1104, 96th Cong., 2d Sess. 317–18 (1980). To the extent that it regulates some aspect of the acquisition process, and could substantially frustrate efforts by the Secretary of Energy to use the authority granted in the ESA to exchange NPR oil, we believe the Cargo Preference Act is a "procurement" statute covered by the ESA. Therefore if, in the Secretary of Energy's judgment, limiting the NPR exchange in order to assure 50 percent Cargo Preference Act shipping would have frustrated the objectives of the ESA, reliance on the waiver authority in § 804(b) to permit the exchange without regard to the Cargo Preference Act would be consistent with the letter and the spirit of the ESA. Any resulting shortfall in meeting Cargo Preference Act requirements for the NPR exchange should thus not be counted as a Cargo Preference Act deficiency.

We take no view, however, as to whether the Secretary of Energy has actually waived or could yet waive applicability of the Cargo Preference Act to NPR exchanges that have already taken place. DOT takes the position that the ocean transportation of foreign oil delivered to the SPR in exchange for NPR oil was included in calculating DOE's existing obligations under the interagency agreement, and therefore DOE cannot now maintain that such exchanges should be excluded from calculation of its Cargo Preference Act compliance for past years. DOE asserts that the agreement does not address treatment of NPR exchanges, and therefore that the Secretary of Energy is not barred by the agreement from exercising his waiver authority.[17]

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[16] The definition of the term "procurement" as used in the Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96–83, § 3, 93 Stat. 649 (41 U.S.C. § 403(b)), is certainly broad enough to cover the Cargo Preference Act. That definition reads as follows:

> As used in this chapter the term "procurement" includes all stages of the acquisition process, beginning with the process for determining a need for property and services through to the Federal Government's disposition of such property and services.

Similarly, the definition of "procurement" contained in the Federal Procurement Regulations includes the "acquisition (and directly related matters) . . . of personal property and non-personal services," which would also appear broad enough to cover Cargo Preference Act requirements. FPR § 1–1.209. Finally, we note that rules governing Cargo Preference Act compliance are included in the Federal Procurement Regulations and the Defense Acquisition Regulations. FPR § 1–19.108–2; DAR § 1–1404.

[17] DOE does not address whether the Secretary has in fact exercised that authority for some or all NPR exchanges, or what action would be necessary to exercise that authority. We understand from conversations with DOE that no official waiver action was taken at the time the NPR exchange cargoes were acquired. Section 804(b) of the ESA does not explicitly require such formal action and, to our knowledge, there are no regulations that establish particular procedures or prerequisites for such waivers. As a matter of logic, however, it seems to us that the waiver authority should be exercised at the time of acquisition of the cargoes,

Continued

As we were not privy to the negotiations that led to the interagency agreement, we are not in a position to determine whether the treatment of past NPR oil exchanges was resolved during those negotiations. We recommend that this issue be addressed again by DOE and DOT and, if necessary, resolved at a higher level within the Executive Branch.

C. Remedies for Shortfalls in Cargo Preference Act Compliance

The second question posed separately by DOE concerns the available remedies under the Cargo Preference Act for a calendar year shortfall in United States-flag vessel shipments. We understand that the Maritime Administration (MarAd), which is the component of DOT responsible for administering the Cargo Preference Act, *see* 46 U.S.C. §§ 1114(b), 1122(d), took the position in discussions and correspondence with DOE, prior to negotiation of the interagency agreement, that annual shortfalls in meeting the 50 percent United States-flag ship share must be made up in succeeding years. DOT now also asserts that in the interagency agreement DOE agreed, independently of its undertaking to make up its 1981 Cargo Preference Act deficiency and to transport at least 50 percent of foreign oil delivered to the SPR on United States-flag tankers — both of which are contingent to some degree on issuance of our opinion here — that it would carry forward calendar year deficits or surpluses in calculating Cargo Preference Act requirements for United States-flag vessels in future years.

For its part, DOE asserts that it is not required, as a matter of law, to carry deficiencies forward from one year to the next in order to reach the 50 percent level, and that there had been, at least prior to 1980, a "longstanding" agreement between MarAd and DOE that Cargo Preference Act compliance would be measured on a calendar year basis, without carrying forward either a surplus or a deficiency from one year to the next. With respect to the effect of the interagency agreement, DOE maintains that its obligation to carry forward deficits and surpluses is contingent on the issuance of an opinion on the question jointly referred to the Attorney General, and therefore ceases with the issuance of that opinion.

The fundamental disagreement between DOE and DOT as to what they agreed upon in the interagency agreement makes it impossible for us to provide specific guidance to either agency with respect to remedying shortfalls in Cargo Preference Act compliance.[18] Obviously, the method of complying with

[17] (. . . continued)
when the Secretary can make a determination that compliance with the Cargo Preference Act *for those particular cargoes* would frustrate the Department's ability to maintain or increase the SPR fill rate to levels mandated by Congress. We have some doubt that the waiver authority in the ESA was intended to provide a post hoc rationalization for overall programmatic shortfalls in an agency's Cargo Preference Act compliance.

[18] At best, the interagency agreement is ambiguous on this point. Subparagraph 1(D) of the agreement recites in part that "commencing with calendar year 1981, deficits from and surpluses over 50% in the calculation of the SPR's cargo preference obligation will be cumulative, to be carried forward in calculating the requirements for United States-flag vessels in future years." DOE maintains that this obligation is subject
Continued

the Act can be a proper matter for negotiation and agreement between MarAd, which is charged with administering the Act, and a federal agency, such as DOE, that ships cargoes subject to the Act. We would not disturb such an agreement unless it were predicated on an incorrect reading of the applicable law and regulations — a conclusion we could not draw with respect to either interpretation advanced here.[19] We are not the appropriate office within the Executive Branch to resolve the questions of fact and policy that should have been addressed by both agencies in the course of negotiation of the interagency agreement, or that must be addressed now in order to resolve the outstanding disagreement between those agencies. We suggest therefore that DOT and DOE attempt to resolve that disagreement in further discussions between the two agencies or, if need be, with the participation of other appropriate Executive Branch officials.

III

We have considered carefully the thorough presentations by both agencies with respect to the application of the Cargo Preference Act to SPR shipments of

[18] (. . . continued)
to the general condition in paragraph 1 that the obligations each agency undertakes last "until such time as the Attorney General may rule affirmatively" on the issue presented by both agencies for decision. Although the structure of the agreement appears to support DOE's position that this general condition was intended to apply to all obligations undertaken in subparagraph (A) through (D) of the agreement, the language used in subparagraph (D) suggests an independent obligation. In addition, if DOE is correct in its interpretation of subparagraph (D), it appears that the subparagraph is largely redundant with subparagraphs (B) and (C), which outline specific remedies for DOE's 1981 Cargo Preference Act shortfall.

[19] We can provide some guidance to both agencies on the issue whether an agency, *as a matter of law*, is required to reach the 50 percent United States-flag ship level established in the Cargo Preference Act. We believe it is clear that the Act does not impose an absolute duty on federal agencies to ship 50 percent of the cargo of a particular program (or of the agency) in United States-flag vessels, regardless of the availability of such vessels or of unforeseen circumstances that might prevent an agency from reaching the 50 percent level. An early version of S. 3233 would have set 50 percent as a mandatory minimum compliance level, by requiring that *"at least 50 per centum* of the gross tonnage . . which may be transported on ocean vessels *shall be transported* on privately-owned United States-flag commercial vessels." S. Rep. No. 1584, *supra*, at 2 (emphasis added). The bill was subsequently amended, however, to require only that agencies "take such steps as may be necessary and practicable to assure that at least 50 per centum . . . " *Id.* (emphasis added). In discussing this amendment, Senator Butler, the sponsor of the bill, specifically noted that the "unequivocal provision for shipment of at least 50 percent of all aid or federally owned or financed cargoes was softened to require only such steps as may be reasonable and practicable to assure shipment of at least 50 percent in American bottoms." 100 Cong. Rec. 8228 (1954) (remarks of Sen. Butler). Moreover, the Act by its terms requires 50 percent shipment in United States-flag vessels only "to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels." 46 U.S.C. § 1241(b).

The language of the statute, particularly when read in light of its legislative history, therefore clearly contemplates that agencies may not be able to meet the 50 percent level — *i.e.*, if, despite the best efforts of the agency, it could not arrange for 50 percent shipment of its cargo on United States-flag vessels, or if United States-flag vessels were not available for particular shipments at fair and reasonable rates for such vessels. Therefore, we do not believe that, as a matter of law, a federal agency is required to meet an absolute 50 percent minimum in its shipments of cargo subject to the Cargo Preference Act.

If MarAd's position on DOE's obligation to remedy Cargo Preference Act deficits were predicated on the legal assumption that the Act *requires* DOE to reach a minimum 50 percent United States-flag vessel share for the SPR program, we believe it would have to be revised to reflect the legal conclusion we have just outlined. However, we do not understand that to be MarAd's position, and therefore cannot provide additional guidance on the issue raised by DOE.

Alaskan oil, and have concluded that the plain language of the Cargo Preference Act allows such shipments to be included in DOE's calculation of its Cargo Preference Act compliance for the SPR program. We understand that our analysis of this issue will resolve much of the actual dispute between DOT and DOE with respect to DOE's Cargo Preference Act compliance obligations. With respect to the two questions raised independently by DOE, however, we cannot fully resolve the disagreement between DOT and DOE, because of the continuing controversy between those agencies as to the intent and effect of their interagency agreement.

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The Secretary of Transportation's Continued Authority to Sell the Consolidated Rail Corporation Under the Regional Rail Reorganization Act in Light of *INS* v. *Chadha*, 462 U.S. 919 (1983)

The legislative veto provisions of the Regional Rail Reorganization Act, 45 U.S.C. §§ 761(a)(3), 767(d), which purport to condition the Secretary of Transportation's authority to sell Consolidated Rail Corporation (Conrail) as an entity or by sale of assets, are unconstitutional under the Supreme Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983). Nonetheless, the Secretary of Transportation continues to have authority to sell Conrail, either as an entity or by sale of assets, because the unconstitutional veto provisions are severable from the rest of the statute.

The severability of an unconstitutional provision from the remainder of the statute is determined by analyzing whether Congress would have enacted the remainder of the statute had it recognized that the questioned provisions were unconstitutional.

The presence of a severability clause in the Regional Rail Reorganization Act creates a strong presumption that Congress intended that any unconstitutional provisions be severable from the remainder of the statute. The legislative veto provisions are further presumed severable because the Secretary's sale authority remains "fully operative as a law" without the legislative veto provisions. The legislative history, taken as a whole, also suggests that Congress would have wanted the Secretary of Transportation to exercise the sale authority even without the legislative vetoes, and thus provides insufficient evidence to rebut the presumption of severability created by the severability clause and the otherwise "fully operative" statutory scheme.

September 16, 1983

MEMORANDUM OPINION FOR THE SECRETARY OF TRANSPORTATION

This memorandum responds to your request for our view whether the Secretary of Transportation (Secretary) continues to have authority to sell the Consolidated Rail Corporation (Conrail) under the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §§ 701 *et seq.* (3R Act), either as an entity, *see* 45 U.S.C. § 761, or by sale of assets ("freight transfer agreements"), see 45 U.S.C. § 765, in light of the recent Supreme Court decision in *INS v. Chadha,* 462 U.S. 919 (1983). Because the Secretary's authority to sell Conrail as an entity is subject to a two-House veto provision, *see* 45 U.S.C. § 761(d)(3), that is unconstitutional under *United States Senate v. FTC,* 463 U.S. 1216 (1983) (summary affirmance), and the authority to sell Conrail by freight transfer agreements is subject to a one-House veto that is unconstitutional under the analysis set forth in *Chadha,* you have asked us to determine whether the

Secretary's underlying sale authority remains valid. You have also noted that, in light of the *Chadha* decision, the leadership of the House Committee on Energy and Commerce and its Subcommittee on Transportation has initiated legislation that would replace both legislative veto provisions with the requirement that Congress affirmatively enact into law any sale plan arranged by the Secretary. For the reasons set forth below, we conclude that the legislative veto provisions are severable and that there is no constitutional impediment to the Secretary's continued authority to sell Conrail either as an entity or by sale of assets.

I. Background

In 1981, Congress enacted the Northeast Rail Service Act of 1981, a subtitle of Title XI of the Omnibus Budget Reconciliation Act of 1981. *See* Pub. L. No. 97–35, 95 Stat. 357, 643 (1981). Section 1142 of the subtitle amended the 3R Act of 1973 by inserting a new Title IV that authorizes the Secretary to arrange for the sale of the common stock of Conrail or to engage in freight transfer agreements. Pursuant to the legislative scheme, the Secretary shall, as soon as practicable, engage the services of an investment banking firm to arrange for the sale of the interest of the United States in the common stock of Conrail. *See* 45 U.S.C. § 761(a)(1). The Secretary may submit a stock sale plan to Congress if that plan ensures continued rail service, promotes competitive bidding for the common stock, and maximizes the return to the United States on its investment. *See id.* § 761(a)(2). A plan that meets these requirements is deemed approved sixty days after its submission to Congress, unless both Houses pass a concurrent resolution disapproving the plan. *See id.* § 761(a)(3).

Congress also required the Board of Directors of the United States Railway Association (USRA Board) to make a prospective determination on June 1, 1983 whether Conrail will be a profitable carrier. *See id.* § 763.[1] If the USRA Board determines that Conrail will be profitable, the Secretary is to continue pursuit of the stock sale plan. If the USRA Board determines that Conrail will not be a profitable carrier, the Secretary is authorized to initiate negotiations for the transfer of Conrail's properties and service responsibilities. *See id.* § 763(a)(3)(A), (B). Because the USRA Board found Conrail profitable on June 1, 1983, the Secretary is continuing to pursue the sale of Conrail as an entity.

Once Conrail meets the initial profitability test, the USRA Board is required to make a historically based determination whether Conrail has been profitable from June 1 to October 31, 1983. *See id.* § 763(b)(1). Again, if the USRA Board finds that Conrail has been a profitable carrier, the Secretary must continue to pursue the sale of Conrail as an entity at least until June 1, 1984. If the USRA Board finds that Conrail has not been a profitable carrier, the Secretary is authorized to negotiate freight transfer agreements to sell Conrail

[1] The United States Railway Association (USRA) is a nonprofit association authorized to monitor the financial performance of Conrail and to review whether certain goals, such as the creation through reorganization of a financially self- sustaining regional rail system, are met. *See* 45 U.S.C. §§ 711–719.

in pieces. *See id.* § 763(b)(3)(A), (B). After June 1, 1984, the Secretary may notify the USRA Board that she is unable to sell Conrail as an entity, and if the USRA Board approves the Secretary's determination then the employees have 90 days within which to submit a stock purchase plan. Thereafter, if no employee stock purchase plan is approved, the Secretary is authorized to negotiate for the transfer of Conrail in pieces. If the USRA Board does not concur in the Secretary's June 1, 1984, determination, however, the procedure for continuing to sell Conrail as an entity and, if unsuccessful, seeking approval for authority to negotiate freight transfer agreements is repeated every ninety days. *See id.* § 764; 127 Cong. Rec. 19505 (1981) (Explanatory Statement of Conferees on Title XI of Omnibus Budget Reconciliation Bill as provided for in the House Conference Report).

The Secretary's authority to negotiate for the transfer of Conrail's rail properties and service responsibilities, once triggered by the requisite prior conditions, *see* 45 U.S.C. § 765(a), is carefully circumscribed by congressionally defined goals and provisions for consultation and review. The Secretary must consult, among others, railroads, employee representatives, State and local government officials, shippers, consumer representatives, and potential purchasers. *See id.* § 765(b), (d). The Secretary must ensure that no less than 75 percent of Conrail's rail service operations are maintained under the aggregate of the freight transfer agreements and that the agreements provide for the long term viability of the acquiring private sector railroads and the enhancement of competition. *See id.* § 766. After preliminary approval of the freight transfer agreements the Secretary shall request public comment for at least thirty days; the Attorney General must then advise the Secretary within ten days whether the agreements are inconsistent with the antitrust laws, and the Interstate Commerce Commission (ICC) during the same time period must advise the Secretary of the effect of the agreements on the adequacy of public transportation and railroad competition. *See id.* § 767(a), (b). Finally, after any modifications in light of the above described comments and advice, the Secretary may grant final approval to the freight transfer agreements subject to a one-House resolution of disapproval within sixty days of transmittal of the freight transfer agreements to Congress. *See id.* § 767(d).

II. Severability

Whether the Secretary continues to have authority to sell Conrail as an entity under 45 U.S.C. § 761 in the absence of the two-House veto provision in § 761(a)(3) depends on whether that provision of § 761(a)(3) is severable from the remainder of § 761. Similarly, whether the Secretary has authority to approve freight transfer agreements for the sale of Conrail's rail properties under 45 U.S.C. §§ 765–767 depends on whether the disapproval provision in § 767(d) is severable from the rest of these statutory provisions. Determining the severability of an unconstitutional provision from the remainder of a statute requires an "elusive inquiry" into legislative intent: whether Congress would have enacted the remainder of the statute had it recognized that the questioned provisions were unconstitutional and therefore could not have properly been included in the statute. *See United States* v. *Jackson,* 390 U.S. 570 (1968); *Dorchy* v. *Kansas,* 264 U.S. 286, 290 (1924); *Consumer Energy Council of America* v. *FERC,* 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council,* 463 U.S. 1216 (1983). The invalid portions are to be severed "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *INS* v. *Chadha,* 462 U.S. at 931–32 (quoting *Buckley* v. *Valeo,* 424 U.S. 1, 108 (1976)). In the present case, we must attempt to determine which of two basic options Congress would have chosen. Congress could have decided to authorize the Secretary to sell Conrail, either as an entity or by sale of assets, absent the opportunity for a legislative veto; alternatively, Congress could have refused to authorize the Secretary to sell Conrail in the absence of a provision for legislative review.

In *INS* v. *Chadha,* the Court analyzed the severability question by discerning certain statutory characteristics that create a presumption of severability and by examining the legislative history to determine whether it was sufficient to rebut those presumptions. First, the presence of a severability clause "plainly authorized" the presumption that Congress intended that any unconstitutional provision be severable from the remainder of the statute. *See* 462 U.S. at 932. In the present instance, there is a severability clause, which was contained in the original legislation, the 3R Act of 1973. *See* 45 U.S.C. § 701 note.[2] This clause, which is virtually identical to the severability provision at issue in *Chadha,* provides that: "If any provision of this Act . . . or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby." Although the Omnibus Budget Reconciliation Act of 1981, which enacted the relevant provisions governing the sale of Conrail, does not contain a severability provision, it is significant that the 1981 statute specifically provides that the Conrail sale provisions amend the 3R Act of 1973. *See* Pub. L. No. 97–35, § 1142, 95 Stat. 654 (1981) ("The Regional Rail Reorganization Act of 1973 is amended by inserting immediately after Title III the following new title: 'Title IV Transfer of Freight Service'"). Because Congress was clearly aware that the 1981 amendments were to become a part of the 3R Act of 1973, we must presume that Congress understood that the original severability clause was fully applicable to the more recent statutory additions. *Cf. Albernaz* v. *United States,* 450 U.S. 333, 342 (1981) (Congress presumed to be aware of existing law and to legislate with it in mind). We therefore conclude, as the Supreme Court did in *Chadha,* that the language of the

[2] We deem it irrelevant for purposes of analysis that the severability provision currently is set forth in a note rather than in an independent provision in the United States Code. The legislation, as originally enacted, contained an independent "Separability Provision." *See* Pub. L. No. 93–236, § 604, 87 Stat. 1023 (1974) The subsequent decision to classify the statutory provision as a note was made by the Law Revision Counsel of the House of Representatives, as authorized by 2 U.S.C. § 285b, and not by Congress itself as a legislative act.

severability clause "is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether the veto clause . . . was invalid." 462 U.S. at 932.

The Supreme Court in *Chadha* also determined that "a provision is further presumed severable if what remains after severance 'is fully operative as a law.'" 462 U.S. at 934 (quoting *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U.S. at 234). Similar to the legal situation under the statutory scheme remaining after severance in *Chadha,* the Secretary's sale authority under § 761 and §§ 765–767 is fully operative and remains a workable administrative machinery without the legislative veto provisions in § 761(a)(3) and § 761(d). The Secretary's authority to sell Conrail as an entity under § 761 remains, independent of the two-House veto provision, and that authority is channeled by the congressionally defined goals of ensuring continued service and of maximizing the return of the United States on its investment. *See* 45 U.S.C. § 761(a)(2). The Secretary's authority to sell Conrail as an entity also continues to be subject to the profitability determinations of the USRA Board: under certain conditions the Secretary must attempt sale as an entity and has no discretion to negotiate for transfers of assets. Moreover, Congress' oversight of the exercise of this delegated authority is preserved, because pursuant to § 761(a)(2) the Secretary is to submit to Congress any plan for the sale of Conrail's common stock.[3] And as *Chadha* suggests, although the legislative veto provision in § 761(a)(3) is invalid, Congress would presumably retain the power, during the time allotted in § 761(a)(3), to enact a law, in accordance with the requirements of bicameralism and presentment set forth in Article I of the Constitution, forbidding the submitted sale plan. *See* 462 U.S. at 971–72 n.8.

Likewise, the Secretary's authority to negotiate freight transfer agreements under § 765, subject to the congressional goals set forth in § 766(a), remains fully operative. Independent of the one-House veto provision in § 767(d), the administrative process adopted by Congress — comprising USRA Board approval of the Secretary's determination of inability to sell Conrail as an entity, negotiations and conferences between the Secretary and parties interested in developing freight transfer agreements, public comment, and the advice of the Attorney General and the ICC on the transfer agreements — remains otherwise intact. Congressional oversight is ensured because § 765(f) requires the Secretary to submit reports to Congress every six months on her activities in negotiating freight transfer agreements.[4] And, as noted above, Congress presumably retains the power to reject, albeit by plenary legislation, the freight transfer agreements within the 60–day time period for legislative review established by the statute. Unquestionably, both §§ 761 and 767 survive as workable

[3] Although § 761(a)(2) is phrased in terms of "the Secretary may submit," it is unclear what range of discretion is thereby granted the Secretary. Presumably, the Secretary would not have to submit clearly unviable or uneconomical proposals that fail to meet the congressional goals of continued service and maximum return to the United States on its investment.

[4] Section 765(f) further requires concurrent notification of Congress and the USRA Board whenever the Secretary finds that she is unable to sell Conrail as an entity.

administrative mechanisms. Accordingly, we conclude that the second indicator relied on in *Chadha*, that a court may presume a provision severable if what remains after severance is fully operative as law, is fulfilled in the present instance.[5]

III. Legislative History

Because the statutory mechanism in §§ 761–767 is operable absent the legislative review provisions in § 761(a)(3) and § 767(d), and because the statute contains a severability clause, the Secretary is presumed to have authority under §§ 761 and 765–767 to sell Conrail as an entity or by sale of assets unless the legislative history rebuts the presumption that Congress would have wished the Secretary to exercise this authority without the opportunity for congressional veto. Although nothing in the legislative history definitively indicates what Congress would have done had it known it could not rely on the legislative veto provisions, we believe that the legislative history, taken as a whole, suggests that Congress would have wanted the Secretary to exercise the sale authority even without the legislative vetoes. More significantly, similar to the situation in *Chadha*, the legislative history is not sufficient to rebut the presumption of severability because there is no compelling evidence that Congress would have refused to grant the sale authority to the Secretary. *See* 462 U.S. at 932.

Prior to the Omnibus Budget Reconciliation Act, legislation was introduced in both the House and Senate to improve rail service in the Northeast, to restructure and render profitable Conrail's operations, and to provide for the sale of Conrail to the private sector. *See* S. Rep. No. 101, 97th Cong., 1st Sess. (1981) (S. 1100, providing for transfer of Conrail by sale of assets to private sector railroads); H.R. Rep. No. 153, 97th Cong., 1st Sess. (1981) (H.R. 3559, providing for sale of common stock of Conrail if profitable and sale of assets if not profitable). H.R. 3559 and the report thereon were incorporated in the House Report on the Omnibus Budget Reconciliation Act of 1981. *See* H.R. Rep. No. 158, Vol. II, 97th Cong., 2d Sess. 438 (1981). S. 1100, to the extent it is reflected in the Senate amendments to the House Report, was considerably altered during consideration of the Omnibus Budget Reconciliation bill, largely to express congressional intent "that to the extent practicable, the Secretary shall make every effort to transfer Conrail as a single entity." S. Rep. No. 139, 97th Cong., 2d Sess. 328 (1981). At all stages, however, the legislative history reveals a strong, indeed urgent, congressional intent to achieve fundamental changes in the efficiency and cost structure of Conrail and, most importantly, to provide for the orderly sale of Conrail either as an entity, if feasible, or by

[5] In treating the operability of a statute after excision of an unconstitutional provision from it as creating a "presumption" of severability, the Court in *Chadha* went beyond its decision in *Champlin*, 286 U.S. 210 (1932), in which a "presumption" was created only by the existence of a severability clause in the statute before it. In *Buckley v. Valeo*, 424 U.S. 1, 108–09 (1976), the Supreme Court dealt with a statute that did not contain a severability clause and found an unconstitutional provision in that statute to be severable by relying on the fact that the statutory scheme was fully functional; the Court did not, however, use the word "presumption" in *Buckley*.

sale of assets. *See* S. Rep. No. 101, 97th Cong., 1st Sess. 2–3 (1981); H.R. Rep. No. 153, 97th Cong., 1st Sess. 205 (1981). Congress made clear that "the purpose of the legislation is to remove the federal government from the rail freight business." *Id.* at 2. If the legislative veto is regarded as inseverable, however, the Secretary's authority to sell Conrail is invalid and the major objective of the legislation would be frustrated. Given the choice between continuing the Secretary's authority to sell Conrail or denying the Secretary authority to undertake any sale plans, it is probable that Congress would have opted for continuation of the existing method for eliminating federal involvement with rail freight service.

More important, nothing in the legislative history indicates that Congress would not have delegated the sale authority to the Secretary but for the existence of the invalid legislative veto device. The House bill delegated "broad authority," 127 Cong. Rec. 19503 (1981), "much latitude," H.R. Rep. No. 153, 97th Cong., 1st Sess. 8 (1981), to the Secretary to sell the common stock of Conrail and to transfer Conrail assets, without linking that broad authority to the existence of the legislative vetoes.[6] Indeed, the Secretary's authority to sell the common stock of Conrail was not subject to any congressional review. *See id.* at 61. Although the House bill qualified the Secretary's authority to sell Conrail by sale of assets with a provision for a one-House veto within 90 days of submission of the transfer plan, neither the House Report nor the additional comments on the House bill in the House Conference Report in any way indicate that such authority was granted only in light of the veto provision. To the contrary, the Reports simply describe the working of the congressional review provision, but fail to mention, much less emphasize, the significance of the legislative veto device. *See Consumer Energy Council* v. *FERC*, 673 F.2d at 442 (severability argument aided insofar as Conference Report fails to stress importance of legislative veto provision).

The Senate Amendment set forth more elaborate procedures for public comment and notification of Congress with respect to freight transfer agreements. Congress had 120 days within which to disapprove the transfer agreements by concurrent resolution. In addition, the ICC and the Attorney General were to report to Congress on the aggregate of transfer agreements negotiated by the Secretary "to provide assistance to Congress in its deliberations." S. Rep. No. 139, 97th Cong., 1st Sess. 330 (1981). Although these provisions suggest that Congress intended to retain the ability to engage in a meaningful review of the transfer agreements, the Senate Committee Report did not regard the Secretary's sale authority as inextricably bound to this invalid legislative review provision. Moreover, the period for congressional review was reduced to 60 days in the Conference substitute. *See* 127 Cong. Rec. 19505 (1981). In addition, although the final House Conference Report summarily describes the

[6] As explained in the House Conference Report, the provisions of the subtitle of the Omnibus Budget Reconciliation Act that involve Conrail, as they appear in the conference substitute, and the corresponding provisions of the House bill and Senate amendment, are discussed in an explanatory statement printed in the Congressional Record. *See* H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 368–69 (1981).

shortened 60–day period for congressional review of asset sales, it fails altogether to mention the provision for congressional review of a stock sale. *See id.* This lack of emphasis on the importance of the legislative veto provisions indicates that Congress did not regard the provisions as essential to, or inseverable from, the statutory scheme for the sale of Conrail. *See Consumer Energy Council* v. *FERC,* 673 F.2d at 442.

Finally, we note that the leadership of the House Committee on Energy and Commerce and of the Subcommittee on Transportation has initiated legislation to replace the legislative veto provisions in §§ 761(a)(3) and 767(d) with a requirement that any sale plan be enacted into law in conformity with the Article I procedures governing the exercise of legislative authority. You have also informed us that the informal view of some Committee staff members is that the Secretary's authority to arrange for the sale of Conrail is invalid because the unconstitutional vetoes in §§ 761(a)(3) and 767(d) are inseverable from the remaining statutory sale authority. As a general matter, "postenactment developments cannot be accorded 'the weight of contemporary legislative history.'" *North Haven Bd. of Education* v. *Bell,* 456 U.S. 512, 535 (1982). And the normal hesitancy of the courts to attach much weight to comments made after the passage of legislation, *see County of Washington* v. *Gunther,* 452 U.S. 161, 176 n.16 (1981), is necessarily reinforced when those comments are the informal views of staff members. Similarly, we do not accord such informal postenactment comments any weight in our assessment of what the 97th Congress would have intended in the absence of the legislative review provisions. *See id.* It is significant, however, that the Secretary's basic authority to arrange for the sale of Conrail stock or to negotiate for transfers of its assets would be preserved under the proposed amendment. To the extent the proposed amendment indicates anything about Congress' choice between refusing to grant the Secretary any authority to engage in the sale of Conrail or authorizing the Secretary to continue to pursue the effort to remove the federal government from subsidizing and running rail freight service, it is supportive of our conclusion that Congress would have desired that the Secretary retain the authority to sell Conrail.

IV. Conclusion

In sum, the legislative history provides insufficient evidence to rebut the presumption of severability created by the presence of a severability clause and the existence, after severance, of a "fully operative" law and workable administrative machinery. We therefore conclude that although the two-House disapproval mechanism contained in § 761(a)(3) and the one-House disapproval device set forth in § 767(d) are unconstitutional, the Secretary retains authority under the remaining provisions in §§ 761–767 to sell Conrail as an entity or by sale of assets. The Secretary is still required, under § 761(a)(2), to submit to Congress, 60 days prior to its effective date, a plan for the sale of the United States's stock interest in Conrail; we would also, under the reasoning in

Chadha, read the remaining, valid portion of § 767(d) to require the Secretary to transmit copies of any freight transfer agreements to Congress within ten days of their approval. Congress would then have the opportunity to overrule the Secretary's actions, but only by legislative action that conforms with the bicameralism and presentment to the President requirements of Article I, § 7, cls. 2 & 3 of the Constitution.

RALPH W. TARR
Deputy Assistant Attorney General
Office of Legal Counsel

S. 421, A Bill to Require the Comptroller General to Ascertain Increases in the Cost of Major Acquisition Programs of Civilian Agencies and to Limit the Expenditure of Federal Funds to Carry Out Those Programs

Proposed legislation, if construed to give the Comptroller General, a legislative officer, discretionary authority to review Executive Branch acquisition programs and to cut off funds to those programs, would violate the constitutional principle of the separation of powers.

September 23, 1983

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

This responds to your request for the comments of this Office on S. 421, which establishes a procedure for reporting cost overruns on major civil acquisition programs and requires a cutoff of government funding whenever an overrun exceeds 25 percent of the initial cost estimate. Section 2(a) of the bill states:

> The Comptroller General shall be responsible for ascertaining increases in the cost of each major civil acquisition program and compiling statistics on such increases. Such statistics shall be compiled from data submitted to the Comptroller General under section 3 and from data collected by the Comptroller General in the process of carrying out audits and reviews authorized by law.

Section 3 of the bill authorizes the Comptroller General to require submission of reports on major civil acquisition programs carried out by various government agencies.[1] The reports to the Comptroller General must include a description of the acquisition program, the initial cost estimate for the program, estimated total cost of the program as of the date of the report, the total amount of funds authorized, appropriated, and obligated, the estimated date of completion, reasons for any delay in completion, changes in the quantity or size of the acquisition program, the reasons for any actual or projected increase in the total

[1] The term "major civil acquisition program" is defined by the bill as any construction, acquisition or procurement program (not involving the Department of Defense) that is financed entirely with federal funds and is estimated to require an eventual total expenditure exceeding $50,000,000.

cost by more than 25 percent over the initial cost estimate, and actions proposed to control subsequent increases in costs. Section 4 requires that when the Comptroller General determines that the actual or estimated cost of a program exceeds the initial cost estimate by 25 percent or more, the Comptroller General shall transmit notice of this determination to the head of the agency involved and to Congress. No funds may be obligated or expended on the program after the date on which the agency receives such notice unless Congress passes a law that provides for authority to obligate and expend funds.

In our view, this procedure, as currently described by the bill, raises significant constitutional questions. In particular, the bill would be a serious breach of the separation of powers if construed to give the Comptroller General discretionary authority to review Executive Branch programs and, based upon his own independent determination, cut off funds to those programs. The President has sole constitutional responsibility for executing the laws adopted by Congress. Article II of the Constitution states in part that "the Executive Power shall be vested" in the President and that the President "shall take Care that the Laws be faithfully executed." By virtue of these provisions, all executive functions must be placed within the Executive Branch under the control and direction of the President. *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935); *Myers* v. *United States,* 272 U.S. 52 (1926). Congress may not vest itself or its appointees with executive powers. *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

This fundamental principle of constitutional law would be breached if the Comptroller General were granted executive authority. The Comptroller General is not an Executive Branch official subject to Presidential control; rather, the Comptroller General acts as an advisory arm of Congress. The General Accounting Office is by statute made "independent of the executive departments," 31 U.S.C. § 702(a), and Congress has proclaimed that the Comptroller General and the GAO are "part of the legislative branch of the Government." Reorganization Act of 1949, 63 Stat. 205; Reorganization Act of 1945, 59 Stat. 616; *see also* United States Government Manual 1982/83, at 40; Corwin, *Tenure of Office and the Removal Power,* 27 Colum. L. Rev. 354, 396 (1927). Therefore, under the above principles, Congress may vest the Comptroller General with authority to assist it in its lawmaking responsibilities, but it may not grant to the Comptroller General executive authority which is not subject to the control of the President. The Department of Justice has previously taken the position before Congress that "as a general principle of constitutional law the Congress may not vest in its agent, the Comptroller General, the Executive function of enforcing the law." *Hearings before a Subcomm. of the House Comm. on Government Operations on H.R. 12171,* 95th Cong., 2d Sess. 72 (1978) (testimony of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel).

Vesting independent authority in the Comptroller General to require a cutoff of federal funding for acquisition programs would clearly constitute an attempt to lodge executive authority in an arm of Congress. Reviewing the progress of Executive Branch programs, making a judgment based upon standards established by Congress, and taking an action that purports to have binding legal effect on whether those programs may continue is unquestionably an exercise of executive authority. It would involve the Comptroller General deeply in the administration of the Executive Branch and give him substantial authority over the execution of the law. Therefore, such a procedure would breach the constitutionally required separation of powers. In short, Congress can no more vest this authority in the Comptroller General than Congress could vest it in its own committees. *See* 41 Op. Att'y Gen. 230 (1955); 37 Op. Att'y Gen. 56 (1933); cf. *INS* v. *Chadha*, 462 U.S. 919 (1983).*

This does not mean, of course, that Congress may not by law regulate procurement by the Executive Branch. For example, Congress certainly could require that an agency cease spending on an acquisition program if the agency determined that expenditures would exceed the initial estimate by 25 percent. The problem in this case is not the particular requirement that Congress wishes to impose, but rather the mechanism for enforcing that requirement. The requirement is within Congress' power to impose, but its execution must remain within the Executive Branch under the control of the President.

Therefore, if the statute were adopted as now drafted this Office would construe the statute, in order to be consistent with the Constitution, as giving the Comptroller General only a ministerial role in transmitting to Congress determinations made by executive agencies. Thus, funding could be cut off only if an executive agency determined in its report that expenditures would exceed the initial estimate by 25 percent or more. The Comptroller General would have no independent authority to make such a binding determination and would simply be required to transmit the agency's report to Congress.

However, if Congress wishes to proceed with this legislation, we urge that it be amended to make it clear that the Comptroller General's role is purely ministerial and that the determinative reports will be made by the executive agencies involved. In particular, § 2 of the bill should be deleted and the bill should explicitly describe the timing and content of the reports required to be filed by the executive agencies. This Office objects to the bill unless it is amended to make this point clear.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

* NOTE: Subsequent to the issuance of this Office of Legal Counsel opinion, the Supreme Court determined in *Bowsher* v. *Synar*, 478 U.S. 714, 732–33 (1986), that the Comptroller General is an agent of Congress, and therefore cannot be vested with functions that "plainly entail[] execution of the law in constitutional terms."

Historical Use of Assistant Attorneys General

The Attorney General may reassign Assistant Attorneys General from one unit to another within the Department of Justice. This has been done on at least ten occasions and does not require that the Assistant Attorney General be reconfirmed by the Senate.

October 27, 1983

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This responds to your request for information on whether the Attorney General may reassign Assistant Attorneys General (Assistants) from one unit to another without resubmitting their names to Congress, and whether the Attorney General has ever done so. We believe that the Attorney General is authorized to make such shifts as internal Department transfers because, except for the Assistant for Administration, 28 U.S.C. § 507, the Assistants are not limited to any statutory functions. 28 U.S.C. § 506.[1] *See also id.* §§ 509, 510. We have identified at least ten occasions on which an Attorney General has made such transfers. In one other instance, discussed below, political considerations persuaded the Attorney General to make the shift by having the Assistant resign from his first position and be nominated and confirmed again as an Assistant for the second position.

I. Historical Examples

The Register of the United States Department of Justice and the Federal Courts (1983) does not list Assistants by division until 1925, shortly after appointment by division apparently began. *Id.* at 140. By comparing names of Assistants heading the divisions since then, we have identified the following individuals who served consecutively as the head of two different units in the Department and who were transferred to their second position without a new confirmation hearing.

1. *Robert H. Jackson:* Mr. Jackson became head of the Tax Division in March 1936. In January 1937 he was designated head of the Antitrust Division to fill a vacancy caused by a resignation.[2]

[1] Section 506 states that "[t]he President shall appoint, by and with the advice and consent of the Senate, ten Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties." Prior to 1950, this language was codified at 5 U.S.C. § 295.

[2] N.Y. Times, Jan. 19, 1937, at 7, col. 7.

2. *James W. Morris:* Mr. Morris was appointed to head the Claims (now Civil) Division in November 1935. In January 1937, he was transferred to the Tax Division to fill the vacancy left by Mr. Jackson's transfer, described above.[3]

3. *Tom C. Clark/Wendell Berge:* Mr. Clark was placed in charge of the Antitrust Division in early 1943, and Mr. Berge was placed in charge of the Criminal Division in 1941. As part of a Department reorganization aimed at increasing efficiency in response to the demands of World War II, the Attorney General had Mr. Clark and Mr. Berge exchange positions in August 1943.[4]

4. *David L. Bazelon:* Mr. Bazelon was the Assistant in charge of the Land and Natural Resources Division from 1946 until he was transferred in the Spring of 1947 to head the newly created Office of Alien Property.[5]

5. *John F. Sonnett:* Mr. Sonnett served as Assistant in charge of the Claims Division from 1945 until May 1947, when Attorney General Clark shifted him to the Antitrust Division to fill a vacancy caused by the resignation of Wendell Berge.[6]

6. *Theron Lamar Caudle:* Mr. Caudle headed the Criminal Division from 1945 until July 1947, when he was moved to the Tax Division.[7]

7. *James M. McInerney:* As the result of a Department-wide reshuffling in the early 1950s, Mr. McInerney was transferred from the Criminal Division to the Land and Natural Resources Division in August 1952.[8]

8. *Malcolm R. Wilkey:* Mr. Wilkey headed the Office of Legal Counsel for a year until he was shifted in 1959 by Attorney General Rogers to the Criminal Division. Att'y Gen. Order No. 177–59 (Mar. 26, 1959).[9]

9. *Edwin L. Weisl, Jr.:* Mr. Weisl was moved by Attorney General Clark in 1967 from the Land and Natural Resources Division to the Civil Division. Att'y Gen. Order No. 384–67 (Oct. 9, 1967).[10]

There was one transfer that deviated from this pattern. After passage of the Civil Rights Act of 1957, Attorney General Rogers chose W. Wilson White, then Assistant Attorney General for this Office, to head the newly created Civil Rights Division.[11] One reported reason for the choice of Mr. White was to avoid debate in Congress over the new division by eliminating the need for a confirmation hearing.[12] However, unfavorable reaction from Congress, which wanted to scrutinize the first head of the Civil Rights Division, persuaded the

[3] *Id.*

[4] N.Y. Times, Aug. 29, 1943, at 27, col. 1.

[5] N.Y. Times, Apr. 25, 1947, at 18, col. 7. Prior to that, there had been an Office of Alien Property headed by a director and a separate alien property litigation unit. *Id. See also Register, supra,* at 13 (41st ed. 1947).

[6] N.Y. Times, May 2, 1947, at 28, col. 2. *See also Register, supra,* at 3 (41st ed. 1947).

[7] *See Register, supra,* at 4 (41st ed. 1947); H.R. Rep. No. 1079, 83rd Cong., 1st Sess. 90, 91, 95 (1953).

[8] N.Y. Times, Aug. 9, 1952, at 1, col. 6; *id.,* Aug. 6, 1952, at 12, col. 6.

[9] N.Y. Times, Mar. 24, 1959, at 27, col. 2. The *Times* noted that "[t]he move to the Criminal Division does not require Senate confirmation."

[10] N.Y. Times, Oct. 1, 1967, at 1, col. 2.

[11] *See* Att'y Gen. Order No. 155–57 (Dec. 9, 1957).

[12] N.Y. Times, Nov. 22, 1957, at 1, col. 2 ("The expected struggle over confirmation, with all its likely personal attacks, would doubtless have discouraged any judges or leading lawyers in private practice from accepting the civil rights position.").

Attorney General and the White House to change their plans. Mr. White resigned his position with this Office, received a recess appointment as Assistant Attorney General for the Civil Rights Division, and was nominated for the permanent position. After a six-month delay, the Senate confirmed him.

II. Prior Memoranda

This Office has written at least three times with reference to the fungibility of Assistants. In 1953 we responded to inquiries from the Deputy Attorney General by stating flatly that "[t]he several Assistant Attorneys General are not required to be assigned to any particular divisions." Memorandum for Russell L. Malone, Jr., Deputy Attorney General from Ellis Lyons, Acting Assistant Attorney General, Executive Adjudications Division (Jan. 15, 1953). In 1957, we examined the issue again in a memorandum prepared for use by the Attorney General. Noting the lack of any statutory requirement that any Assistant perform specific duties and the statutory vesting of all functions of the Department, with limited exceptions, in the Attorney General, 28 U.S.C. § 509, we concluded that there were no statutory limits on the duties of any Assistant Attorney General. Memorandum on Statutory Specification of Duties of Assistant Attorneys General (Feb. 18, 1957). Finally, earlier this year we wrote an opinion explaining why there were no constraints on the use of the tenth Assistant slot created by Pub. L. No. 95–598, § 218, 92 Stat. 2549, 2662 (1978). We concluded that, "[a]s with the other nine Assistant Attorney General slots we believe that the Attorney General may exercise unfettered discretion in deciding how this new Assistant Attorney General can best assist him." Memorandum for Edward C. Schmults, Deputy Attorney General from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel (Feb. 8, 1983).

Conclusion

The Attorney General is authorized under 28 U.S.C. § 506 to have ten Assistants. He may assign them any duties he chooses, 28 U.S.C. §§ 509, 510, including the supervision of a division other than that for which they were nominated and confirmed. This has in fact that been done at least ten times and there is no reason to believe it cannot be done in the future.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Church Sanctuary for Illegal Aliens

The historical tradition of providing church sanctuary for criminal offenses was abolished by statute in England in 1623 and thus did not enter the United States as part of the common law.

Providing church sanctuary to illegal aliens probably violates 8 U.S.C. § 1324(a)(3), which forbids the harboring of illegal aliens.

Courts are unlikely to recognize church sanctuary as legally justified under the Free Exercise Clause of the First Amendment, because disagreement with the government's treatment of aliens is not a religious belief that is burdened by enforcement of the immigration laws, and the government has a compelling countervailing interest in uniform law enforcement.

October 31, 1983

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

We have discussed briefly at various times the legal issues raised by churches offering sanctuary to illegal aliens, recently those from El Salvador.[1] We have undertaken to provide you with a preliminary and very general analysis of those issues. In doing so, we have examined whether there is any law which makes it illegal to provide sanctuary and have concluded that the practice probably violates 8 U.S.C. § 1324(a)(3). We have also examined whether a charge of violating 8 U.S.C. § 1324(a)(3) could be defeated by the defense that sanctuary should be recognized at common law or should be protected by the First Amendment. We do not believe that a court would recognize either of these defenses.

I. Historical Background

The practice of providing asylum in a church or other sacred place has roots in ancient history,[2] although Christian churches were not recognized by Roman law as places of sanctuary until the 4th century.[3] Ecclesiastical sanctuary spread with the growth of the church but the exact nature of the privilege varied from country to country.[4] The English common law permitted an accused felon

[1] *See* Wash. Post, Oct. 11, 1983, at B1, col. 2; N.Y. Times, Sept. 21, 1983, at A18, col. 1; Time, Apr. 25, 1983, at 118; N.Y. Times, Apr. 8, 1983, at A1, col. 1.

[2] *See generally* 24 *Encyclopedia Americana* 218 (1983); 19 *Encyclopaedia Britannica* 992–93 (1971); 13 *Encyclopaedia of the Social Sciences* 534 (1935). *See also Deuteronomy* 4:41, 4:42.

[3] *Encyclopaedia Britannica, supra* note 2, at 993.

[4] *Encyclopedia of the Social Sciences, supra* note 2, at 535–36.

to seek sanctuary in a church where he could choose either to submit to trial or to confess and leave the country.[5]

The general demise of government recognition of church sanctuary took many years and is usually seen as the result of the growth of strong central governments and the development of effective national systems of justice.[6] In England, efforts to curtail abuses of church sanctuary or to eradicate sanctuary altogether achieved their first major success during the Reformation when many of the recognized sanctuaries were abolished and replaced by a limited number of cities of refuge.[7] Sanctuary for criminals in England was finally abolished in 1623.[8]

We have found no evidence that the colonists revived church sanctuary in America.[9] A search of both federal and state case law has revealed no case recognizing church sanctuary as a legitimate barrier to law enforcement. It is true that American churches have been used at times as symbolic sanctuaries. During the Vietnam War, for example, some churches offered "sanctuary" to young men who did not want to serve in the Armed Forces. *See Bridges* v. *Davis,* 443 F.2d 970 (9th Cir. 1971), *cert. denied,* 405 U.S. 919 (1972); *United States* v. *Beyer,* 426 F.2d 773 (2d Cir. 1970). In both of the cited cases federal officers eventually entered the churches and arrested individuals.[10] Thus, as with the protection presently being offered by churches to illegal aliens, the continued existence of the "sanctuary" depended entirely upon the authorities' desire to avoid a confrontation.

II. Legality of Sanctuary

The housing of illegal aliens by churches would appear to be a violation of 8 U.S.C. § 1324(a)(3), which forbids the harboring of illegal aliens.[11] Although the churches alert the INS that they are offering the aliens shelter, the most recent case law rejects the notion that harboring must involve actually hiding the alien or otherwise "clandestine" activity. *United States* v. *Acosta De Evans,* 531 F.2d 428, 430 (9th Cir. 1981). Instead, harboring has been held to include

[5] W. Blackstone, 4 *Commentaries on the Laws of England* 332–33 (1765).

[6] T. Plucknett, *A Concise History of the Common Law* 382 (2d ed. 1936); *Encyclopaedia of the Social Sciences, supra* note 2, at 536–37 (1935).

[7] *Encyclopaedia Britannica, supra* note 2, at 993.

[8] An Act for Continuing and Reviving of Divers Statutes, and Repeal of Divers Others, 1623, 21 Jac. 298, 303, ch. 28, § 7. *See also* Blackstone, *supra* note 5, at 333. Sanctuaries from civil process lingered on in some districts until 1723. *Encyclopaedia Britannica, supra* note 2, at 993.

[9] For example, church sanctuary is not referenced in such basic sources as *The Records of the Federal Convention* (M. Farrand ed. 1966), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (J. Elliot ed. 1836), *The Federalist Papers* (C. Rossiter ed. 1961), or *The Complete Anti-Federalist* (H. Storing ed. 1981).

[10] That the men had been taken from a church was recited in the facts of both cases but played no part in either court's legal analysis.

[11] Section 1324(a)(3) provides:

> Any person . . . who . . . willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation . . . any alien . . . not duly admitted by an immigration officer . . . shall be guilty of a felony . . . .

knowingly taking steps that "afford shelter to" an illegal alien, even if done without the purpose of concealing the alien from the immigration authorities. *Id.* "[T]he term was intended to encompass conduct tending substantially to facilitate an alien's 'remaining in the United States illegally,' provided, of course, the person charged has knowledge of the alien's unlawful status." *United States* v. *Lopez*, 521 F.2d 437, 41 (2d Cir.) (citation omitted), *cert. denied*, 423 U.S. 995 (1975). *See also United States* v. *Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). The debate on the conduct covered by harboring is not entirely settled, however, as there are older cases that take a contrary position. *See Susnjar* v. *United States*, 27 F.2d 223 (6th Cir. 1928). In addition, all of these cases involved defendants who simply kept silent about the aliens' presence, rather than individuals who have reported the aliens' presence to the INS but who have continued to shelter them.

We believe that it is unlikely that the historical tradition of offering sanctuary would provide a defense to an indictment under 8 U.S.C. § 1324(a)(3). As noted above, church sanctuary for criminal offenses was abolished by statute in England in 1623 and thus did not enter the United States as part of the common law. It has never, as far as we can discover, been recognized here by any state or federal legislation.[12] The only way to use church sanctuary as a successful defense on historical grounds would be to persuade the courts to resurrect the common law right. This is unlikely. Not only have centuries passed since sanctuary was abolished by statute, but there are major policy implications in a decision to revive sanctuary. Sanctuary grew out of the need of primitive societies for a place of respite. Where blood feud and tribal concerns dominate a society or the courts are weak or the executive is too ready to dispense harsh and bloody punishment, there may be a need for sanctuary. None of these conditions exists in this country today. We doubt the courts would be willing, even in the face of sympathetic facts, to hold that they were no longer able to enforce the country's laws in the church sanctuaries.[13]

Nor do we believe that a court would recognize sanctuary as legally justified under the Free Exercise Clause of the First Amendment.[14] Although there are cases recognizing that some government regulations must yield if contrary to the sincere religious convictions of a citizen,[15] we do not believe that the

[12] Although a complete search of all state laws enacted since 1789 is impractical, we have reviewed human rights treatises, general and specialized encyclopedias, and historical reference works without uncovering any reference to an American law dealing with church sanctuary. Churches have often opposed particular government policies by preaching civil disobedience, but not, as far as we can determine, by claiming a general exemption from the legal process. There was no claim, for example, that either the Underground Railroad or the sit-ins of the modern Civil Rights movement were legal — only that the particular laws involved were immoral and should, therefore, be changed.

[13] The issue for countries with modern governments, such as the United States, has instead become whether to grant asylum to aliens (in derogation of a sister state's laws), leaving behind the more primitive question of whether to permit derogation of one's own criminal laws by permitting churches to act as sanctuaries — and thus, as alternate sources of temporal power.

[14] N.Y. Times, Apr. 8, 1983, at A16, col. 5 (reporting the view of Thomas Cannon of the Marquette University School of Law that offering sanctuary could be legally justified under the First Amendment and as an observance of an ancient custom with roots in the Judeo-Christian tradition).

[15] *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

analysis in those cases will protect people harboring illegal aliens. First, disagreement with the government's treatment of illegal aliens is not a religious belief that is burdened by enforcement of the immigration laws. Sherbert v. Verner, 374 U.S. 398, 403–06 (1963). Church members are not compelled by our deportation of aliens to forego a religious practice, such as resting on the Sabbath. Even if granting sanctuary were viewed as a legitimate religious practice authorized by modern canon law, which all the evidence suggests it is not, the federal government has a compelling countervailing interest in insuring that the law is enforced throughout our country.[16] The integrity of our government would be seriously threatened if individuals could escape the criminal law by pleading religious necessity.

III. Suggestions for Statement

It has been suggested that the Department might wish to issue a formal statement on the growing use of churches as places of sanctuary for illegal aliens. If it is decided to do so, we recommend that the statement indicate that there is a statutory right to file for asylum in this country. 8 U.S.C. § 1158. INS does not deport aliens during the pendency of an application. The statement might reiterate our determination to adjudicate all asylum claims fairly, and urge that those with bona fide claims file them promptly.

The plight of illegal aliens in this country obviously generates strong emotions, especially when aliens are seeking escape from a strife-filled nation and argue that the government from which they are seeking sanctuary is the source of at least some of the violence. In any prosecution the courts are likely to be presented with defendants whose cases are sympathetic and whose advocates will be drawn from persons who assert a moral basis for their views. As in the case of enforcing any law affecting large numbers of people who may have acted pursuant to strong and principled convictions, sensitivity in the process, with adequate notice to all involved and manifest concern for matters of conscience, will be an important ingredient in convincing the courts to uphold enforcement.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[16] Unlike the beliefs protected in *Yoder*, which were recognized by the Supreme Court as having been practiced consistently for centuries, church sanctuary has been a nullity for over three hundred years The comments of various church leaders, *see supra* note 1, indicate that while the bishops may sympathize with their pastors' intentions, they also recognize that harboring the aliens is illegal and not immunized by an invocation of church sanctuary.

Delegation of the Attorney General's Authority to Investigate Credit Card Fraud

The Attorney General has authority under 28 U.S.C. § 533 to investigate all criminal violations against the United States, including credit card fraud under 15 U.S.C. § 1644, except in cases in which Congress has specifically assigned the responsibility with respect to a particular investigation exclusively to another agency.

The Attorney General's investigative authority under 28 U.S.C. § 533, which has been delegated to the Federal Bureau of Investigation by 28 C.F.R. § 0.85(a), may not be delegated outside of the Department of Justice to the Secret Service.

A preliminary analysis reveals no independent authority for investigations of credit card fraud in the Secret Service's enabling statute, 18 U.S.C. § 3056.

November 22, 1983

MEMORANDUM OPINION FOR THE ASSISTANT SECRETARY
DEPARTMENT OF THE TREASURY

This responds to your letter to your request that the Attorney General delegate to the Secret Service the Department of Justice's authority to investigate violations of 15 U.S.C. § 1644.

As you know, § 1644 generally makes it a crime (in certain circumstances affecting interstate or foreign commerce) to receive, transport, or use counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit cards. We understand that the Secret Service and the Postal Service have informally agreed upon procedures for coordinating and cooperating in investigations of § 1644 violations, but that you have taken the position that the Secret Service "is not in a position to effect those procedures governing counterfeit credit card investigations until the Department of Justice delegates to the Service the appropriate authority to investigate violations" of this provision. Your position is predicated on the assumption that the Secret Service does not have independent authority to investigate criminal violations of § 1644, but that the Attorney General may delegate to the Secret Service his statutory responsibilities to enforce § 1644. For the reasons set forth below, we conclude that the Attorney General may not transfer duties vested in him to other departments of the federal government in these circumstances, although we express no final view at this time whether the Secret Service possesses independent authority to undertake such investigations, a question which the Department of Treasury should examine in detail in the first instance.[1]

I. Delegation of Authority Under § 533

Section 1644 does not specifically provide that the Department of Justice may undertake credit card investigations. Nevertheless, the Department of Justice has general statutory authority to investigate the violation of criminal laws of the United States under 28 U.S.C. § 533. This section, which is part of the chapter in Title 28 setting forth the duties of the Federal Bureau of Investigation, states that the Attorney General "may appoint officials . . . to detect and prosecute crimes against the United States."[2]

The history of this provision can be traced back to a 1921 Appropriations Act for the Department of Justice, which contained a provision routinely included in Department of Justice appropriation laws over the years authorizing the expenditure of funds "for the detection and prosecution of crimes against the United States." Act of Mar. 4, 1921, Pub. L. No. 389, 41 Stat. 1367, 1410. Attached to this standard clause was a proviso, stating that "for the purpose of executing the duties for which provision is made by this appropriation, the Attorney General is authorized to appoint officials who shall be designated 'special agents of the Department of Justice,' and who shall be vested with the authority necessary for the execution of such duties." Id. at 1411. Similar provisos were included in appropriation statutes passed during each of the following six years, *see, e.g.*, Act of June 1, 1922, Pub. L. No. 229, 42 Stat. 599, 613 (codified at 5 U.S.C. § 300 (1925)).

As interpreted by this Office over the years, this provision authorizes the Department of Justice to investigate all criminal violations against the United States, except in cases in which Congress has specifically assigned this responsibility with respect to a particular investigation exclusively to another agency.[3]

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[1] We do not understand you to be asking the Department of Justice to enter into an agreement with the Secret Service for the performance of such services pursuant to the Economy Act, 31 U S.C. § 1535, and thus we have not considered the appropriateness of such an arrangement. An Economy Act agreement between the Departments of Justice and Treasury would not involve a "delegation" of responsibilities to the Secret Service, but only the performance of services by the Secret Service for the Department of Justice. *See, e.g.*, 57 Comp. Gen. 677, 678–80 (1978), H.R. Rep. No. 1126, 72d Cong., 1st Sess. 15–16 (1932). For this reason, if an Economy Act arrangement provided the basis for Secret Service investigations of § 1644 violations, the Department of Justice would be required to reimburse Treasury for all such services, unless it was determined that Treasury does indeed have independent authority to conduct such investigations.

[2] The grant of authority is not exclusive, for, according to § 533, it is not intended to "limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies."

[3] *See, e.g.*, Memorandum for Herbert J. Miller, Assistant Attorney General, Criminal Division from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel (Oct. 25, 1961); Memorandum for the Attorney General from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel (Nov. 9, 1955); Memorandum for the Attorney General from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel (Oct. 19, 1954); Memorandum for the Deputy Attorney General from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel (Oct. 5, 1954). *See generally* 28 C.F.R. §0.85(a).

For this reason, the Federal Bureau of Investigation, which has been delegated the Attorney General's responsibilities under § 533, *see* 28 C.F.R. § 0.85(a), clearly may undertake credit card investigations pursuant to § 1644.

In our view, however, the Attorney General may not delegate this responsibility outside of the Department of Justice to the Secret Service. Section 533 vests the authority to appoint criminal investigative officials in the Attorney General, not in the heads of other departments designated by the Attorney General.[4] In other words, on its face this provision does not authorize the Attorney General to delegate these duties outside this Department. Similarly, neither the language nor the legislative history of § 533 contemplates that the Attorney General would "appoint" employees of other departments directly in order that these employees may perform criminal investigations under the direct supervision of the heads of other departments. As noted above, this section was originally passed as a rider to an appropriation for the Department of Justice, which stated that such officials were to be designated "special agents of the Department of Justice" and were to execute the duties set forth in the appropriation for the Department of Justice. Floor comments regarding this proviso only reflect a congressional intent to support the appointment of Department of Justice investigative employees.[5]

We also believe the authority to transfer functions vested in the Attorney General may not be inferred in these circumstances. By establishing the Department of Justice and placing certain responsibilities in its head, *see* 28 U.S.C. §§ 501, 509, Congress has expressed its intent that these duties should be discharged by officials of this Department. The Attorney General, like the heads of many other departments who have similar authority with respect to their departments, may transfer responsibilities between officials within this Department pursuant to 28 U.S.C. §§ 509 and 510, but Congress has not granted the Attorney General general authority to transfer responsibilities outside this Department. This Office has previously observed that, in the absence of any general provision of law permitting an agency to transfer its statutory authority to another agency, such transfer or delegations may nor-

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[4] Of course, as discussed below, 28 U.S.C. § 510 authorizes the Attorney General to delegate functions vested in him to "any officer, employee, or agency of the Department," but there is no authority for the Attorney General to transfer such authority outside the Department of Justice.

[5] For example, in opposing passage of this provision on the ground that it would have conferred substantive power in an Appropriations Act, one Representative explained.

> All of the employees of the Department of Justice that are authorized to be appointed are creatures of legislation ... [The present bill would] give additional authority to the Department of Justice outside of the present legislation, [thereby] authorizing the [Attorney General] to appoint *additional employees* unauthorized by the present law.

62 Cong. Rec. 5209 (1922) (remarks of Rep. Blanton) (emphasis added).

Congress' consideration of a proposed cap on salaries paid under this provision reflects a similar understanding. One Representative argued that, based on his knowledge of the salaries of "agents of the Bureau of Investigation, . . . the designation of special agents of the Department of Justice is simply a device to enable the Attorney General to differentiate between the general agents and these special agents as far as salaries and compensation are concerned." *Id.* (remarks of Rep. Connally). He went on to observe that there was "no reason for making these officials special agents of the Department, when the Attorney General and the chief of the bureau now have authority to appoint all the regular agents of the bureau that they may find desirable." *Id.*

mally be accomplished only by legislation or by Executive Reorganization under the Reorganization Act.

This does not suggest, of course, that other agencies may not have *independent* authority to investigate violations of particular criminal statutes, authority which normally is exercised concurrently with the Department of Justice. For example, Congress has specifically granted the Secret Service the responsibility to investigate counterfeiting of United States obligations, *see* 18 U.S.C. § 3056, and conferred upon the United States Postal Service the right to investigate postal violations. *See* 39 U.S.C. § 404(a)(7). The failure of Congress to specify which agencies other than the Department of Justice may undertake criminal investigations, however, cannot be construed as empowering the Attorney General to choose any agency he wishes to assume these responsibilities. The "determination of where investigative jurisdiction lies for criminal violations" of a statute can only be made "pursuant to general principles of law and construction of existing statutes," Memorandum for the Deputy Attorney General from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel (Oct. 5, 1954), not through a policy determination by the Attorney General specifying which agency he believes is best suited to undertake such efforts. Thus, in our view, the Secret Service may undertake to enter into the division of investigative jurisdiction with the Postal Service only if the Secret Service has independent authority to investigate violations of § 1644.

II. Independent Authority of the Secret Service to Investigate Credit Card Fraud

This conclusion raises the question whether the Secret Service has independent authority to undertake these responsibilities. Generally, it is preferable that this Office interpret an agency's basic authorizing statute only after the agency itself has had an opportunity to examine the issue in detail and submit its views. As the Supreme Court has observed on numerous occasions, the construction of a statute by the agency charged with its administration is due substantial deference. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 15 (1965). We hesitate to give any final interpretation of the enabling statutes for the Department of Treasury and Secret Service in the present case without having the assistance of your views.

Nevertheless, we do offer the following brief observation which may be of some guidance. As in many cases where Congress has enacted a new statute making certain conduct a federal criminal violation, Congress did not specify clearly when passing § 1644 which agency or agencies would have authority to investigate possible criminal violations. The provision was originally added on the Senate floor when Congress was making several general amendments to the Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.*, of which it was made a part. *See* 116 Cong. Rec. 11839–40 (1970). Neither the language of § 1644 nor its legislative history indicates what agency should be responsible for investigating criminal violations.[6] Thus, the authority of the Secret Service to investigate possible credit card fraud depends in large part upon whether its enabling statute permits it to engage in such efforts.

Our preliminary review of the Secret Service's basic authorizing provision, 18 U.S.C. § 3056, however, has failed to uncover any basis for such an undertaking. As you know, § 3056 provides, in pertinent part, that the Secret Service may "detain and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments." The legislative history of this provision only suggests, as the language itself states, that the Secret Service may investigate counterfeiting of obligations of the United States and foreign countries. *See* S. Rep. No. 467, 82d Cong., 1st Sess. 2 (1951). There is no indication it may generally investigate fraud involving private financial obligations, such as credit cards. Although certain types of government-related transactions might come within the broad jurisdiction of the Department of Treasury and Secret Service, we are not aware at this time of any general authority for the Secret Service to investigate private credit card violations. Once again, though, we note these views are only preliminary and are intended to be of some assistance to your own examination of this question.

Should you ultimately conclude that the Secret Service lacks independent authority to undertake credit card investigations, we would be happy to work with you in drafting general legislation to submit to Congress. We believe that an amendment to § 1644 to permit the Secret Service, with the approval of the Attorney General, to pursue § 1644 investigative efforts, would afford a firm legal basis for the important investigative responsibilities you seek to undertake.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[6] We raise one caveat to this conclusion. The Truth-in-Lending Act, 15 U.S.C. § 1607, does authorize certain agencies to enforce the requirements of Title I of the Act, of which § 1644 was made part. It is unclear, however, whether Congress intended these provisions to apply to criminal enforcement of the credit card fraud section, which was first added two years after the original Act was passed and is generally concerned with a different type of abuse than the remainder of Title I. As a general matter, Title I seeks to ensure that financial institutions which extend credit "provide meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U.S.C. § 1601. The enforcing agencies identified in Title I are generally those responsible under other statutes for overseeing the financial institutions which are obliged under Title I to give such information, and do not appear to have any special expertise of which we are aware with credit card fraud. Even if Congress' inclusion of § 1644 in the Act is construed to give these agencies authority to investigate violations, moreover, the Secret Service is not included among them. Thus, the Act cannot serve as a basis for the Secret Service to investigate credit card violations.

Commencement of the United States Commission on Civil Rights

The United States Civil Rights Commission may commence its duties as soon as the statutory quorum of five members has been appointed.

The President may appoint the Chairman, Vice Chairman, and Staff Director prior to the appointment of all eight members of the Commission. Such appointments will be effective when a majority of the Commissioners then in office concurs, provided that at least five members have been appointed.

December 7, 1983

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to the request for the advice of this Office concerning several issues relating to the commencement of the new duties of the United States Commission on Civil Rights. Specifically, you have asked whether the Commission may begin to exercise its statutory responsibilities prior to the time that all eight members have been appointed. In addition, you have asked whether the President may designate a Chairman, Vice Chairman, and Staff Director for the Commission (which appointments require the concurrence of a majority of the Commission's members) prior to the time that all eight members are appointed. In brief, our conclusions are as follows: (1) the Commission may begin to take action in accordance with its statutory mandate as soon as the statutorily prescribed quorum of five members has been appointed; and (2) although the issue with respect to appointment of the Chairman, Vice Chairman, and Staff Director is less clear, we believe that the President may make these designations as soon as he pleases and that the appointment will be effective as soon as he has the concurrence of a majority of the Commissioners then in office, as long as at least five members have been appointed.

Congress recently adopted H.R. 2230, the United States Commission on Civil Rights Act of 1983. Pub. L. No. 98–183, 97 Stat. 1301 (1983). This bill creates a new Commission on Civil Rights with an expanded membership of eight Commissioners. The new Commission will exercise the same investigative and informative powers that were exercised by the previous Commission on Civil Rights. The appointment procedure for the new Commission has been changed, however, so that four members will be appointed by the President, two by the President *pro tempore* of the Senate, and two by the Speaker of the

House of Representatives. Because the Commission is a new creation, with a new procedure for appointment of its members, new appointments must be made in order for the new Commission to begin functioning.

1. The first question you have asked is whether the initial meeting of the Commission may be convened and operation of the Commission may commence prior to the time that all members of the Commission have been appointed. Section 2(f) of the bill specifically states that "five members of the Commission shall constitute a quorum." The Supreme Court has held that a majority of a quorum may act for a collective body in the absence of a statutory provision to the contrary. *FCC* v. *Flotill Products,* 389 U.S. 179, 183 (1967). Under this rule, federal agencies have frequently operated with vacancies in their membership as long as the statutory quorum is observed. In addition, this Office has consistently concluded that a federal agency or commission may act as long as the prescribed quorum is present. *See, e.g.*, "Federally Chartered Corporations — National Consumer Cooperative Bank," 3 Op. O.L.C. 311 (1979). In the case of the new Commission on Civil Rights, the statutorily prescribed quorum is five. Therefore, the Commission may begin to undertake its responsibilities as soon as five members have been appointed and have taken office.

2. The second question raised with respect to the new Commission is whether the President may designate the Chairman and Vice Chairman and appoint the Staff Director prior to the appointment of all eight members of the Commission. Section 2(c) of the bill states:

> The President shall designate a Chairman and a Vice Chairman from among the Commission's members with the concurrence of a majority of the Commission's members.

97 Stat. 1301. Section 6(a)(1) states:

> There shall be a full-time staff director for the Commission who shall be appointed by the President with the concurrence of a majority of the Commission.

97 Stat. 1305. These provisions raise the issue whether a majority of the Commission's members means a majority of the statutorily prescribed members (*i.e.*, five) or simply a majority of the members holding office at that time, as long as at least five have been appointed.[1]

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[1] The two provisions differ slightly in their descriptions of the concurrence required. Section 2(c) requires concurrence by a "majority of the Commission's members," while § 6(a)(1) uses the term a "majority of the Commission." There is no indication in the text or purpose of the statute or in the legislative history that Congress intended the two provisions to have different meanings. Therefore, we do not ascribe any legal significance to this minor difference, and we believe that the two phrases should be interpreted in the same manner. We also note that § 2(c) uses the term "designate," while § 6(a)(1) uses the term "appointed." We believe that this difference in terminology is due to the fact that the Chairman is selected from among members already appointed to the Commission, while the Staff Director is appointed to the position from a different job. Therefore, this difference in terminology also has no legal significance with respect to the issues considered herein.

Although a good argument could be made that Congress intended the President to obtain concurrence of a majority of the statutorily prescribed members, we believe that on balance, the correct reading of the statute is that concurrence may be obtained from a majority of the Commissioners holding office at the time of the designation or appointment.[2] The language of the concurrence provisions gives no indication that Congress intended to depart from the otherwise clear quorum requirement of § 2(f), which permits the Commission to act when at least five members are present. In addition, § 2(e) states in part that "any vacancy in the Commission shall not affect its powers." 97 Stat. 1302. This provision suggests that a quorum is all that is required in order to exercise the concurrence necessary to appoint the Chairman, Vice Chairman, and Staff Director. Finally, when Congress intended a majority of the statutorily prescribed Commissioners to take an action, as in the quorum requirement, it specifically used the number five to indicate that point. If Congress had intended to require concurrence by five Commissioners, it could easily have so stated. All of these factors lead us to the conclusion that a majority of the current members is sufficient to provide the necessary concurrence, provided a quorum is present.

This conclusion is supported by several court of appeals cases concerning a similarly worded provision in the Interstate Commerce Act. *See Michigan Dep't of Transportation* v. *ICC,* 698 F.2d 277 (6th Cir. 1983); *American Trucking Ass'n, Inc.* v. *United States,* 642 F.2d 916 (5th Cir. 1981); *Union Pacific R.R. Co.* v. *United States,* 637 F.2d 764 (10th Cir. 1981); *Assure Competitive Transp., Inc.* v. *United States,* 629 F.2d 467 (7th Cir. 1980), *cert. denied,* 449 U.S. 1124 (1981). In these cases the courts concluded that a statutory provision that "a majority of the Interstate Commerce Commission . . . constitutes a quorum" meant that a quorum required merely "a majority of the Commissioners actually in office," and not a majority of the statutorily prescribed Commissioners. *Assure Competitive,* 629 F.2d at 473. In so ruling, the courts relied on a vacancy clause similar to § 2(e) quoted above. Given the similarity of the vacancy clauses and the additional similarity between the language of the ICC's quorum clause and the language of the concurrence requirements in the Civil Rights Commission statute, these cases provide strong support for the conclusion that the required concurrence may be obtained from a majority of the members currently appointed, as long as at least five members have been appointed.

ROBERT B. SHANKS
Deputy Assistant Attorney General
Office of Legal Counsel

[2] Needless to say, the safest course would be to obtain concurrence from a majority of the statutorily prescribed members. If five members of the new Commission concurred in the appointments at issue, there would be no question about their validity.

Payment of Attorney Fee Awards Against the United States Under 28 U.S.C. § 2412 (b)

The United States is liable under 28 U.S.C. § 2412(b) for a court award of attorney fees in civil cases "to the same extent any party would be liable under the common law or under the terms of any statute." Attorney fees awarded by a court under § 2412(b) are to be paid from the judgment fund, and not from agency appropriations, unless an award is based on a finding of bad faith.

Although the terms of § 207 of the Equal Access to Justice Act, Title II of Pub. L. No. 96–481, 94 Stat. 2325 (1980), prohibit the payment of awards from the judgment fund without a specific congressional appropriation for that purpose, the legislative history of § 207 reveals that Congress only intended § 207 to apply to awards under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d), and not to apply to attorney fee awards under § 2412(b). Thus, § 207 does not bar the Comptroller General from certifying awards of attorney fees under 28 U.S.C. § 2412(b).

December 15, 1983

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY

This responds to your request for our opinion concerning the effect of § 207 of the Equal Access to Justice Act, Title II of Pub. L. 96–481, 94 Stat. 2325 (1980) (the Act), on the payment of attorney fee awards against the United States made under authority of 28 U.S.C. § 2412(b). Specifically, you wish to know whether § 207 bars payment of such awards from the judgment fund, and, if so, whether such awards may be paid from an agency's general appropriation.[1] The General Accounting Office has refused to certify such awards for payment from the judgment fund, apparently on grounds that § 207 bars payment of any awards authorized by the Act from this source. For reasons discussed below, we believe that awards made under authority of 28 U.S.C. § 2412(b) are not subject to § 207, and that § 207 therefore does not preclude their being certified for payment from the judgment fund. Furthermore, we

[1] Sections 2414 and 2517 of Title 28 set forth procedures for payment of final judgments or compromise settlements against the United States from the general fund of the Treasury, under authority of the permanent, indefinite appropriation established by 31 U.S.C. § 1304. The term "judgment fund" is generally used as a shorthand rendition of that process. Under 31 U.S.C. § 1304, the Comptroller General must "certify" all final court judgments and compromise settlements before they may be paid from the judgment fund. Because all final judgments must be paid from the judgment fund unless they are "otherwise provided for," the Comptroller General has no discretion to refuse to certify a final judgment which is properly payable from the judgment fund and whose payment is not governed by another statute. *See General Accounting Office, Principles of Federal Appropriations Law* 12–13 (1981).

believe that the judgment fund is the only available source of payment of awards made under authority of § 2412(b), except those based on a finding of bad faith.

Section 2412(b), enacted by § 204(a) of the Act, makes the United States liable for a court award of attorney fees in civil cases "to the same extent that any other party would be liable under the common law or under the terms of any statute."[2] Fees awarded by a court under authority of § 2412(b) are to be paid in accordance with 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.

With the text of § 2412(c)(2) before us, we turn first to your question whether general agency appropriations are available to pay an award made under authority of 28 U.S.C. § 2412(b). Unless an award is based on a finding of bad faith, we think they are not.

By its terms, § 2412(c)(2) specifies that an award made under § 2412(b) "shall" be paid from agency funds in cases where an award is based on a finding of bad faith; in all other cases, awards "shall" be paid from the judgment fund. There is no indication in the legislative history of the Act of an intention to depart from the plain directive of the statutory text by making agency appropriations available for payment of awards in cases other than those involving bad faith. It is an elementary principle of appropriations law that an agency may expend its general appropriations in a particular manner only if it has statutory authority to do so. Section 2412(c)(2) does not authorize the use of an agency's general appropriation to pay any but bad faith awards, and we know of no other authority which would permit such a disposition of an agency's general appropriation. *Compare* 5 U.S.C. § 504(d)(1)(A) (fee awards "may be paid by any agency over which the party prevails from any funds made available to the agency"). Moreover, under 31 U.S.C. § 1304, all final judgments must be paid from the judgment fund, unless "otherwise provided for." *See Principles of Federal Appropriations Law, supra* note 1, at 12–13 ("[I]f a judgment is properly payable from the permanent appropriation, then payment

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[2] Section 2412(b) provides in full 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.

of that judgment from agency funds violates 31 U.S.C. § 1301 (restricting appropriations to the objects for which made) and is an improper payment.").

Accordingly, we conclude that an agency's general appropriation is not available to pay awards made under authority of § 2412(b), except where such an award is based on a finding of bad faith. Thus, in the absence of some specific statutory directive to the contrary, § 2412(b) awards can be paid only from the judgment fund.[3]

Before turning to an examination of the text of § 207 of the Act, we make several observations regarding other provisions of the Act which we believe are relevant to an understanding of the effect of § 207. In addition to the authority contained in § 2412(b), the Act also authorizes an award of attorney fees in certain administrative and judicial actions, where the position of the United States cannot be shown to be "substantially justified." These authorities, enacted on a temporary and experimental basis, are codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412(d).[4] Awards made under authority of these provisions are to be funded in the following manner:

> Fees and other expenses . . . 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 pursuant to section 2412 [and section 2517] of title 28, United States Code.

See 5 U.S.C. § 504(d)(1); 28 U.S.C. § 2412(d)(4)(A). In contrast to awards made under the permanent authority of § 2412(b), all awards made under the experimental authorities in § 504 and § 2412(d) are to be paid in the first instance from agency budgets. Only in very limited circumstances may awards made under authority of § 504 and § 2412(d) be paid from the judgment fund.[5]

[3] One such contrary statutory directive appears in 39 U.S.C. § 409(e), which provides that judgments arising out of activities of the United States Postal Service shall be paid by the Postal Service from its own funds. Judgments under this provision are payable directly by the Postal Service and do not require the Comptroller General's certification. Other examples of statutes providing alternative sources of funding for judgments are cited in *Principles of Federal Appropriations Law*, *supra* note 1, at 12–13.

[4] 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.

Section 2412(d)(1)(A) of Title 28 provides for fee awards in certain judicial proceedings involving the United States in similar 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 have 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.

Under §§ 203(a)(2) and 204(c) of the Act, both of these authorities are repealed effective October 1, 1984.

[5] In brief, awards under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d) may be paid from the judgment fund only when their payment from agency funds would be a very heavy financial blow to the agency.

We must now determine what effect, if any, § 207 has upon the payment of awards made under authority of § 2412(b) from the judgment fund. Section 207 provides that

> The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations acts.

See 5 U.S.C. § 504 note. The effect of § 207, where it applies, is to prohibit the payment of awards from the judgment fund unless and until Congress makes a specific appropriation for that purpose. If § 207 applies to fee awards made under § 2412(b), then those awards may not be certified by the Comptroller General for payment from the judgment fund. Because of our conclusion that § 2412(b) awards not based on bad faith may not be paid from an agency's appropriated funds, the result would be that such awards could not be paid at all without a specific new appropriation. However, for reasons discussed below, we do not believe that Congress intended § 207 to apply to awards made under § 2412(b).

The terms of § 207 are ambiguous. On the one hand, they mirror the wording in 5 U.S.C. § 504(d)(1) and 28 U.S.C. § 2412(d)(4)(A), which govern the funding of awards made under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d), both of which provide for payment of awards "in the same manner as the payment of final judgments." By its terms, therefore, § 207 could be construed to apply only to awards made under authority of § 504 and § 2412(d). On the other hand, § 207 could also be more broadly interpreted to govern all awards newly authorized by the Act to be paid from the judgment fund, including awards made under authority of § 2412(b).

Because the language of § 207 admits of more than one reasonable construction, we turn to the legislative history to ascertain whether Congress intended § 207 to apply to all awards made under the new authorities contained in the Act, or only to awards made under § 504 and § 2412(d).

Section 207 was added to the Act on the House floor in response to a point of order to the Conference Report. The point of order, made by Representative Danielson, was

> that the conferees have agreed to a provision in the Senate amendment which constitutes an appropriation on a legislative bill, in violation of clause 2 of rule XX of the rules of the House of Representatives. The conferees have included, as an amendment to the bill, a title II, which provides for the award of attorneys' fees and other expenses to the prevailing party other than the United States, in certain actions or administrative proceedings in which the judgment or adjudication has been adverse to the United States, unless the court or adjudicative

officer of the agency finds that the position of the United States was substantially justified or that special circumstances make the award unjust.

126 Cong. Rec. 28638 (1980). Clause 2 of House Rule XX provides that conferees may not agree to Senate amendments which provide for an appropriation in any bill other than a general appropriation bill "unless specific authority to agree to such amendment is first given by the House by a separate vote on every such amendment." Because the Act had never been considered by the full House as an independent piece of legislation, reaching the House floor for the first time as Title II of the conference bill to amend the Small Business Act, H.R. 5612, Representative Danielson's point of order under House Rule XX could have applied to all of the fee-shifting authorities contained in the Act, including that under § 2412(b). However, it appears that the only specific fee-shifting authorities contained in the Act about which Representative Danielson was concerned, and to which he directed his point of order, were those which authorized fee awards in civil cases in which "the court or adjudicative officer of the agency [does not find] that the position of the United States was substantially justified." This reference clearly contemplates the authorities codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412(d), but does not encompass that codified at 28 U.S.C. § 2412(b). In a word, even if the point of order could have been directed at all of the new fee-shifting authorities under the Act, it appears in fact to have been directed only at those contained in § 504 and § 2412(d).

As sustained by the Speaker *pro tempore,* the point of order was narrowly focused on certain provisions of Title II:

> 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.

126 Cong. Rec. 28638 (1980) (emphasis added). The funding provisions to which the Speaker pro tempore was necessarily referring were § 504(d)(1) and § 2412(d)(4)(A), which provide for payment of awards "in the same manner as the payment of final judgments."

After the Speaker *pro tempore* had sustained Representative Danielson's point of order, Representative Smith offered an amended version of the bill to cure the defect. That amended version was identical to the conference version except that it contained a new section, § 207. Representative Smith explained that the proposed new section "modifies those provisions which had been ruled to be an appropriation on an authorization bill." The terminology chosen for § 207 is consistent with this narrow purpose to block payment of awards made under § 504 and § 2412(b) from the judgment fund.

The limited construction of § 207 that is suggested by its legislative history better effectuates the purpose of the several fee-shifting authorities enacted by the Act than does a broad construction of that section, and leads to a far more sensible result. One of the primary purposes of the fee-shifting authorities in § 504 and § 2412(d) was to ensure greater agency accountability. And, in early versions of the legislation, agency budgets had been made the sole source of payment for awards made under § 504 and § 2412(d).[6] This somewhat unconventional approach reflected the hope and expectation of some legislators that the experimental fee-shifting provisions in § 504 and § 2412(d) would provide a mechanism for holding agencies accountable for their activities. *See, e.g.*, 126 Cong. Rec. 28106 (1980) (remarks of Sen. Thurmond) ("affecting the 'pocketbook' of the agency is the most direct way to assure more responsible bureaucratic behavior"). When the bill finally reached the House floor, however, the conferees had agreed to make the judgment fund, as well as agency budgets, available to pay fees awarded under § 504 and § 2412(d). It is very likely that some Members of the House would have been concerned over the possibility that shifting the onus of paying these particular fee awards away from agency budgets to the judgment fund would cancel out whatever prophylactic effect the prospect of incurring adverse fee awards might otherwise have on "bureaucratic behavior." Section 207 can thus be best understood as intended to reinstate the requirement in previous versions of the legislation that awards under the experimental provisions of the bill should be paid from an agency's budget rather than the alternative source of the judgment fund.

There is no analogous reason why the House Members sponsoring § 207 should have wished to impair the conventional and uncontroversial funding mechanism for awards under § 2412(b). Indeed, applying § 207 to awards under § 2412(b) serves only to frustrate Congress' goals in enacting the latter provision. The purpose of § 2412(b) was to hold the United States "to the same standards in litigating as other parties," and to "plac[e] the Federal Government and civil litigants on a completely equal footing." *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980) (Report of the House Committee on the Judiciary); S. Rep. No. 253, 96th Cong. 2d Sess. 4 (1980). If § 207 applied to awards made under § 2412(b), such awards could not be paid *at all* under existing law, except in cases involving agency bad faith.[7] It would hardly be consistent with

[6] The funding provisions of the version of the bill passed by the Senate, identical to those reported out by the House Committee on Small Business, would have placed fiscal responsibility for paying awards made under § 504 and § 2412(d) exclusively on individual agencies. *See* Senate Report at 18; H.R. Rep. No. 1005, 96th Cong., 2d Sess. (Part 1) 11 (1980) (House Committee on Small Business). The funding provisions agreed to in conference, which gave prevailing parties access to the judgment fund, derived from the version of the bill reported out by the House Committee on the Judiciary. *See* H.R. Rep. No. 1005 (Part 1), 96th Cong., 2d Sess. 12 (1980).

[7] In the absence of a specific appropriation to pay an award made under § 2412(b), it would remain an obligation of the United States until satisfied by legislative action to authorize its payment. Such an obligation could remain unsatisfied forever if Congress never acted to authorize its payment, but history suggests that such obligations usually are paid, and uncertainty as to the source of funding for such awards in no way restricts the authority of judges to make them.

the purpose of creating new liability simultaneously to cut off the only means of enforcing it short of new appropriations legislation.

In sum, we conclude that awards made under authority of § 2412(b) are payable from the judgment fund and not from agency appropriations. Moreover, § 207 of the Act applies only to fee awards authorized by 5 U.S.C. § 504 and 28 U.S.C. § 2412(d), and not to awards authorized by 28 U.S.C. § 2412(b). That section therefore does not prevent the payment of such awards from the judgment fund, and we know of no reason why they should not be certified by the Comptroller General in accordance with the procedure called for in 28 U.S.C. §§ 2414 and 2517.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Use of the "Pocket Veto" During Intersession Adjournments of Congress

Under the Constitution, the President has the power to veto an enrolled bill by "return[ing] it, with his objections to that House in which it shall have originated" within ten days of the bill's being presented to the President. If, however, "the Congress by their Adjournment prevent [a bill's] Return" from the President, he may veto the bill simply by failing to sign it (*i.e.*, by "putting it in his pocket"). Congress may not override a pocket veto of a bill by a two-thirds vote of both Houses. Rather, the bill must be reintroduced and repassed by both Houses and resubmitted to the President for his approval or veto.

The Supreme Court has held that Congress' appointment of an officer or agent to receive returned bills from the President during an intersession adjournment does not preclude the President from exercising a pocket veto. The Court has also held, however, that an ordinary "return veto" was valid when the President returned a bill to the Secretary of the Senate while that House was in an intrasession adjournment of three days or less.

Despite lower court decisions questioning the continued validity of the Supreme Court's reasoning, use of the pocket veto during intersession adjournments remains valid, whatever steps Congress may take to receive returned bills during such and adjournment. The Supreme Court has not decided whether the pocket veto can be exercised when one House, but not the other, has adjourned *sine die* or for an intersession recess. Nor has that Court decided whether the pocket veto can be used during intrasession adjournments lasting longer than three days.

December 19, 1983

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorializes our response to your questions whether the President should use the "pocket veto" or the "return veto" during the present intersession adjournment of Congress, and whether there have been any recent developments in the law that would affect the advice that we have previously given to you on this subject.

Congress is currently in an intersession adjournment. The House and Senate adjourned *sine die* on November 18, 1983. *See* H.R. Con. Res. 221, 129 Cong. Rec. 34334 (1983). By separate resolution, the House and Senate agreed to reconvene on January 23, 1984, for the second session of the 98th Congress. *See* H.R.J. Res. 421, 129 Cong. Rec. 33123 (1983); *id.* at 34334.[1] Before

[1] Congress traditionally ends a session by a *sine die* adjournment at a date specified by concurrent resolution of both Houses. The 20th Amendment to the Constitution requires that Congress assemble each year on January 3 "unless they shall *by law* appoint a different day." (Emphasis added.) Thus, although Congress can adjourn by concurrent resolution, it must establish a return date other than January 3 by a *law*. Therefore, the time for reassembly is fixed, at the time of adjournment, by a joint resolution which must be presented to the President and which, when signed, has the force of a law. Although a joint resolution specifies the date for return, the adjournment by concurrent resolution is considered to be *sine die*.

adjourning, the Senate authorized the Secretary of the Senate to receive messages from the President during the adjournment.[2] Under House Rule III-5, the House Clerk is authorized to receive such messages "at any time that the House is not in session."[3] H.R. Con. Res. 221 also provides that both Houses may be reconvened two days after Members are notified to reassemble by the Speaker and the Majority Leader of the Senate "acting jointly," after each consults with the Minority Leader of the House and the Minority Leader of the Senate, respectively, "whenever, in their opinion, the public interest shall warrant it."

The practical consequence of a decision to exercise a pocket veto, instead of a return veto, is significant. Congress may override a return veto by a two-thirds vote of both Houses; a bill which is pocket vetoed must be reintroduced and repassed by both Houses and resubmitted to the President for his approval or veto. But if a court were to determine that an attempted pocket veto of a bill was ineffective, that bill would become law because it had not been disapproved within ten days (Sundays excepted) after it was presented to the President.

The pocket veto power is very significant because it may often be much more difficult for proponents of legislation to start the legislative process anew, repass legislation, and overcome a second Presidential veto than simply to override the first veto. Time and inertia, extremely important factors in American political life, make the pocket veto a potent Presidential weapon. This is particularly so given Congress' increasing propensity to be unable to pass much legislation except in the last few days of a congressional session. Because of this phenomenon, the pocket veto is available for use against a disproportionate number of bills. For example, out of 146 bills (public laws only) passed during the first session of the 97th Congress, 53 or more were presented to the President within ten days (Sundays excepted) prior to or after adjournment. Fifty-two of those bills were approved; one was disapproved by pocket veto. Others presented within the ten days (Sundays excepted) may have been signed in less than ten days. For the first sessions of 94th, 95th, and 96th Congresses, the corresponding figures are as follows:

94th Congress: 50 or more presented out of 207 passed (48 were signed, 2 were disapproved)

95th Congress: 13 or more presented out of 223 passed

96th Congress: 35 or more presented out of 187 passed

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[2] Senator Baker

> ask[ed] unanimous consent that during the *sine die* adjournment of the Senate, messages from the President of the United States and the House of Representatives may be received by the Secretary of the Senate and appropriately referred, and that the Vice President, President pro tempore, and acting President pro tempore, may be authorized to sign duly enrolled bills and joint resolutions.

Without objection, it was so ordered. *See* Authority for Certain Action During *Sine Die* Adjournment and Upon Reconvening of the Senate, 129 Cong. Rec. 34679 (1983).

[3] The House Rule provides:

> The Clerk is authorized to receive messages from the President and from the Senate at any time that the House is not in session.

Rules of the House of Representatives, Rule III-5.

As a matter of political dynamics, even a slight increase or decrease in Presidential power may have enormous impact on the President's influence with Congress. The pocket veto, therefore, should be appreciated as a tool of no little significance.

Because of the short time typically available for analysis at the time that a veto decision is required, and because of the adverse consequences of an erroneous decision to pocket veto a bill rather than return it, with objections, to the originating House, we have previously examined in rather comprehensive fashion the legal issues associated with pocket vetoes in situations that are likely to arise in the future.[4] We have also carefully memorialized oral advice, whenever we have given it, so that it may be readily available for review when needed. We continue these practices in this memorandum, which reaffirms and supplements the conclusions in our prior memoranda and confirms our oral advice on this occasion.

We have consistently advised your Office on prior occasions that disapproval by inaction, the pocket veto, is the appropriate method of Presidential disapproval after a *sine die* adjournment of the Congress, where the end of the President's constitutional period for approving or disapproving a bill falls during the adjournment.[5] That advice is fully applicable to the present adjournment. In our view, neither the designation of an agent to receive messages from the President nor the provision for the possible recall of Members affects this conclusion.

I. Background

Article I, § 7, cl. 2 of the Constitution provides in 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, 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

[4] *See* "Approval and Disapproval of Bills by the President after *Sine Die* Adjournment of the Congress," 6 Op. O.L.C. 846 (1982); "The Pocket Veto: Historical Practice and Judicial Precedent I," 6 Op. O.L.C. 134 (1982); "The Pocket Veto: Historical Practice and Judicial Precedent II," 6 Op. O.L.C. 150 (1982).

[5] *See* the memoranda cited *supra* note 4. *See also* Memorandum for the President from Griffin B. Bell, Attorney General (May 13, 1977) (attaching Memorandum for the Attorney General from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel (May 13, 1977)).

> 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 added.) The highlighted phrase is commonly referred to as the "Pocket Veto Clause" because it empowers the President to prevent a bill from 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. As noted above, the functional difference between ordinary vetoes and pocket vetoes is that Congress cannot override the latter.

In *The Pocket Veto Case*, 279 U.S. 655 (1929), the Supreme Court upheld the use of a pocket veto during an intersession adjournment of the 69th Congress. Justice Sanford's opinion for the Court concluded that the word "adjournment" was not limited to final adjournments of a Congress, but also included interim adjournments. The determinative factor with regard to an adjournment was whether it "prevented" the President from returning the bill within the time allowed to the House in which it originated. In resolving this question, the Court rejected the argument that a bill could be "returned" to the House within the meaning of the constitutional provision if it was returned to an officer or agent of the House to be held by him and delivered to the House when it resumed its sittings at the next session. The Court stated:

> 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 . . . 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.

Delivery of the bill to an officer or agent, even if authorized by Congress, "would not comply with the constitutional mandate":

> 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 . . . . 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. at 684–85.

Use of the return veto during a brief, intrasession recess of only one House of Congress was upheld in Wright v. United States, 302 U.S. 583 (1938).[6] There, the Supreme Court held that "Congress" had not adjourned when only one House, the Senate, recessed for three days while the other was in session.[7] The Court rejected both legal and practical arguments that the President was "prevented" from returning a bill because of the Senate's recess:

> In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. . . .
>
> Nor was there any practical difficulty in making the return of a bill during the 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 the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence.

Id. at 589–90.

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[6] We do not believe that there is any constitutional significance to the designation of a period when one or both Houses are not in session as a "recess" or an "adjournment" for purposes of determining whether a return or a pocket veto is appropriate. There are certain technical practices which are unique to the House or the Senate and from which certain parliamentary consequences flow, but the difference does not depend on duration or the consent of the other House. In this memorandum, we use the terms "recess" and "adjournment" to mean any period in which Congress or one House is not in session. We do not, however, characterize the normal day-to-day or weekend interruptions in the session of Congress as adjournments for pocket veto purposes within the meaning of the Constitution.

[7] The Constitution provides that "neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4.

The Court distinguished *The Pocket Veto Case* on the ground that the dangers inherent in an intersession adjournment were not present in the context of a brief intrasession recess of three days or less by only one House. *Id.* at 595. As discussed more fully in Part II, below, 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, cl. 4, would prevent the return of a bill and thereby trigger the pocket veto provision. *Id.* at 598. The holding of the case was therefore expressly limited to the statement that the return veto could be used to prevent a bill from becoming law "where the Congress has 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." *Id.* at 598.

More recently, in *Kennedy* v. *Sampson,* 511 F.2d 430 (D.C. Cir. 1974), the United States Court of Appeals for the District of Columbia Circuit considered a challenge by a Senator to a pocket veto of a bill, for which he had voted, during a brief intrasession adjournment (six days for one House, five for the other) of both Houses. The district court granted summary judgment for the plaintiff. The court of appeals affirmed, holding that the adjournment fell within the rule of *Wright* v. *United States,* not *The Pocket Veto Case.* Moreover, the court's opinion concluded that a pocket veto would have been inappropriate even under the standards set forth in *The Pocket Veto Case:* "The 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.*" *Id.* at 440. According to the court, "intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case,*" *id.* at 441.; and "[m]odern methods of communication" make the return of a disapproved bill to the appropriate officer of the originating House a matter of public record accessible to every citizen. *Id.* The court therefore broadly concluded 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.

In a subsequent case, *Kennedy* v. *Jones,* 412 F. Supp. 353 (D.D.C. 1976), the Government entered into a consent judgment with the plaintiff, who had challenged the President's pocket veto of two bills, one during an intersession adjournment and the other during an intrasession election adjournment of thirty-one days. The same day that judgment was entered, President Ford announced that he would not invoke his pocket veto power during intrasession or intersession recesses or adjournments if the originating House had specifically authorized an officer or other agent to receive returned bills during such periods. That announcement was limited to President Ford's intended use of the pocket veto.[8] It did not purport to bind, and, in our view, could not have bound, future Presidents. President Reagan has made no similar statement, nor did President Carter during his Presidency.

II. Analysis

As we have stated in our prior memoranda, we are confident that the President may pocket veto bills when the President's constitutional period for exercising his veto power ends during an intersession adjournment of Congress.

A. The Case Law

We believe that *The Pocket Veto Case* stands for the proposition that intersession pocket vetoes are not only appropriate, but required. The Court in Wright distinguished *The Pocket Veto Case* and strongly implied that the earlier decision was still the law with respect to intersession adjournments:

> However real th[e] dangers 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 [in *The Pocket Veto Case*] was dealing — they appear to be illusory when there is a mere temporary recess.

302 U.S. at 595.

Our conclusion that pocket vetoes are the appropriate veto mechanism during an intersession adjournment is not inconsistent with the District of Columbia Circuit's holding in *Kennedy* v. *Sampson,* which involved intrasession vetoes. To the extent that the district court's judgment in *Kennedy* v. *Jones* is inconsistent with our conclusion, we believe that it is incorrect and inconsistent with both *The Pocket Veto Case* and *Wright*. In any event, *Kennedy* v. *Jones* is not a meaningful precedent because of the nonadversarial nature of the outcome. The court never did address the issues on the merits.

We therefore continue to read the case law to preserve the President's power to use the pocket veto during an intersession adjournment of Congress. We believe that the holding in *Wright* regarding a recess of one House should be limited to the facts of that case: a short (up to three day) intrasession recess or adjournment of one House. For, just as *Wright* held that the return veto was appropriate on those facts, *The Pocket Veto Case* held that the pocket veto was required during a lengthy intersession adjournment by both Houses. *Wright* neither expressly overruled *The Pocket Veto Case* nor challenged that Court's

[8] Following the decision in the *Kennedy* v. *Jones,* 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).

perception of and remedy for the dangers attendant to a lengthy intersession adjournment. *See The Pocket Veto Case,* 279 U.S. at 684–85. In between the extremes of these two cases lies a number of other factual situations in which the result cannot be clearly derived from *Wright.* For example, we suspect that the holding in *Wright* would not control if either House has adjourned *sine die* at the end of a Congress: the Congress as a whole would not be in a position to reconsider a bill returned to it. An intersession adjournment by one House might also present a much more difficult issue for the Court than the short recess in *Wright.* Finally, the most difficult situation under the analysis in *Wright* would be an intrasession adjournment by one House of Congress longer than three days. The Court in *Wright* expressly declined to predict the result in such circumstances, stating:

> [W]e have no such case before us and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case, or what would be its effect.

Wright, 302 U.S. at 598. It is therefore clear that *Wright* cannot be read as the final word on these issues. It goes without saying, of course, that what *Wright* preserved of *The Pocket Veto Case,* the District of Columbia Circuit could not on its own authority destroy. Thus, we conclude that if both Houses of Congress have adjourned *sine die* between sessions of Congress, their adjournment "prevents" the President's return of a bill within the meaning of the Pocket Veto Clause.

B. The Effect of President Ford's Announcement

As we stated in our November 15, 1982 memorandum, *see* 6 Op. O.L.C. at 151–52, 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. Moreover, as the Supreme Court so recently reaffirmed, any doubt that the President's approval could immunize a practice from constitutional scrutiny was resolved in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803). *See INS* v. *Chadha,* 462 U.S. 919, 942 n.13 (1983).

C. The Receipt of Messages

As we discussed in our previous memoranda, specific authorizations of agents to receive messages from the President have been customary for intersession and intrasession adjournments in both Houses. The Senate's provision for receipt of messages by the Secretary of the Senate during the present intersession adjournment appears unexceptional in this regard. Since 1981, it has not been necessary for the House to adopt *ad hoc* provisions because it has maintained a standing Rule providing for receipt of messages from the President and the Senate whenever the House is not in session. As we noted in our memorandum of November 15, 1982, however, the House Parliamentarian's comments make clear that the House Rule, originally adopted by the 97th Congress, H.R. Res. 5, 127 Cong. Rec. 98 (1981), was added to facilitate, if possible, the use of the return veto during intrasession recesses and thereby to discourage use of the pocket veto at that time. *See* 6 Op. O.L.C. at 151. The Parliamentarian's comments do not mention intersession pocket vetoes. Moreover, the legislative history of House 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. 99–102 (1981), in which he explained that the proposed rule applied only to "non sine die adjournments." *Id.* at 100. We therefore believe that the Senate's appointment of an agent to receive messages during the current adjournment and the House's standing delegation of authority to receive messages were not intended to, and do not, require the President to use a return veto during an intersession adjournment.

D. The Recall Provision

For similar reasons, we believe that the provision in H.R. Con. Res. 221, authorizing the recall of Members upon two days' notice by joint action of the Speaker of the House and the Majority Leader of the Senate, does not affect the use of the pocket veto during an intersession adjournment. First, there is no indication in either the language or the legislative history of the Concurrent Resolution that it was intended to prevent the President's use of the pocket veto. The "public interest" standard specified in the Concurrent Resolution for the recall of Congress is at least as consistent with a conclusion that the provision was intended to permit Congress to reconstitute itself to deal with unanticipated crises in foreign or national affairs. A similar clause was included, for example, in H.R. Con. Res. 68, by which the 79th Congress adjourned during the first session in 1945 shortly after the end of World War II. *See* 91 Cong. Rec. 7733–34, 7911–12 (1945). *See also* H.R. Con. Res. 412, 93d Cong., 1st Sess., 119 Cong. Rec. 43323, 43327 (1973).[9]

Second, even if the Congress had indicated an intention to preclude use of the pocket veto during this intersession adjournment, we do not believe that the provision in H.R. Con. Res. 221 could accomplish that objective. The Concurrent Resolution merely provides that the Speaker and the Majority Leader, acting jointly, *may,* at their discretion, recall the Members on two days' notice. Under the reasoning of *The Pocket Veto Case,* once Congress adjourns, there is no functioning "House" in the constitutional sense to which a bill can be returned. Moreover, because the recall is discretionary, the President could not

[9] A prior memorandum written in this Office considered the effect of the recall provision in H.R. Con. Res. 412 on the use of the pocket veto during the intersession *sine die* adjournment of the 93rd Congress. That memorandum concluded that the recall provision was not effective to require the use of the return veto. A similar recall provision was included in S. Con. Res. 42, 93d Cong., 2d Sess., 119 Cong. Rec. 26427 (1973). *The Guide to Congress* (Congressional Quarterly, 3d ed. 1982) states that S. Con. Res. 42 revived a procedure that had not been used in 25 years. *See also* H.R. Con. Res. 697, 93d Cong., 2d Sess., 120 Cong. Rec. 41815 (1974).

know in advance whether Congress in fact would be recalled to reconsider a bill returned with his objections. The Congress could remain adjourned and "prevent" the return of the bill — the precise situation the Pocket Veto Clause was designed to prevent. We do not believe the mere possibility that Congress could be recalled can affect the constitutional power of the President that arises on the adjournment of Congress *sine die*. Indeed, under the Constitution, the President always retains the authority to recall the Congress. U.S. Const. art. II, § 3. That he could have done so did not lead the Court in *The Pocket Veto Case* to conclude that a return veto could have been exercised in lieu of the pocket veto. We thus conclude that the mere reservation by the congressional leadership of the power to recall the Congress does not alter the fact that Congress has adjourned and dispersed, rendering a pocket veto appropriate.

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Effective Date of the Reporting Requirement Imposed by the Multinational Force in Lebabon Resolution

The three-month reporting requirement imposed by § 4 of the Multinational Force in Lebanon Resolution (Lebanon Resolution) commenced as of the date of enactment of that Resolution, October 12, 1983. The specification in § 4 of the Lebanon Resolution that reports should be made "[a]s required by section 4(c) of the War Powers Resolution" is intended to incorporate only the reporting obligation, not the timing mechanism, set forth in the War Powers Resolution.

December 21, 1983

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This confirms our oral advice to you in response to your request for our views on when the President must submit to Congress the first of the periodic reports on the situation in Lebanon that are required by § 4 of the Multinational Force in Lebanon Resolution, S.J. Res. 159 (Oct. 12, 1983) ("Lebanon Resolution"). That section requires the President to submit certain information to Congress on the situation in Lebanon "as required by section 4(c) of the War Powers Resolution [50 U.S.C. § 1543(c)] . . . but in no event shall he report less often than once every three months." In full text, the section reads as follows:

> As required by section 4(c) of the War Powers Resolution, the President shall report periodically to the Congress with respect to the situation in Lebanon, but in no event shall he report less often than once every three months. In addition to providing the information required by that section on the status, scope, and duration of hostilities involving United States Armed Forces, such reports shall describe in detail —
>
> (1) the activities being performed by the Multinational Force in Lebanon;
>
> (2) the present composition of the Multinational Force in Lebanon, including a description of the responsibilities and deployment of the armed forces of each participating country;
>
> (3) the results of efforts to reduce and eventually eliminate the Multinational Force in Lebanon;
>
> (4) how continued United States participation in the Multinational Force in Lebanon is advancing United States foreign policy interests in the Middle East; and

(5) what progress has occurred toward national political reconciliation among all Lebanese groups.

For the reasons discussed below, we conclude that the three-month reporting requirement set forth in the Lebanon Resolution began to run upon enactment of the Resolution on October 12, 1984, and therefore the first report will be due three months from that date, on January 12, 1984.[1]

The Lebanon Resolution does not expressly state that the three-month reporting period commences on a particular date. Therefore, we would ordinarily conclude that the reporting period would commence as of the date of enactment of the Resolution. *See generally United States* v. *Commonwealth Auto Sales, Inc.*, 463 F. Supp. 12, 13 (M.D. Pa. 1978). However, because § 4 specifies that the reports should be made "as required by the War Powers Resolution," and Congress in § 2(b) of the Lebanon Resolution purported to "determine . . . that the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983," we must look at the question more closely.

Section 4(c) of the War Powers Resolution requires that, "whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall . . . report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities, but in no event shall he report to the Congress less often than once every six months." 50 U.S.C. § 1543(c).[2] As indicated in note 1, *supra*, Senator Byrd has taken the position that the three-month period imposed by § 4 of the Lebanon Resolution began to run on August 29, 1983. This position appears to be based on the argument that the

[1] The occasion for your request is a letter to the President from Senator Byrd of December 5, 1983, in which Senator Byrd takes the position that the three-month period specified in the Lebanon Resolution began to run on August 29, 1983, rather than on October 12, 1983. We note that pursuant to the President's letter to Speaker O'Neill of October 19, 1983, in which the President stated his intention to submit the reports required by S.J. Res. 159 "no less frequently than once every sixty days," a report dated December 14, 1983 was transmitted to the Speaker and the President *pro tempore* of the Senate by the President. Although not directly relevant to the point at issue, we observe that if Senator Byrd's interpretation of § 4 of S.J. Res. 159 were correct, then the first report would have been due, under the President's October 19, 1983 letter, on October 27, only two weeks after S J. Res. 159 became law. Thus, according to Senator Byrd's interpretation, the President would presumably be viewed by the Speaker as having failed to honor his intention, expressed on October 19, to report at sixty-day intervals. However, if Speaker O'Neill had understood the President to have promised the first report by October 27, it must be assumed that the Speaker would have expressed his concern shortly after October 27. We are unaware that any such concern has been expressed.

[2] The situations described by subsection (a) include any case in which United States Armed Forces are introduced, in the absence of a declaration of war, —

> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.

50 U.S.C. § 1543(a). We note that neither § 1543(a) nor § 1543(c) requires that the President specify the subsection under which information is being provided. Reports to Congress, which have generally been characterized as "consistent with" the War Powers Resolution, have traditionally not specified the subparagraph of subsection (a) that may arguably have been triggered by the particular facts and circumstances involved.

language in that section, "[a]s required by section 4(c) of the War Powers Resolution," expresses a congressional intent that the three-month reporting period began to run on August 29, 1983, the date recited by Congress in § 2(b) of the Lebanon Resolution as the operative date on which, according to the Congress, § 4(a)(1) of the War Powers Resolution was triggered with respect to Lebanon.[3] Under this interpretation, the first report on the situation in Lebanon would have been due on November 29, 1983.

This interpretation of the Lebanon Resolution assumes that the reporting requirement imposed by § 4 of the Resolution was not intended to be an independent obligation imposed in the context of the compromise worked out between the Executive and Legislative Branches, but rather was intended only to supplement § 4(c) of the War Powers Resolution by requiring § 4(c) reports to include certain additional categories of information and to be submitted at three-month, rather than six-month, intervals.

We believe, however, that the reporting obligation imposed by § 4 of the Lebanon Resolution must be interpreted in light of the full text, background, and legislative history of that Resolution. Seen in context, we believe the three-month reporting requirement stands alone as an independent reporting obligation imposed with respect to the situation in Lebanon, an obligation linked directly to the eighteen-month authorization by the Lebanon Resolution for participation of United States Armed Forces in the Multinational Force in Lebanon.

We reach this conclusion for several reasons. First, we observe that the authority provided by § 6 of the Lebanon Resolution for the participation of United States Armed Forces in the Multinational Force in Lebanon extends for an eighteen-month period commencing with the date of enactment of the Resolution.[4] Thus, at the only point in the Lebanon Resolution at which Congress specifically focused on the commencement of a time period, Congress chose to have the time period commence on the date of enactment of the Resolution itself. Congress could, of course, have chosen to commence the eighteen-month authorization as of August 29, but it did not do so. We believe it is both logical and reasonable to conclude that Congress contemplated that the reports to be submitted pursuant to the terms of the Lebanon Resolution would be submitted in phase with the eighteen-month authorization — *i.e.*, at three-month intervals at the end of the third, sixth, ninth, twelfth, fifteenth, and eighteenth months of the authorization.

Second, there is no suggestion in the congressional debates or reports accompanying enactment of the Lebanon Resolution that Congress intended the three-month period to run from August 29, 1983. We have been unable to

[3] We note that in signing S.J. Res. 159 into law, the President specifically stated that he did not "necessarily join in or agree with" some expressions of Congress in that Resolution, including "the congressional determination that the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983."

[4] In signing S.J. Res. 159 into law, the President stated that § 6, providing an eighteen-month authorization for deployment of United States Armed Forces in Lebanon, should not "be interpreted to revise the President's constitutional authority to deploy United States Armed Forces."

locate in that legislative history any specific discussion of when the periodic reporting requirement with respect to Lebanon would commence. Debate over the reporting requirement focused only on the length of the interval between reports. Draft resolutions in both the House and Senate initially provided for a six-month reporting period but, because of concerns about the volatility of the situation in Lebanon and the perceived need for more frequent information, both Houses agreed upon a three-month reporting period. *See, e.g.*, S. Rep. No. 242, 98th Cong., 1st Sess. 9–10 (1983); 129 Cong. Rec. 26036 (1983) (remarks of Senator Mathias); *id.* at 26145 (1983) (text of H.R.J. Res. 364); *id.* at 26494 (1983) (remarks of Rep. Zablocki). These congressional discussions concerning the reporting period do not suggest in any way that the commencement of the period would be triggered as of the date Congress "determined" in the same resolution that § 4(a)(1) of the War Powers Resolution had been triggered — *i.e.*, as of August 29, 1983 — rather than as of the date of enactment of the Resolution.

Third, the language of early House and Senate draft resolutions that would have imposed a six-month reporting period suggests strongly that Congress did not contemplate that its determination regarding the operative date for triggering of the War Powers Resolution, August 29, 1983, would also commence the running of the time for the reporting requirement imposed by the Lebanon Resolution. Those drafts provided, in much the same language as was ultimately used in S.J. Res. 159, that the reports were to be submitted "[a]s required by section 4(c) of the War Powers Act . . . *but in no event shall he report less often than once every six months.*" *See* 129 Cong. Rec. 26145 (1983) (text of H.R.J. Res. 364); S. Rep. No. 242, *supra*, at 30–31 (text of S.J. Res. 166) (emphasis added). If the drafters had intended that the time for submission of reports under the proposed Lebanon Resolution would begin to run on August 29, it would not have been necessary to specify that the reports be submitted at six-month intervals, since that requirement was already provided in § 4(c) of the War Powers Resolution, and the language imposing the six-month requirement therefore would have been completely superfluous.[5] What Congress must have contemplated was that the six-month period, later reduced to three months, would commence at the same time as the eighteen-month authorization.

[5] It could, of course, be argued that this six-month requirement was inadvertently included in bills such as H.R.J. Res. 364 by drafters unaware that § 4(c) of the War Powers Resolution already required semiannual reporting. However, it must be remembered that H.R.J. Res. 364 was authored by the late Chairman Zablocki of the House Committee on Foreign Affairs, who was also a prime drafter and sponsor of the War Powers Resolution in 1973. Chairman Zablocki's introductory remarks explaining the provisions of H.R.J. Res. 364 to his colleagues on the floor of the House on September 28, 1983, make quite clear that he viewed the reporting requirement of H.R.J. Res. 364, which was then a six-month requirement, as independent from the reporting obligation imposed by § 4(c) of the War Powers Resolution. He stated that H.R.J. Res. 364 "[r]equires a semiannual reporting requirement on the status, scope and duration of hostilities involving U.S. forces." 129 Cong. Rec. 26112 (1983). To accept Senator Byrd's suggested reading of the Lebanon Resolution would require us to conclude that Chairman Zablocki did not understand the terms of § 4(c) of the War Powers Resolution, and to disregard this important evidence of congressional intent, neither of which we are prepared to do.

Our interpretation does not render superfluous the language "[a]s required by section 4(c) of the War Powers Resolution" used in § 4 of the Lebanon Resolution. That language can reasonably be understood to incorporate by reference the substantive obligation set forth in § 4(c) of the War Powers Resolution for the submission of reports on the status, scope, and duration of hostilities described in § 4(a) of the War Powers Resolution. It need not necessarily — and we believe should not — be interpreted to incorporate, in addition, the timing mechanism of the War Powers Resolution. Moreover, § 4 of the Lebanon Resolution actually reiterates those substantive requirements of § 4(c) of the War Powers Resolution, which we believe is further evidence of Congress' intent that § 4 of the Lebanon Resolution be a separate, independent reporting requirement tailored to the unique circumstances of the situation in Lebanon.[6]

Finally, we believe that directly linking the specific reporting requirement imposed by § 4 of the Lebanon Resolution to the date determined by Congress to be the operative date for invocation of the War Powers Resolution would threaten to undercut the compromise reached by the Executive and Legislative Branches on the underlying constitutional controversy surrounding application of the War Powers Resolution to the situation in Lebanon. We view the reporting requirement imposed with respect to Lebanon to be part of that overall compromise, which was engineered to avoid perhaps irreconcilable conflict between those Branches in the context of an ongoing crisis. Given this background, and in the absence of any persuasive language or legislative history to the contrary, we conclude that the three- month reporting requirement imposed by § 4 of the Lebanon Resolution commenced as of the date of enactment of that Resolution, October 12, 1983.

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[6] We note in this regard that the legislation at issue here was truly unique in that no similar legislation had ever been considered and adopted by Congress since the enactment of the War Powers Resolution in 1973.

Proposed Commission on Deregulation of International Ocean Shipping

Individuals who serve on a purely advisory Commission on the Deregulation of International Ocean Shipping need not be officers of the United States. Appointment of Members of Congress to such a Commission does not implicate the Incompatibility Clause, U.S. Const. art. I, § 6, cl. 2. A provision authorizing the congressional leadership to make recommendations for appointments to the Commission does not limit the President's ultimate responsibility for such appointments.

The proposed Commission may not hold a witness in contempt for failure to comply with a Commission subpoena or to testify. Rather, the Commission should be required to seek a court order compelling compliance.

December 21, 1983

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

This responds to your request of December 5, 1983 for our comments on § 17 of S. 47, the Shipping Act of 1983. Section 17 would establish a Commission on the Deregulation of International Ocean Shipping (Commission). The Commission would be comprised of twenty-two members drawn from both the Executive and Legislative Branches and from the private sector. The Executive Branch would be represented by the President, the Secretary of State, the Attorney General, the Secretary of Transportation, the Chairman of the Federal Trade Commission, and the Chairman of the Federal Maritime Commission or their designees. Proposed § 17(a)(2)(A), (B). The Legislative Branch would be represented by eight Members of Congress, four from the House of Representatives and four from the Senate, chosen by the President from members of particular committees. *Id.* § 17(a)(2)(C), (D). The majority leader of the Senate and the Speaker of the House of Representatives would make recommendations on these appointments. The private sector would be represented by eight citizens chosen by the President. *Id.* § 17(a)(2)(E).

An examination of the bill indicates that the Commission's functions, *id.* § 17(c), are purely advisory: the Commission is to make a comprehensive study of particular issues involved in deregulation of ocean shipping and submit a report making recommendations to Congress and the President. *Id.* § 17(e). Thus, individuals who serve on this Commission will possess no enforcement authority or power to bind the Government and therefore need not be officers of the United States. *Buckley* v. *Valeo*, 424 U.S. 1, 126, 141 (1976). Therefore, appointment of Members of Congress does not implicate the Incompatibility Clause of the Constitution. U.S. Const. art. I, § 6, cl. 2. We also read § 17(a)(4), pursuant to which the Senate Majority Leader and the Speaker of the House of Representatives make recommendations for appointments under § 17(a)(2)(C) & (D), as in no way limiting the President's ultimate responsibility for the selection of the members of the Commission. That ultimate responsibility must include the power to refuse to appoint any person recommended and to request the submission of another recommendation if a nominee appears unsuitable.

We must object, however, to § 17(d), which provides that failure of a witness to comply with a Commission subpoena or to testify when summoned will be punishable under 2 U.S.C. §§ 192– 194. These are the provisions applicable to contempt of Congress, and they provide for summary process. Whoever fails to comply with a request for information is "deemed guilty of a misdemeanor" and the matter is referred to the appropriate United States Attorney for prosecution. *Id.* §§ 192, 194. By contrast, under the numerous provisions for enforcement of Executive Branch agency and independent regulatory commission subpoenas, the agency or commission must apply, usually through the Attorney General, to a court for an order directing the subpoenaed individual to comply and it is the court order that an individual must comply with, not the agency request. The individual is punished for contempt of court, not contempt of the agency.

This distinction is rooted in both constitutional and policy concerns. In 1894, the Supreme Court stated that the Interstate Commerce Commission could not, consistent with due process, enforce its own subpoenas by being given the power to commit or fine people for disobedience:

> The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson* v. *Dunn*, 6 Wheat. 204, and in *Kilbourn* v. *Thompson*, 103 U.S. 168, 190, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a

competent judicial tribunal having jurisdiction in the premises. *See Whitcomb's Case*, 120 Mass. 118, and authorities there cited.

ICC v. *Brimson*, 154 U.S. 447, 485 (1894). Since then, Congress has "never" conferred the power to enforce a subpoena on an issuing agency. L. Jaffe & N. Nathanson, *Administrative Law* 439 (1976). Thus, there has been no occasion for the Court to reexamine *Brimson*. Although there has been continuing debate over *Brimson's* analysis,[1] the fact remains that *Brimson* is the Supreme Court's last word on the subject, and in that case the Court distinguished Congress' contempt power as being rooted in the Constitution and historical precedent, and which the Court has recognized is subject to limits. *See, e.g., Marshall* v. *Gordon*, 243 U.S. 521 (1917). Although modern legal theory is less hostile to coercive agency action than when *Brimson* was decided, there is at the same time more sensitivity to arguments that due process requires that the prosecutor not also be the judge.[2] It is not clear to which branch of the government the Commission belongs. If Congress intends the Commission to be part of the Executive Branch, we are reluctant to approve the use of 2 U.S.C. §§ 192 and 194, and would urge rather that the power to enforce subpoenas be modeled on that traditionally given agencies. *See, e.g.*, 7 U.S.C. § 2717. This is especially true when there is no need to press for this extraordinary power. Other advisory commissions, charged with equally important tasks, have been able to rely on the courts to enforce their subpoenas. Likewise, federal agencies have functioned to Congress' satisfaction for decades without this power. If, on the other hand, the Commission is meant to be part of the Legislative Branch, similar to the Commission on Security and Cooperation in Europe, 22 U.S.C. § 3007(b), the bill should be amended to say so specifically.

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[1] *See* K. Davis, *Administrative Law Treatise* 214–15 (1958); Note, *Use of Contempt Power to Enforce Subpoenas and Orders of Administrative Agencies*, 71 Harv. L. Rev. 1541 (1958). *See also Federal Maritime Comm'n* v. *New York Terminal Conference*, 373 F.2d 424, 426 n.2 (2d Cir. 1967).

[2] *See, e.g., Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471, 485–86 (1972).