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

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Attorney General
Edwin Meese III

Assistant Attorney General
Office of Legal Counsel
Charles J. Cooper

Deputy Assistant Attorneys General
Office of Legal Counsel
Samuel A. Alito, Jr.
Allan Gerson
Douglas W. Kmiec

OFFICE OF LEGAL COUNSEL

Attorney-Advisers

(1986)

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Bradford R. Clark
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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 nine volumes of opinions published covered the years 1977 through 1985; the present volume covers 1986. The opinions included in Volume 10 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 1986 are not included.

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

Opinions of the Office of Legal Counsel in Volume 10

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Legality of State Payments to Attorneys Representing Veterans

A state veterans agency's payment of fees exceeding $10 to attorneys for representing veterans under laws administered by the Veterans Administration does not violate federal laws governing the practice of attorneys before the Veterans Administration. The $10 limit and other restrictions on attorney's fees imposed by federal law do not apply to payments by third parties.

January 28, 1986

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, VETERANS ADMINISTRATION

This responds to your request that this Department consider whether legislation recently enacted by the state of Oregon authorizing payment by the Oregon Department of Veterans' Affairs to attorneys representing veterans under laws administered by the Veterans Administration violates 38 U.S.C. §§ 3404 and 3405.[1] Payments to attorneys under the Oregon statute are likely to exceed the $10 fee limit imposed by § 3404. Although we view the question as close, we have concluded that 38 U.S.C. §§ 3404 and 3405 do not bar payments by the Oregon Department of Veterans' Affairs to attorneys representing veterans.

Sections 3404(a) and (b) provide for the "recognition" of attorneys by the Administrator of the Veterans Administration (Administrator), and allow the Administrator to suspend or exclude "unprofessional, unlawful, or dishonest" attorneys from practice before the Veterans Administration.[2] Section 3404(c)

[1] Chapter 790, Oregon Laws 1985 (to be codified at Oregon Rev. Stat. 406.030) provides, in relevant part:

> (1) The Director of Veterans' Affairs, on behalf of this state, may, with agreement of the Attorney General, contract with attorneys for the provision by the attorneys of services as counsel for war veteran residents of Oregon in the preparation, presentation and prosecution of claims under laws administered by the United States Veterans Administration.
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> (3) Insofar as possible, the expense of services provided under a contract authorized by this section shall be paid by the state to an attorney from funds available to the Department of Veterans' Affairs.

Provisions concerning the representation of veterans in claims before the Veterans Administration are set out in 38 U.S.C. §§ 3401–3405.

[2] Section 3404 provides in full:

> (a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section,

Continued

provides that the Administrator pay attorneys representing veterans no more than $10 for each claim. Section 3405[3] establishes criminal penalties for soliciting, contracting, charging, or receiving "any fee or compensation except as provided in section[] 3404" or another provision not relevant here.[4] Congress first enacted fee limitations for veterans' attorneys in 1862. 12 Stat. 568. The current limit of $10 was set in 1864, 13 Stat. 389, and has remained unchanged since that day.

In determining whether the recently enacted Oregon legislation is legal, we begin with the language of the federal statutes.[5] There is no dispute that the statutory language prohibits the payment by a veteran of an attorney's fee in excess of $10 with respect to any one claim. Indeed, §§ 3404 and 3405 do not allow any direct payment to the attorney by the claimant. As noted, these provisions instruct the Administrator to determine and pay fees, and provide that the fees "shall not exceed $10 with respect to any one claim" and "shall be deducted from monetary benefits claimed and allowed."

Whether the statutory language also forbids payments in excess of $10 by third parties to attorneys representing veterans is more problematic. Section 3404(c), the prohibitory provision, does not address fees paid by third parties. Instead, this provision simply limits the fees that can be deducted from benefits allowed in successful claims, and provides that the Administrator determine and deduct those fees.

Section 3405 is somewhat less clear. As noted, § 3405 imposes criminal penalties for, among other things, receiving "any fee or compensation except as

[2] (. . . continued)

show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney (1) has engaged in any unlawful, unprofessional, or dishonest practice; (2) has been guilty of disreputable conduct; (3) is incompetent; (4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or (5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under the laws administered by the Veterans' Administration. Such fees (1) shall be determined and paid as prescribed by the Administrator; (2) shall not exceed $10 with respect to any one claim; and (3) shall be deducted from monetary benefits claimed and allowed.

[3] Section 3405 provides in full:

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

[4] 38 U.S.C. § 784 provides jurisdiction in the United States district courts over insurance claims by veterans against the Veterans' Administration. Section 784(g) allows the court, as part of its judgment, to allow reasonable attorney's fees "not to exceed 10 per centum of the amount recovered and to be paid by the Veterans Administration out of the payments to be made under the judgment or decree at a rate not exceeding one tenth of each of such payments until paid."

[5] The Supreme Court has repeatedly emphasized that, in construing a statute, the place to begin is with the plain language of the provision. *See, e.g., United States* v. *Apfelbaum*, 445 U.S. 115 (1980); *see generally* 2A Sutherland, *Statutory Construction* § 46.01 (4th ed. 1973).

provided in section[] 3404" or another inapplicable provision. This language may be reasonably interpreted as merely imposing criminal penalties for conduct that violates § 3404(c) (*i.e.*, receipt of a fee in excess of $10 from a veteran or the Veterans Administration). Under this interpretation, because § 3404(c) does not address the receipt of fees from third parties, § 3405 would not impose any penalty for this conduct.[6] This reading would allow third-party payment of veterans' attorney's fees because the third party would not contract for any fee to be taken from the claimant, nor would the attorney solicit, contract for, charge, or receive any fee from the claimant. It is also possible, however, to construe § 3405 as prohibiting the receipt of any fee other than those lawfully made under § 3404(c), a reading that would bar the third-party funding of veterans' lawyers envisioned in the Oregon statute.

Because the statutory language is not wholly clear on the point at issue, it is appropriate to examine the statute's legislative history. In our view, the limited legislative history of § 3404 strongly supports the view that the original purpose of these provisions was to protect veterans from unscrupulous lawyers[7] and to keep lawyers from substantially diminishing any benefits granted to veterans through the claim process.[8] In *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), all members of the Supreme Court agreed that protection from unscrupulous lawyers was the principal purpose of these provisions.[9]

Obviously, the goal of protecting veterans from unscrupulous lawyers and the desire to protect benefits recovered by a veteran suggest no reason to bar third-party funding of attorneys representing veterans.[10] It must be acknowl-

[6] Such a reading would put a parallel construction on the two parts of § 3405. The second part, dealing with the "wrongful[] withhold[ing]" of benefits, is explicitly directed towards withholding from "any claimant or beneficiary."

[7] In *Calhoun* v. *Massie*, 253 U.S. 170, 173–74 (1920), the Court explained generally that such limits "protect just claimants from extortion or improvident bargains."

[8] *See* Cong. Globe, 37th Cong., 2d Sess. 2101, 3119 (1862). *See also* Cong. Globe, 41st Cong., 2d Sess. 1967, 4459 (1870). In discussing the limited fee for veterans' agents or attorneys on pension claims the five dollar (at that time) fee was referred to as "sufficient compensation." The discussions clearly show the intent of each speaker to "protect the soldier from the rapacity of these agents." In less charitable moments agents and attorneys are referred to as "vampires," an "infamous gang of cut throats," "sharks," and a "piratical crew." Yet it is repeatedly noted that "the object of [the limit on fees of agents and attorneys in claiming pensions and other allowances] . . . is to prevent extortionate charges," to prevent fraud, and to make sure it is "the soldier" who gets the money "and not the attorney."

[9] In *Walters*, the Supreme Court rejected a due process challenge to the restriction imposed by §§ 3404 and 3405; the holding of the case does not control the issues raised when a state seeks voluntarily to provide counsel. The Supreme Court upheld the facial constitutionality of §§ 3404 and 3405. The constitutionality of these provisions as applied to specific individuals or identifiable groups remains an open question. 473 U.S. at 336 (concurrence), 358 (dissent).

[10] However, any payment that directly or indirectly diminished the veteran's benefits would be inconsistent with this purpose. *See Richman* v. *Nelson*, 49 N.Y.S.2d 514, 516 (1944) (payment to attorney from veteran's estate through the veteran's sister, acting as a committee, would "circumvent the statute"); *but see Fuller* v. *Dittmeier*, No. 82–0648 C (E.D. Mo. Mar. 1, 1983) (unpublished) (decision that father of veteran could pay attorney to represent son); *Welty* v. *United States*, 2 F.2d 562 (6th Cir. 1924) (criminal conviction for violating $3 limitation on attorney's fees for representing War Risk Insurance claimants reversed on grounds that father was third party not covered by statute). *Fuller* and *Welty* are not directly on point, however, because § 3405's ten-dollar limit applies to fee payments from any recipient *or beneficiary*. An immediate family member might not be an independent third party in paying attorney's fees for a veteran.

edged, however, that another goal of the federal statutes, as explained in *Walters*, might be frustrated by third-party payments such as those that will be made under the Oregon statute. In *Walters*, the Court concluded that "even apart from the frustration of Congress' principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible." 473 U.S. at 326. Recognizing a relationship between the twin goals of informality and the delivery of undiminished benefits to the Veteran, the Court noted:

> It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries.

Id.

Notwithstanding Congress' desire to preserve the informality of benefits proceedings, we do not believe that this purpose is sufficient to support the conclusion that third-party payments under the Oregon legislation would be illegal.

The barrier erected under §§ 3404 and 3405 against "[t]he regular introduction of lawyers into the proceedings" was not made absolute. Lawyers willing to provide representation *pro bono* or for $10 or less are clearly allowed under §§ 3404 and 3405. Indeed, §§ 3402 and 3403 expressly authorize certain "representatives" and "agents" to participate in the "preparation, presentation, and prosecution" of veterans claims, provided that no fee is extracted from the veteran.

Section 3402 allows the Administrator to recognize representatives of veterans' organizations and the Red Cross "in the preparation, presentation, and prosecution of [veterans'] claims,"[11] provided that such representatives certify

[11] Section 3402 provides in relevant part:

(a) (1) The Administrator may recognize representatives of the American Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as he may approve, in the preparation, presentation, and prosecution of claims under the laws administered by the Veterans' Administration.

(2) The Administrator may, in his discretion, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized.

(b) No individual shall be recognized under this section —

Continued

to the Administrator "that no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim." The statute authorizes the Administrator to provide space and office facilities for such "*paid*, full-time representatives." *Id.* (emphasis added).[12] Similarly, § 3403 grants the Administrator power to recognize an individual for the preparation, presentation, and prosecution of any particular claim for benefits after certification that no fee will be charged any individual for services rendered. Although these "representatives" and "agents" need not be lawyers, it seems clear that lawyers may serve in that capacity. In fact, we are informed that veterans organizations have used and currently are using attorneys as representatives.[13] Legal aid society attorneys also represent veterans in claims before the Veterans Administration. Thus, because Congress approved of some participation by attorneys, it seems doubtful that Congress would have wished to bar representation by lawyers furnished free of charge to the veteran by a state such as Oregon.

Finally, general principles of statutory construction support a narrow reading of §§ 3404 and 3405. Section 3405 provides substantial criminal penalties, and under the widely recognized "rule of lenity" criminal provisions subject to more than one reasonable construction should be interpreted narrowly and ambiguity should be resolved in favor of lenience. *See, e.g., Bifulco* v. *United States*, 447 U.S. 381 (1980); 3 Sutherland, *Statutory Construction* §§ 59.03 *et seq.* (4th ed. 1973). This principle of construction supports the view that these provisions only restrict payments from the claimant or beneficiary.

For the foregoing reasons, this Department believes that the Oregon statute providing funds for attorneys representing veteran claimants does not violate 38 U.S.C. §§ 3404 and 3405.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

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[11] (. continued)

(1) unless he has certified to the Administrator that no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim; and

(2) unless, with respect to each claim, such individual has filed with the Administrator a power of attorney, executed in such manner and form as the Administrator may prescribe.

[12] 38 U.S.C. § 3402(a)(2). The extensive use of full-time paid service agents from veterans' organizations was noted by the Supreme Court in *Walters*. 473 U.S. at 311–12. The Court noted that 86 percent of all claimants are represented by service representatives. *Id.* at 312 n.4.

[13] In a footnote, the *Walters* Court referred to testimony by two attorneys, one who had handled claims by veterans as a law student and another who was a staff member of the appellee veterans' organization, "Swords to Ploughshares." 473 U.S. at 324 n.11.

Indemnification of Department of Justice Employees

The Attorney General may use funds from the Department of Justice's general appropriation to indemnify Department employees for actions taken within the scope of their employment.

February 6, 1986

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to your request for this Office's opinion on the question whether you have authority to indemnify Department of Justice employees against personal liability for actions taken within the scope of their employment. Funds for the indemnification would come from the Department's own appropriation.

In an opinion issued in 1980, this Office expressed the view that the Attorney General does have such authority.[1] We have carefully re-examined that opinion and, for the reasons discussed below, continue to adhere to the view that the Attorney General may lawfully authorize the indemnification of Department employees for adverse money judgments (as well as for settled or compromised claims) arising out of actions taken within the scope of their employment.

As noted in this Office's 1980 opinion, the Attorney General has plenary authority to conduct and supervise all litigation in which the United States has an interest. This power derives generally from the Attorney General's position as the chief legal officer of the federal government. *See* 28 U.S.C. §§ 516–519; 5 U.S.C. § 3106. "Included within the broad authority of the Attorney General to carry on litigation is the power to compromise." "Settlement Authority of the United States in Oil Shale Cases," 4B Op. O.L.C. 756 (1980) (footnote omitted). *See generally United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 284 (1888); 38 Op. Att'y Gen. 98 (1934).

Under this general authority, the Attorney General has long taken steps to defend Department employees sued for actions taken within the scope of their employment. As stated in 1858 by Attorney General Black:

> When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the

[1] Memorandum to Alice Daniel, Assistant Attorney General, Civil Division from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Aug. 15, 1980) (1980 Opinion). *See also* Memorandum to Richard K. Willard, Assistant Attorney General, Civil Division from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel (Oct. 4, 1984) (commenting on 1984 Civil Division Representation Study); Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Nov. 5, 1981) (suggesting that the Attorney General establish a policy on this issue).

> Government, he ought to be defended by the Government. This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits, which he must carry on at his own expense. For this reason it has been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defense of its officers who are sued or prosecuted for executing its laws.

9 Op. Att'y Gen. 51, 52 (1858). *See also* 5 Op. Att'y Gen. 397 (1851).[2]

The gradual erosion of the doctrine of sovereign immunity culminated in the enactment of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671–2680, which permits suit to be brought directly against the United States once administrative remedies have been exhausted. Although enactment of the FTCA initially led to a decline in the number of suits against individual officers, the problem emerged afresh after the Supreme Court's decision in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), holding that damages may be obtained against federal officers who have violated the constitutional rights of private individuals. *Bivens* and its progeny have led to a steadily increasing stream of damage actions against government employees sued in their individual capacity for alleged constitutional violations. This growth in damages claims, in turn, has revived the government's interest in the problems of providing assistance to its employees who are sued in their individual capacity for job-related activities. The primary form of assistance, of course, is the provision of an attorney, either a Department of Justice employee or private counsel. Expenses incurred by the Department for private counsel are paid out of the Department's general appropriation.[3] In light of the Department's interest in protecting both employee morale and any underlying federal interests involved in the lawsuits, payment of private counsel fees incurred in the defense of Department employees is warranted as "expenses necessary for the legal activities of the Department of Justice," as our appropriation usually provides. *See, e.g.*, Pub. L. No. 96–68, 93 Stat. 419 (1979). The Department has developed in the last decade extensive guidelines governing such representation. *See* 28 C.F.R. § 50.15.[4]

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[2] The practice of defending such officers was made necessary in the early days of our country because the doctrine of sovereign immunity forbade suits against the United States. Claimants would therefore often sue the officer who had taken the wrongful action, alleging that he had acted outside the scope of his official capacity.

[3] Early examples of agency appropriations being used to pay private counsel fees can be found at 12 Op. Att'y Gen. 368 (1868), 9 Op. Att'y Gen. 146 (1858), 5 Op. Att'y Gen. 397 (1851), and 3 Op. Att'y Gen. 306 (1838). "When a ministerial or executive officer is sued for an act done in the lawful discharge of his duty, the government which employed him is bound, in conscience and honor, . . . not [to] suffer any personal detriment to come upon him for his fidelity, but will adopt his act as its own and pay the expense of maintaining its legality before the tribunal where it is questioned." 9 Op. Att'y Gen. 146, 148 (1838).

[4] The Comptroller General has long approved this use of our general appropriation. *See* 31 Comp. Gen. 661 (1952); *see also* 53 Comp. Gen. 301 (1973) (use of judiciary appropriation to pay for litigation costs when Department of Justice has declined representation).

In the 1980 Opinion, we advised the Civil Division that the Attorney General could expend money from the Department's general appropriation to settle claims against Department employees for damages caused by actions taken within the scope of their employment. As in the case of departmental payment of private counsel fees, our conclusion was based on the basic rule that a general appropriation may be used to pay any expense that is necessary or incident to the achievement of the underlying objectives for which the appropriation was made. General Accounting Office, *Principles of Federal Appropriations Law* 3–12 to 3–15 (1982). If the agency believes that the expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency's mission, the appropriation may be used:

> It is in the first instance up to the administrative agency to determine that a given item is reasonably necessary to accomplishing an authorized purpose. Once the agency makes this determination, GAO will normally not substitute its own judgment for that of the agency. *Id.* at 3–14.

There is a clear logical connection between the achievement of an agency's underlying mission and protecting the agency's employees from financial liability for actions taken within the scope of their employment. As Attorney General Black noted in 1858, it will be difficult to recruit or maintain a superior federal work force if employees are fearful that they may face financial ruin for their actions notwithstanding the fact that they have acted within the scope of their employment.[5]

Similarly, the General Counsel for the Comptroller General has opined that the Department of the Interior may use its general appropriation to pay a judgment entered against two game wardens who had been convicted of trespass.[6] *See* GAO Opinion B-168571–O.M. (Jan. 27, 1970) (unpublished). The wardens had entered onto private property at the direction of their superiors in order to post "No Hunting" signs. The General Counsel turned first to the question whether the employees had been acting within the scope of their employment:

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[5] 9 Op. Att'y Gen. 51, 52 (1858). In 1838 Attorney General Butler determined that the Navy could pay a judgment for damages and costs entered against a naval officer:

> The recovery was for acts done by Commodore Elliot in the performance of his official duty, and for costs occasioned by the defenses made by the United States. It is therefore one of those cases in which the officer ought to be fully indemnified; and the section to which I have referred may well be regarded as authorizing the department to pay the amount required for such indemnification, if, as already suggested, there be any funds within its control properly applicable to such a subject.

3 Op. Att'y Gen. 306 (1838). There is other language in the early cases and Attorney General opinions supporting the proposition that the government should and will indemnify such employees, but it is not clear whether the payment was made in these cases from an agency appropriation or through special legislation. *See Tracy* v. *Swartwout*, 35 U.S. (10 Pet.) 80, 98–99 (1836) ("Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship."); 9 Op. Att'y Gen. 51, 53 (1857) ("In *Little* v. *Bareme*, 6 U.S. (2 Cranch) 170, the Government took no part in the defense, but it afterwards assumed the judgment, and paid it with interest and all charges.").

[6] *See Merovka* v. *Allen*, 410 F.2d 1307 (10th Cir. 1969).

> It is apparent that the claimants acted at the direction of their superiors and with legal advice upon which they were entitled to rely. They were required to act in the line of duty, and they intended faithfully to carry out the law enforcement activity of the Bureau. Under these circumstances and especially since they were directed by their superiors, the government is obligated to compensate them.

Id. at 2.

He then examined whether the judgment should be paid out of what is familiarly called the Judgment Fund, 31 U.S.C. § 1304, or some other source:

> [T]he judgment against the claimants is not sufficiently similar to a judgment against the United States to justify payment under 31 U.S.C. 724a [now codified at 31 U.S.C. § 1304]. On the other hand, the claimants' course of conduct resulting in their payment of the damages was sanctioned and directed by the Bureau of Sport Fisheries and Wildlife to the extent that it can reasonably be considered as law enforcement activity of the Bureau. Accordingly, reimbursement to the claimants should be charged to the Department of Interior appropriation available to the Bureau for necessary expenses of its law enforcement program.

Id. at 3.

The Comptroller General had earlier used the same analysis in determining that the Justice Department could use its general appropriation to indemnify an FBI agent for a fine imposed by a district court for contempt of court. 44 Comp. Gen. 312 (1964). The agent had refused, pursuant to Department regulations and instructions from the Attorney General, to answer certain questions concerning a Mafia figure. After first determining that the agent had been acting within the scope of his employment and that the Judgment Fund was not available, the Comptroller General concluded:

> [I]t is a settled rule that where an appropriation is made for a particular object by implication it confers authority to incur expenses which are necessary or proper or incident to the accomplishment of the objective or purpose for which made. The FBI appropriation . . . provides in general terms for, among other things, "expenses necessary for the detection and prosecution of crimes against the United States."
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> Accordingly, and since it appears from the facts reported and outlined herein that the expense of the fine reasonably would fall into that category, we conclude that payment of the contempt fine of $500 may be regarded as a proper charge against this appropriation.

Id. at 314–15.

More recently, the Comptroller General reached the same conclusion with respect to attorneys' fees assessed against FBI agents involved in a raid on the Black Panthers. 59 Comp. Gen. 489 (1980). After noting that the lawsuit "arose by reason of the performance of their duties as employees of the FBI," the Comptroller General stated flatly: "It has long been our view that the United States may bear expenses, including court imposed sanctions, which a Government employee incurs because of an act done in the discharge of his official duties." *Id.* at 492–93.

The Comptroller General has applied these principles in at least two cases raising the specific issue of individual liability for damages. In 1977, he issued an opinion addressing the issue of liability under 26 U.S.C. § 7217 for disclosure of a taxpayer's return. 56 Comp. Gen. 615 (1977). Although IRS employees were protected under a specific statute authorizing their indemnification, *see* 26 U.S.C. § 7423(2), employees of other agencies that might have access to the forms were not. The Comptroller General concluded that damage awards against these employees could be funded from their agencies' general appropriations. *Id.* at 619. In the second case, the Comptroller General concluded that the Drug Enforcement Administration could use its appropriation to settle a case in which two of its agents were charged with conduct violating the Fourth Amendment. *See* GAO Opinion B-176229 (Sept. 27, 1977) (unpublished).[7]

Finally, this Office relied upon these principles in its opinions holding that the Department of Defense could use one of its appropriations to fund the settlement of constitutional tort claims against four Army officers arising out of *Berlin Democratic Club* v. *Brown*, 410 F. Supp. 144 (D.D.C. 1978). *See* Memorandum for the Attorney General from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 15, 1979); Memorandum from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel to Barbara Allen Babcock, Assistant Attorney General, Civil Division (Jan. 24, 1979).[8]

[7] The Comptroller General suggested that indemnification is not possible when an adverse final judgment is entered against an individual government employee on the issue of fault. Although the 1980 Opinion did not reach this issue, this Office advised the Civil Division shortly thereafter that our analysis also supported the conclusion that, in appropriate circumstances, the Attorney General has authority to reimburse Justice Department employees for final judgments entered against them individually. *See* Memorandum for Alice Daniel, Assistant Attorney General, Civil Division from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Aug. 22, 1980).

As the Assistant Attorney General for the Civil Division has underscored, the Comptroller General has not made the settlement/final judgment distinction in other cases, "and in any event Comptroller General opinions are not binding on the Attorney General." Memorandum for the Attorney General from Richard K. Willard, Assistant Attorney General, Civil Division (Jan. 6, 1986). Moreover, a careful reading of the Comptroller General opinion in which the distinction was made suggests that it may actually relate to whether the adverse judgment reveals that actions of the officer were outside the scope of his employment. In any event, we believe that such a distinction is untenable, and we continue to adhere to previous opinions that indemnity is legally permissible both for settlements and final judgments.

[8] The Civil Division's 1984 Representation Study identified memoranda from Attorneys General Civiletti and Smith that appear to conflict with the view expressed in our 1980 opinion. Memorandum for Alice

Continued

Conclusion

We have reviewed our 1980 opinion on this subject and have again concluded that the Attorney General may use the Department's general appropriation to indemnify Department employees for adverse money judgments, as well as for settled or compromised claims, arising out of actions taken within the scope of their employment.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[8] (. . . continued)
Daniel, Assistant Attorney General, Civil Division from Benjamin R. Civiletti, Attorney General (Nov. 20, 1980); Memorandum to William Webster, Director, Federal Bureau of Investigation from William French Smith, Attorney General (Nov. 17, 1981) (resolving "to adhere to the existing Department policy generally not to pay settlements on behalf of employees"). This apparent conflict may have led to uncertainty within the Department, resulting in statements by Department officials suggesting the need for express legislative authority. *See* Memorandum for the Attorney General from Richard K. Willard, Assistant Attorney General, Civil Division (Jan. 6, 1986). While these statements obviously may be weighed in your decision on whether to change the Department's indemnification policy and, if so, on how to alert Congress, they do not affect our analysis of the Attorney General's legal authority to indemnify.

Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals

A proposed condition on the Senate's consent to the Interim Convention on Conservation of North Pacific Fur Seals that dictates how the United States representative to the international North Pacific Fur Seal Commission must vote on certain matters before the Commission is unconstitutional because, rather than setting forth the Senate's understanding of the terms of the convention, it would interfere with the ability of the President and his appointee to execute faithfully the convention according to its terms.

February 6, 1986

MEMORANDUM OPINION FOR THE DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

You have asked for our views on the constitutionality of a proposed "condition" to the Senate's consent to the Protocol Amending the Interim Convention on Conservation of North Pacific Fur Seals (Convention). The proposed condition would require the United States representative to the North Pacific Fur Seal Commission (Commission) to vote against any recommendation before the Commission that would result in a commercial taking of fur seals within United States waters, and to abstain from voting on any recommendation that seeks to regulate taking of fur seals for subsistence purposes on the Pribilof Islands. For the reasons set forth below, we believe that this provision would impermissibly interfere with the President's constitutional authority to execute the laws, and therefore would violate the constitutionally mandated separation of powers between the Legislative and Executive Branches.

The Convention, originally signed in 1957, provides an international regime for the protection and management of fur seals. Parties to the Convention (Canada, Japan, the Soviet Union, and the United States) have agreed to coordinate scientific research programs and to cooperate in investigating the fur seal resources of the North Pacific Ocean. Art. II, § 1. The Convention specifically requires that the parties prohibit pelagic sealing (*i.e.*, the killing of fur seals at sea). Art. III. The Convention also provides for establishment of the Commission, which is composed of one member from each party.

The Commission is charged to:

> (a) formulate and coordinate research programs designed to achieve the objectives of the Convention;

(b) recommend coordinated research programs to the parties for implementation;

(c) study the data obtained from the implementation of coordinated research programs;

(d) recommend appropriate measures to the parties on the basis of findings obtained from the implementation of coordinated research programs, including measures regarding the size and the sex and age composition of the seasonal commercial kill from a herd; and

(e) recommend to the parties the methods of sealing best suited to achieve the objectives of the Convention.

Art. V, § 2. Decisions and recommendations of the Commission must be unanimous, with each party having one vote. Art. V, § 4.

The Interim Convention was extended by agreement of the parties in 1963, 1969, 1976, and 1980. On October 12, 1984, the parties signed another protocol extending the Convention until October 13, 1988, which the President has submitted to the Senate for its advice and consent.[1] *See* Message from the President of the United States Transmitting the Protocol, signed at Washington on October 12, 1984, Amending the Interim Convention on Conservation of North Pacific Fur Seals between the United States, Canada, Japan, and the Soviet Union, S. Treaty Doc. No. 5, 99th Cong., 1st Sess. (1985).

The staff of the Senate Committee on Foreign Relations, which is now reviewing the Protocol, has proposed that the Senate's consent be subject to four "conditions." The first of these, which you have asked us to review,[2] would provide:

> That as a result of the decline of the fur seal population on the Pribilof Islands and other factors, whenever the North Pacific Fur Seal Commission, during the period of this Protocol, considers recommendations to the Parties pursuant to Article V of the Convention, the United States Commissioner shall vote against any recommendation that would result in the taking of fur seals for commercial purposes on lands or waters within the jurisdiction of the United States. The Commissioner shall also abstain from voting on any recommendation that seeks to regu-

[1] In addition to extending the Convention, the parties agreed upon a "Statement of Concerns." In that statement, the parties take note of concerns over declines in the fur seal population, current economic conditions, and other problems of fur seal management and conservation.

[2] The other three conditions provide that (1) the North Pacific fur seal herd shall be conserved, managed, and protected pursuant to United States domestic laws to the extent such laws are more restrictive than provided for under the Convention; (2) the Secretary of Commerce is to take appropriate steps under the Convention to develop and implement a program of cooperative research in the Bering Sea ecosystem to determine the causes of the fur seal population decline and to increase the health and viability of the Bering Sea ecosystem and the North Pacific fur seal population; and (3) the subsistence taking of fur seals shall be at no cost to the government. You have not asked us to review these proposed conditions, and we therefore take no position as to their constitutionality.

late the taking of fur seals for subsistence purposes on the Pribilof Islands.

Because of the interplay between the Convention and United States domestic law, the effect of this reservation would be to prohibit the commercial taking of fur seals on lands or waters within the jurisdiction of the United States,[3] and to allow subsistence kills of fur seals on the Pribilof Islands only as permitted under United States domestic law.[4]

This proposed condition does not purport to set out the Senate's understanding of the scope of the international obligations imposed by the treaty or its domestic effects;[5] nor does it purport to limit the obligations or rights of the parties under the treaty.[6] Rather, it would limit the discretion of the United States representative, who is appointed by and answerable to the President, to implement the Convention in accordance with its agreed-upon terms. The condition thus reaches beyond the making of the treaty — *i.e.*, delineating the legal obligations and rights of the parties under the agreement — to the actual execution of its terms. Because the execution of a treaty is clearly part of the President's "executive power" under Article II of the Constitution, we believe

[3] The killing of fur seals within United States waters is effectively prohibited by the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361 *et seq* , except as authorized under the Fur Seal Act of 1966, 16 U.S.C. §§ 1151 *et seq.*, which was passed to implement the Fur Seal Convention. Pursuant to § 107 of the Fur Seal Act, 16 U.S.C. § 1157, the Secretary of State, with the concurrence of the Secretary of Commerce, is authorized to accept or reject any recommendation made by the Commission under Article V, and thereby to authorize commercial fur seal kills. Because recommendations of the Commission must be unanimous, the effect of the reservation would be to preclude the Commission from making any recommendation to the Secretary of State for a commercial kill in United States waters.

[4] Indians, Aleuts, and Eskimos who live on the coasts of the North Pacific Ocean are permitted to take fur seals for subsistence purposes under the terms of the Fur Seal Act and the Marine Mammal Protection Act. *See* 16 U.S.C. §§ 1152, 1379.

[5] The Senate has often included "understandings" as part of its consent to ratification. In general, such understandings interpret or clarify the obligations undertaken by a party to the treaty, and do not change those obligations. For example, the Senate Foreign Relations Committee has recently approved the Genocide Convention, subject to several understandings that set forth the Senate's interpretation of certain key definitions in the Convention, and of the relationship between certain other provisions and obligations of the United States under domestic law. *See* S. Ex. Rep. No. 2, 99th Cong., 1st Sess. 16, 21–26 (1985). The Senate has included similar understandings as part of its consent to a number of other treaties. *See generally* Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, 98th Cong., 2d Sess. 11, 109–10 (Comm. Print prepared for the Senate Committee on Foreign Relations, 1984) (CRS Study); S. Rep. No. 29, 97th Cong., 1st Sess. 45 (1981) (SALT II Treaty); S. Rep. No. 47, 96th Cong., 1st Sess. 13–25 (1979) (Panama Canal Treaty).

[6] The Senate may, by "reservation" or "amendment," condition its consent to a treaty on a revision or limitation of its terms. *See generally Restatement of the Law, Foreign Relations of the United States (Tentative Draft No. 6) (Restatement)* § 313; CRS Study, *supra*, at 109–10. The resolution of ratification for the Genocide Convention, as reported by the Senate Foreign Relations Committee, would condition the Senate's consent to the Convention on two such reservations: that the specific consent of the United States is required before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice, and that nothing in the Convention requires or authorizes legislation or other action by the United States "prohibited by the Constitution of the United States as interpreted by the United States." S. Ex. Rep. No. 2, *supra*, at 17–20. Reservations have also been attached by the Senate (or by the President) to ratification of numerous other treaties, including the Panama Canal Treaty, *see* S Rep. No. 47, *supra*, at 24–25 and the SALT II Treaty, *see* S. Rep. No. 29, *supra*, at 44–45. *See generally* CRS Study, *supra*, at 109–10; L. Henkin, *Foreign Affairs and the Constitution* 134 & n. 23 (1972). Under international law, a substantive revision to the treaty obligations (whether characterized as a "reservation" or an "amendment") must be accepted by the other contracting states. *See Restatement, supra*, § 313.

the proposed condition transgresses the "enduring" and "carefully defined limits" imposed by the Framers on the powers of the coordinate branches. *See INS* v. *Chadha*, 462 U.S. 919, 957–58 (1983).

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

The Framers recognized nonetheless that the peculiar nature of treaty-making warranted a limited exception to the strict separation of powers between the branches because the negotiation and acceptance of treaties incorporates both legislative and executive responsibilities:

> [T]he particular nature of the power of making treaties indicates a peculiar propriety in that union. Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other . . . . The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

The Federalist No. 75, at 450–51 (A. Hamilton) (C. Rossiter ed. 1961); *see also The Federalist* No. 64, at 390–93 (J. Jay); *The Federalist* No. 66, at 402–03 (A. Hamilton); *see generally* CRS Study, *supra*, at 25–28. Rather than vest either the Congress or the President with the sole power to make treaties, the Framers sought to accommodate the interests of both, providing that the President shall make the treaties, but subject to the "advice and consent" of the Senate.[7]

In practice, the Senate's formal participation in the treaty-making process has been to approve, to approve with conditions, or to disapprove treaties negotiated by the Executive.[8] Although the Senate's practice of conditioning its consent to particular treaties is well-established, its authority is not unlimited merely because it may withhold its consent.[9] The general principle that Congress cannot attach unconstitutional conditions to a legislative benefit or program merely because it has authority to withhold the benefit or power entirely applies equally to the Senate's advice and consent authority.[10] For example, the requirement that the Senate consent to appointments of executive officers does not, by inference, empower the Senate to exert control over the removal of officers once approved. *See Myers* v. *United States*, 272 U.S. 52, 126 (1926).[11] The Senate cannot use its advice and consent power to alter the constitutional distribution of powers or to impair constitutionally protected rights, any more than the President and the Senate together can override the requirements of the Constitution:

> [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.
>
> * * *
>
> The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be

[7] Article II, § 2, cl. 2 of the Constitution provides in part that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

[8] President Washington attempted to consult with the Senate, with limited success, on the negotiation of several treaties with the Indians. By 1816 the practice had become so firmly established that the Senate would grant its "advice and consent" to treaties already negotiated by the President or his representatives. *See* CRS Study, *supra*, at 34–36; L. Henkin, *Foreign Affairs and the Constitution*, *supra*, at 131–32.

[9] The Senate adopted a resolution advising and consenting to the Treaty of 1797 with Tunis on condition that a certain article be suspended and renegotiated. The Senate later gave its advice and consent to the treaty and two other articles after they had been renegotiated. CRS Study, *supra*, at 36. The Supreme Court has recognized the validity of the practice, but has never delineated the outer limits of the Senate's power to condition its consent. *See Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 182 (1901) (Brown, J., concurring); *Haver* v. *Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869).

[10] For example, Congress could, if it chose, bar aliens from our shores, but could not admit them under conditions which deprive them of constitutional rights such as the right to a fair trial. *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896).

[11] Similarly, the Senate may not use its advice and consent power with respect to treaties to impose conditions affecting only the domestic aspects of a treaty. *See Power Authority* v. *Federal Power Comm'n*, 247 F.2d 538 (D.C. Cir.), *vacated as moot*, 355 U.S. 64 (1957). The Senate could not, for example, condition its consent to the Convention on a provision depriving the Secretaries of State and Commerce of their authority under the Fur Seal Act to adopt recommendations of the Commission. Such a condition would in effect amend the existing statutory discretion of those Executive Branch officers, and could be accomplished only through plenary legislation. *See INS* v. *Chadha*, 462 U.S. at 952–54.

nullified by the Executive or by the Executive and the Senate combined.

Reid v. *Covert*, 354 U.S. 1, 16–17 (1957). *See also Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620–21 (1871); *Fourteen Diamond Rings* v. *United States*, 183 U.S. at 183 (1901) (Brown, J. concurring).

Thus, it is critical that the "JOINT AGENCY of the Chief Magistrate of the Union, and of two-thirds of the members of the Senate"[12] embodied in Article II, § 2, cl. 2, extends only to the *making* of treaties, *i.e.*, the negotiation and agreement with other nations as to the legal obligations and rights of the parties. Nothing in the text of the Constitution or the deliberations of the Framers suggests that the Senate's advice and consent role in the treaty-making process was intended to alter the fundamental constitutional balance between legislative authority and executive authority. In fact, the Framers included the Senate in the treaty-making process precisely because the result of that process, just as the result of the legislative process, is essentially a law that has "the effect of altering the legal rights, duties and relations of persons . . . outside the Legislative Branch." *INS* v. *Chadha*, 462 U.S. at 952.

Under the Constitution, only the President is given the "executive power," and is charged with the specific responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1 and 3. It is indisputable that treaties are among the laws to be executed by the President,[13] and that "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," which necessarily includes fulfilling obligations under international agreements or treaties, is part of the executive power. *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *see also Haig* v. *Agee*, 453 U.S. 280, 291–92 (1981); *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 190 (1948).

The condition proposed by the staff of the Senate Foreign Relations Committee would strike at the heart of the President's executive prerogatives. Absent such a condition, the United States representative to the Fur Seal Commission would be free to follow the directions of the President in evaluating the complex questions that come within the jurisdiction of the Commission. The proposed condition, however, would eliminate that discretion with respect to two issues likely to come before the Commission. Such a limitation on the discretion of the President's representative — a limitation that takes effect only after the scope of the legal obligations of all parties has been agreed upon[14] —

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

[13] Article VI, cl. 2 of the Constitution provides in part that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." The President's constitutional duty under Article II extends to treaties as well as to statutes and the Constitution itself. *See In re Neagle*, 135 U.S. 1, 64 (1890); 1 Op. Att'y Gen. 566, 570 (1822).

[14] The condition is thus different from a reservation that would seek to limit the legal authority of the Commission to consider recommendations for commercial fur seal kills within United States waters, or for

Continued

would directly undercut the President's authority "as the sole organ of the federal government in the field of international relations." The Senate cannot constitutionally impose such a condition to its consent to ratification of a treaty, any more than it could consent to the appointment of an ambassador on the condition that the ambassador refrain from taking certain positions in negotiations or discussions with his designated country. *See generally Myers* v. *United States*, 272 U.S. at 126; 3 Op. Att'y Gen. 188, 189–90 (1837).

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[14] (. . . continued)
subsistence harvests on the Pribilof Islands. Such a reservation would be consistent with the constitutional separation of powers, as it would be a legitimate exercise of the treaty-making power to define the legal obligations and rights of the parties, prior to conclusion of the treaty. Of course, any such reservation would have to be submitted to the other parties for their agreement prior to taking effect. *See supra* note 6.

State Regulation of an Insurance Program Conducted by the Export-Import Bank of the United States

Entities who participate as intermediaries with small businesses in an insurance program operated by the Export-Import Bank are subject to non-discriminatory state regulation of their activities.

March 19, 1986

MEMORANDUM OPINION FOR THE GENERAL COUNSEL,
EXPORT-IMPORT BANK OF THE UNITED STATES

This memorandum responds to your request for the Department of Justice's opinion whether the states may regulate or tax certain entities involved in an insurance program developed by the Export-Import Bank of the United States (Eximbank) for small business.[1] Your request is limited to the single issue of whether the states may regulate the "Administrators" who participated in the program and act as agents for the small businesses purchasing the insurance developed by Eximbank. We conclude that the Administrators are subject to nondiscriminatory state regulation.

I. Background

Eximbank is a wholly owned government corporation and an agency of the United States. 12 U.S.C. § 635(a)(1). Congress originally established it to facilitate the exchange of commodities between the United States and other countries. In 1953, for the first time, Eximbank was granted, in addition to the power to make loans and guarantees, the power to provide insurance against risks of loss associated with commercial exportation of goods. Pub. L. No. 83–30, 67 Stat. 28 (1953). Current law authorizes Eximbank to "guarantee, insure, coinsure, and reinsure against political and credit risks of loss." 12 U.S.C. § 635(a)(1).

Eximbank also is authorized to employ "exporters, insurance companies, financial institutions, or others or groups thereof" to act as its agents in the issuance and servicing of insurance. *Id.* 635(c)(2). The Foreign Credit Insur-

[1] The entities involved in the program are: (1) Eximbank itself; (2) the Foreign Credit Insurance Association, an association of private insurers that acts as Eximbank's agent in providing insurance; and (3) various "Administrators" who act as agents for the small businesses who purchase the insurance developed by Eximbank.

ance Association (FCIA) is an association composed of private commercial insurance carriers created in 1961 to act with Eximbank in providing protection against certain of the commercial and political risks faced by American exporters when they sell to foreign customers on credit terms. The FCIA is the agent of Eximbank in selling such insurance.

The final significant participants in Eximbank insurance activities are known as "Administrators." Your office has described the role of the Administrators as follows:

> In response to a Congressional mandate for Eximbank to encourage the participation of small business in international trade, Eximbank has developed a new insurance policy, the Export Credit Insurance Umbrella Policy (the "Umbrella Policy"). . . . The Umbrella Policy was devised to improve distribution of, and simplify the paperwork associated with, our export credit insurance by using certain entities, which have frequent contact with small businesses, as intermediaries (the "Administrators"). Eximbank is the only insurer on the Umbrella Policy, and FCIA acts as Eximbank's agent. A number of exporters can be insured under one policy and have the policy paperwork handled by an Administrator who is free to charge the insured exporters a fee for its services.

The Administrators are thus essentially insurance brokers for the small businesses who wish to purchase insurance from Eximbank through the FCIA.

II. Analysis

Federal instrumentalities are immune from state regulation, in the absence of "clear and unambiguous" congressional authorization. *Hancock* v. *Train*, 426 U.S. 105, 179 (1976). It is well settled, however, that independent federal contractors are not federal instrumentalities and therefore may be subject to state regulation even if such regulation increases the burden on the federal government. *See Penn Dairies, Inc.* v. *Pennsylvania Milk Control Comm'n*, 318 U.S. 261, 269 (1943) ("those who contract to furnish supplies or render services to the government are not [federal] agencies and do not perform governmental functions"). We understand that the Administrators are not even agents of federal government, but instead are agents of the small business exporters for whom they obtain Eximbank's umbrella insurance and do the policy paperwork and from whom they receive a fee for their services. Therefore, it is clear that the Administrators are not immune from state regulation on the grounds that they constitute federal instrumentalities.

The remaining basis for exempting the Administrators from state regulation is federal preemption. A state law will be deemed preempted by federal law either if it conflicts with federal law, or if the federal law suggests that Congress intended its own law to occupy the field fully, irrespective of the

substance of the state law. *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 141 (1963). We understand that state laws that restrict certain institutions such as state banks from acting as insurance brokers limit the potential class of Administrators, thus possibly inhibiting the distribution of insurance in the small business community.[2] We are also informed that some states impose licensing requirements on corporations engaged in insurance activities such as those undertaken by the Administrators, and thereby subject such corporations to regulation. The overall effect of these state laws may be to discourage some institutions, particularly banks, from becoming Administrators.[3]

The touchstone of a preemption claim is the intent of Congress. *See, e.g., Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978). Preemption analysis, however, begins with certain presumptions, because congressional intent with respect to displacing state regulations is often unclear. When Congress legislates "in a field which the states have traditionally . . . occupied we start with the assumption that the historic police powers of the States [are] not to be ousted by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The regulation of insurance is a field traditionally occupied by the states and therefore it cannot lightly be inferred that Congress intended to legislate in derogation of state regulation of corporations operating in this area.[4]

After a survey of the statute and the legislative history we are unable to locate any statutory provision that conflicts with state insurance law or any congressional intent to abrogate state licensing and regulatory schemes. To be sure, the November 30, 1983 Amendments to the Export-Import Bank Act, Pub. L. No. 98– 181, 97 Stat. 1254, evince an intent to increase Eximbank aid to small business. In the 1983 Amendments Congress stated:

> (i) (I) It is further the policy of the United States to encourage the participation of small business in international commerce.
>
> (II) In exercising its authority, the Bank shall develop a program which gives fair consideration to making loans and providing guarantees for the export of goods and services by small businesses.
>
> (ii) It is further the policy of the United States that the Bank shall give due recognition to the policy stated in § 631(a) of Title 15 that "the Government should

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[2] *See, e.g.*, Conn. Gen. Stat. § 38–72(a).

[3] *See generally* Wisc. Gen Stat. § 618.

[4] Indeed, Congress has recognized the importance of local regulation of insurance in the McCarran-Ferguson Act, which provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such businesses." 15 U.S.C § 1012(a). A subsequent provision of the Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, unless such Act specifically relates to the business of insurance " *Id* § 1012(b). Because we conclude that state regulation of the Administrators is not prohibited under general principles of preemption, we do not have to decide whether the McCarran-Ferguson Act would preclude preemption in any event.

> aid, counsel, assist, and protect insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise."

12 U.S.C. § 635(b)(1)(E).[5] The Amendments also provide that one of the members of Eximbank's board of directors is to "be selected from among the small business community . . . and represent the interests of small business." *Id.* § 635(b)(1)(E)(v). Finally, the Amendments direct Eximbank to render reports on the allocation of sums set aside for small business. *Id.* § 635g(c). Notably lacking in the Amendments or their legislative history is any language which suggests that insurance brokers for exporters connected with an Eximbank program are relieved of the obligation to comply with state insurance requirements. Nor is there any suggestion that state insurance laws have proved an obstacle to the sale of Eximbank's insurance to small business.[6]

Acknowledging that there is no direct conflict between state and federal law, Eximbank argues that state insurance regulation and licensing is preempted because by inhibiting certain kinds of corporations from becoming Administrators such laws impose burdens on the means Eximbank has chosen to meet the congressional goal of developing export insurance for small business. However, courts have uniformly refused to displace state regulations applicable to federal contractors even if such regulations impose incidental burdens on the means of fulfilling a congressional mandate. *See, e.g., Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261, 271 (1943) (state can refuse to renew the license of a milk dealer who sold milk below the state minimum price to United States despite impact in United States' procurement policy; "state regulations are to be regarded as the normal incidents within the same territory of a dual system of government"); *James Stewart & Co.* v. *Sadrakula*, 300 U.S. 94 (1939) (sanctioning state's imposition of safety requirements upon a contractor constructing a federal building in the face of arguments that such regulations would raise the cost to the government); *O'Reilly* v. *Board of Medical Examiners*, 426 P.2d 167 (Cal. 1967) (Traynor, C.J.) (refusing to infer federal preemption of state licensing rules for doctors even in light of burdens such licensing imposed on foreign medical exchange program authorized by Congress); *United States* v. *Town of Windsor*, 496 F. Supp. 581, 591 (D. Conn. 1980) (upholding

[5] In order to assure that the policy of aiding small business is carried out, Eximbank is directed to: promote small business export financing programs in cooperation with the Secretary of Commerce, the Office of International Trade of Small Business Administration, and the private sector, particularly small business organizations, state agencies, chambers of commerce, banking organizations, export management companies, export trading companies, and private industry.
12 U.S.C. § 635(b)(1)(E)(viii).

[6] In a hearing before a subcommittee of the Senate Committee on Small Business, the Chairman of Eximbank described the proposed "umbrella" insurance program for small businesses but nowhere suggested that this program would require the abrogation of state insurance regulation or licensing schemes. To the contrary, one of the themes of the Chairman's testimony was that he had cooperated with state agencies in the past and expected to continue to work closely with them in the future. *Financing of Small Business Exports by The Export-Import Bank: Hearing before the Subcomm. on Export Promotion and Market Development of the Senate Comm. on Small Business*, 98th Cong., 1st Sess. 8–9 (1983) ("We have met several times with representatives of state governments and we will continue to work closely with them as the campaign develops.").

state's right to require building permit of contractor who was building gasification plant pursuant to congressional mandate to develop a more efficient means of utilizing coal). An essential rationale underlying these cases is that state regulation of private contractors, unlike state regulation of federal instrumentalities or federal officials, cannot be viewed as superfluous, because the federal ties government does not directly supervise private contractors even when they ties act as its agents. This rationale applies *a fortiori* to the Administrators who are not even agents of the federal government and are not subject to any federal supervision.

Therefore, we conclude that in the absence of some contrary indication of congressional intent states are not preempted from regulating private entities even if such regulations impose some burdens on their participation in a federal program.[7] When Congress establishes an objective for a federal agency, it is to be presumed that it wishes the agency to pursue the objective against the background of ordinary state regulation of private entities because such regulation has legitimate objectives of its own. Any other conclusion would curtail the ability of the states to protect the welfare of their citizens: federal agencies possessed of some statutory mandate would acquire the authority to grant immunity from state regulation to private entities simply on the grounds that such immunity would lead to the more efficient fulfillment of their mandate.[8]

Conclusion

On the basis of the analysis set forth above, we have concluded that the Administrators are subject to non-discriminatory state regulation.

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

[7] *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982), a case principally relied on by Eximbank to support its argument that the 1983 Export-Import Bank Amendments preempt state insurance licensing requirements does not change the foregoing analysis. In *Fidelity*, the Federal Home Loan Bank Board had issued a regulation providing that a federal savings and loan association continued to have the power to include a due-on-sale provision in its loan agreements. *Id.* at 146–47. The preamble to the regulation also stated that the banks would not be subject to any conflicting state law with respect to due-on-sale provisions. *Id.* at 147. The Court held that the Board's due-on-sale regulations preempted conflicting state limitations on the due-on-sale provisions of a federal savings bank. *Id.* at 155. *Fidelity* thus simply represents an instance of federal preemption arising from an express conflict between state and federal laws. It stands for the proposition that a duly promulgated and authorized regulation of an agency has the same power to preempt contrary state law as a statute passed by the Congress. *Fidelity* does not support the argument for the preemption of state insurance regulation because neither any provision of the statute under which Eximbank operates nor any regulation issued by Eximbank conflicts with state law.

[8] Our opinion that the Administrators would ordinarily be subject to State regulation is not inconsistent with the arguments advanced in *Squire, Inc.* v. *Export-Import Bank of the United States*, No. 84–0234 (S.D. Cal. 1985), that Eximbank and the FCIA should not be subject to punitive damages. First, the argument in *Squire* is not based on a claim that the federal statute preempts all state regulation, but rather that in litigation arising out of nationwide programs in the paramount federal interest compels the application of federal law to questions of *liability* in governmental programs and transactions. *See United States* v *Little Lake Misere Land Co.*, 412 U.S. 580, 592–94 (1974); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Second, this memorandum does not address whether Eximbank or the FCIA may be immune from state regulations on the ground that they are federal instrumentalities.

Constitutionality of State Procedural Reform Provision in Superfund Legislation

A bill reauthorizing the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 contains a section that provides for a uniform federal commencement date for the running of state statutes of limitations in toxic tort actions. By operation of this provision, some actions previously time-barred under existing state law would be revived.

Under current case law, the bill would not be struck down as beyond the constitutional power of Congress. Although the effort to dictate the content of state law is inconsistent with well-established provisions of federalism, it cannot be said that this effort violates the Tenth Amendment as explained by the Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

The retroactive aspects of the bill may be challenged as a denial of property without due process of law or as a taking of property without just compensation. A due process challenge would present difficult questions due to the existence of two lines of Supreme Court authority in apparent tension, and the bill may well be held to violate the Due Process Clause. The revival of a time-barred action probably would not constitute a taking under the ad hoc regulatory takings inquiry established by the Supreme Court.

April 1, 1986

MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

In a letter of December 19, 1985, you requested the views of this Office on the constitutionality of certain provisions in H.R. 2817, prescribing a uniform, retroactive federal commencement date for the running of statutes of limitations in state tort actions arising from exposure to toxic substances (toxic torts). Although the invasion of the powers of the states proposed by this bill raises serious concerns, we cannot say that the bill would be struck down as beyond the constitutional powers of Congress. We believe, however, that the retroactive aspects of the bill may be held to violate the Due Process Clause in certain instances, although they would likely survive a challenge under the Takings Clause. Finally, we think that, even if constitutional, the bill might have the untoward result of inducing some state courts to invalidate entire state causes of action for toxic torts.

H.R. 2817, the House bill reauthorizing the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96–510, 94 Stat. 2767 (codified at scattered sections of titles 26, 33, 42 & 49 of the United States Code) (Superfund), contains a section on "State Procedural Reform,"

which provides a uniform federal commencement date for the running of state statutes of limitations in toxic tort actions. The federal commencement date applies to "any action brought under State law" for injury resulting from exposure to toxic substances; this federal commencement date presumably applies to both statutory and common law actions. No new federal cause of action is created. The bill would make the new commencement date applicable to actions brought after December 11, 1980, thereby retroactively "reviving" at least some actions that are time-barred under existing state statutes of limitations.

1. *Tenth Amendment.* The initial question is whether congressional alteration of state statutes of limitations, other than through creation of a preemptive federal cause of action, is consistent with the constitutional structure of dual sovereignty. We find the question troubling. Although Congress may of course preempt state law in areas of legitimate federal constitutional authority, any effort by the federal government to dictate the content of state law (as this bill contemplates) would do gross violence to our federal system. Nevertheless, we cannot say that this novel provision would be held to violate the Tenth Amendment under the standards for constitutional federalism set forth in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Supreme Court in *Garcia* overruled its earlier decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which had determined that the federal government's Commerce Clause powers were constrained by the Tenth Amendment "in areas of traditional governmental functions." *Id.* at 852. *Garcia* rejected the distinction between traditional and nontraditional governmental functions as untenable, *see* 469 U.S. at 539–49, and concluded that limitations on congressional power to regulate the states were to be left primarily to the political process. *See id.* at 549–55. To be sure, the Court held open the possibility that certain extreme cases might invite judicial scrutiny. *See id.* at 556–57. But H.R. 2817 would have presented a difficult question even under pre-*Garcia* law. *See FERC* v. *Mississippi*, 456 U.S. 742, 764–71 (1982).

2. *Retroactivity and Due Process.* The proposal to apply the new statute of limitations *retroactively* to revive previously barred actions raises serious constitutional questions, the chief of which is whether revival of time-barred actions is an unconstitutional deprivation of the property of defendants without due process of law.

The principal decision suggesting that revival of actions might violate the Constitution is *William Danzer & Co.* v. *Gulf & Ship Island R.R. Co.*, 268 U.S. 633 (1925). Following the First World War, a statute was passed providing that the period of wartime federal control of railroads was not to be counted in determining whether actions under the Interstate Commerce Act were brought within that Act's statute of limitations. The reparations suit by the plaintiff shippers in *Danzer* was brought subsequent to this new statute, but the time limit on the action under the old statute of limitations had expired *before* the post war enactment. If the wartime period was excluded from the computation, the action would have been timely. The Supreme Court held that it would

violate the Fifth Amendment to apply the new limitations provision to revive an action that was already fully barred. Prior decisions had established "that the lapse of time not only barred the remedy but also *destroyed the liability* of defendant to plaintiff. On the expiration of the two-year [limitations] period, it was as if liability had never existed." 268 U.S. at 636 (emphasis added) (citations omitted). In such cases, where the limitations provision "constitute[s] a part of the definition of a cause of action created by the same or another provision, and operate[s] as a limitation on liability," *id.* at 637, retroactive application of a change in the statute to revive liability "would . . . deprive defendant of its property without due process of law in contravention of the Fifth Amendment." *Id.*

Danzer distinguished the Court's earlier opinion in *Campbell* v. *Holt*, 115 U.S. 620 (1885), which had rejected the argument that the retroactive removal of a time-bar to a Texas contract action violated the Fourteenth Amendment. The *Campbell* Court, while suggesting that there would be constitutional problems with revival of an action to recover title to property that had vested with the passage of time, *see* 115 U.S. at 623, found no such bar to revival of an expired contract action, holding: "We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case." *Id.* at 628. *See also id.* at 629 ("[w]e are unable to see how a man can be said to have *property* in the bar of the statute as a defence to his promise to pay") (emphasis in original). The *Danzer* Court found this case inapplicable since it "rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only . . . ." 268 U.S. at 637. By contrast, the *Danzer* Court concluded, the time limitation in the Interstate Commerce Act went to the existence of *liability*, freedom from which was held to be a vested property right that could not be infringed under the Fifth Amendment. *See id.*

In *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), the Court upheld the constitutionality of retroactive application of a change in the statute of limitations for actions under Minnesota's Blue Sky laws. *Danzer* was discussed and distinguished in a footnote:

> In the *Danzer* case it was held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law . . . . But the situation here plainly does not parallel that in the *Danzer* case . . . . At the time this action was commenced the Blue Sky Law of Minnesota had imposed on appellant a duty; it had not explicitly created a liability. The liability was implied by the state's common law; the period of limitation was found only in the general statute of limitations enacted many years earlier. The state court concluded that the challenged statute did not confer on appellees a

> new right or subject appellant to a new liability. It considered that the effect of the legislation was merely to reinstate a lapsed remedy, that appellant had acquired no vested right to immunity from a remedy for its wrong in selling unregistered securities, and that reinstatement of the remedy by the state legislature did not infringe any federal right under the Fourteenth Amendment, as expounded by this Court in *Campbell* v. *Holt*.

Id. at 312 n.8. Thus, the footnote in *Chase Securities* appears to retain the "right/remedy" distinction enunciated by *Danzer*: retroactive application of new statutes of limitations is unconstitutional when it would revive liability, rather than merely revive a remedy for liability that was never extinguished, and in state causes of action one must look to state law to determine which is the case.[1]

The Court's most recent discussion of *Danzer* is consistent with this analysis. In *International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976), the Court upheld the retroactive application of a new statute of limitations for filing charges with the Equal Employment Opportunity Commission (EEOC), thus preserving a suit under Title VII of the Civil Rights Act of 1964 that would otherwise have been barred for failure to file with the EEOC in timely fashion. After concluding that the new limitations period applied to the suit in question, the Court rejected the defendant's constitutional challenge to its application:

> Respondent contends, finally, that Congress was without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period. This contention rests on an unwarrantably broad reading of our opinion in [*Danzer*]. *Danzer* was given a narrow reading in the later case of *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 312 n.8 (1945). The latter case states the applicable constitutional test in this language:
>
> > "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law . . . . Assuming that statutes of limitation, like

[1] "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The Court in *Campbell* does not appear to have consulted state law in this fashion. Rather, it seems to have held generally that limitations on contract actions go to the remedy, *see* 115 U.S. at 629, while the dissent took the contrary position, again as a general matter. *See id.* at 630–31 (Bradley, J., dissenting). A possible reconciliation is found in the comment in *Chase Securities* that *Campbell* "adopted as a *working hypothesis*, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." 325 U.S. at 314 (emphasis added). If a defendant proves that state law establishes that statutes of limitations protect "fundamental rights," this presumption, we assume, can be overcome.

> other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment." *Id.* at 315–316.
>
> Applying that test to this litigation, we think that Congress might constitutionally provide for retroactive application of the extended limitations period which it enacted.

429 U.S. at 243–44 (omission in original).

A plausible interpretation if this passage is that Congress did not intend the limitations provisions in Title VII to condition the liability of defendants, and *Robbins & Myers* is thus a "remedy" case akin to *Campbell* and *Chase Securities*, rather than a "liability" case like *Danzer*.[2] In view of its endorsement of *Chase Securities*, the Court evidently meant to give *Danzer* a "narrow reading" by limiting it to situations in which the statute of limitations is an essential part of the cause of action.

On this understanding of the law, H.R. 2817 presents serious problems. If, under the law of a particular state, statutes of limitations are seen as conditioning liability with respect to any of the actions affected by the bill, then as to those actions retroactive application of the new commencement date would be an unconstitutional deprivation of property without due process. Many states have such rules. *See generally* 51 Am. Jur. 2d *Limitation of Actions* § 44 (1970); 16A Am. Jur. 2d *Constitutional Law* §§ 665–66 (1979). The consequence of this understanding of the law is the unfortunate spectacle of a statute fully constitutional in some states, partly constitutional in others, and wholly unconstitutional in still others (those that guarantee the vesting of limitation defenses).

There is, however, good reason to doubt whether this is an accurate statement of the law. The Supreme Court has recently addressed the constitutional power of Congress to *create liability* retroactively, holding broadly that the legislature has considerable leeway to impose liability for conduct that was legal when performed. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court considered and rejected a constitutional challenge to a congressional program for compensating victims of black lung disease. In particular, the Court upheld the retroactive imposition of liability on mine owners for black lung disease contracted by mine workers who had left employment *before* enactment of the compensation scheme. (The mine owners did not object to compensating current employees for disease contracted in the

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[2] *But cf. United States Trust Co. of New York* v. *New Jersey*, 431 U.S. 1, 20 n.17 (1977) (the remedy/obligation distinction in Contract Clause jurisprudence is "now largely an outdated formalism," though it "approximat[es] the result of a more particularized inquiry into the legitimate expectations of the contracting parties").

past.) The Court pronounced it "well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." 428 U.S. at 15. The Court noted that the statute "has some retrospective effect," *id.* at 16, but countered that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* (citations omitted). The Court suggested that retrospective legislation might be subject to more heightened scrutiny than purely prospective acts and even intimated that it would not uphold the black lung statute if its rationale was deterrence of undesirable conduct. *Id.* at 16–17. But it found "that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor — the operators and the coal consumers." *Id.* at 18.

The Court recently reaffirmed *Turner Elkhorn* in *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984), which upheld the retroactive imposition of liability on employers who withdrew from certain pension plans within five months prior to enactment of a statute imposing additional costs on withdrawal from those plans. Relying on *Turner Elkhorn*, the Court emphasized that

> the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . .

467 U.S. at 729. The heightened burden that retroactive legislation must face "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id. See also United States Trust Co. of New York* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977) ("[t]he Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive'" (*dictum*) (quoting *Welch* v. *Henry*, 305 U.S. 134, 147 (1938)).

If Congress created a new cause of action for toxic torts and imposed retroactive liability, the statute would surely survive constitutional attack under *Gray* and *Turner Elkhorn*. Indeed, the parallels between such hypothetical legislation and the black lung statute upheld in *Turner Elkhorn* are striking, even to the likely cost-spreading rationale. But if this is true, it is difficult to see why Congress should be able to impose retroactive liability *directly* by creating a new cause of action, but not *indirectly* by extending backwards a statute of limitations (or new commencement date). An argument can thus be made that

Danzer is no longer good law. Nonetheless, *Turner Elkhorn* and *Gray* make no reference to *Danzer* or the other statute of limitations cases, nor do the latter cases refer generally to the former, even though *Turner Elkhorn* had been decided when *Robbins & Myers*, the most recent of the statute of limitations cases, was decided.

3. *Takings Clause.* An additional constitutional question may be raised under the Takings Clause of the Fifth Amendment. If liability is imposed *retroactively* on those who deal with toxic wastes in order to spread costs among the general public, defendants may argue that their property (*i.e.*, their freedom from liability by virtue of a state statute of limitations) is being taken for a public purpose without just compensation. However, the bill would likely survive a Takings Clause challenge under the "ad hoc, factual inquir[y]," *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), used by the Supreme Court in regulatory takings cases. *See, e.g., Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223–28 (1986); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1004–08 (1984); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 82–83 (1980). This inquiry looks to such factors as "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations." *PruneYard Shopping Center*, 447 U.S. at 83. Because the government action contemplated by H.R. 2817 does not physically appropriate property for the government's own use, *see Connolly*, 475 U.S. at 224–25, and is likely to have little, if any, impact on "investment backed expectations," the revival of time-barred actions probably does not meet the standards for a regulatory taking.

4. *Other Issues.* Quite apart from the question whether Congress has the power to create retroactive liability through extension of state statutes of limitations, the bill raises a number of other issues. Because H.R. 2817 is not creating a new cause of action, but is merely engrafting a provision onto existing state actions, it is necessary to consider the effects this might have under state law. As was noted above, a number of states guarantee the vesting of limitations defenses. Accordingly, it is conceivable that some state courts may hold that state causes of action for toxic torts are not severable from the statute of limitations under state law and that the effect of the federal law purporting to alter the state statute of limitations is to invalidate the state cause of action *in toto*.[3]

Present case law would not *compel* state courts to take jurisdiction over these actions instead of invalidating the state compensation scheme. The Supreme Court held in *Testa* v. *Katt*, 330 U.S. 386 (1947), that state courts may not

[3] This raises the interesting question of whether such abrogation of liability without provision of a reasonable substitute would violate the due process rights of *toxic tort victims*. We know of no definitive precedent on this point, though a recent *dictum* of the Court suggests that it would not. *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 88 & n.32 (1978). *See also Silver* v. *Silver*, 280 U.S. 117, 122 (1929) (*dictum*). *But see New York Central R.R. Co.* v. *White*, 243 U.S. 188, 201 (1917) ("it perhaps may be doubted whether the State could abolish all rights of action [for personal injuries between employers and employees] on the one hand, or all defenses on the other, without setting up something adequate in their stead") (*dictum*).

decline to take jurisdiction over a federal cause of action on the ground that it is contrary to state policy. Here, however, no federal cause of action is at issue, and neither H.R. 2817 nor any existing federal statute requires a state to recognize a state cause of action for toxic torts or precludes a state from repealing any such existing cause of action.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Congressional Authority to Adopt Legislation Establishing a National Lottery

Neither the Taxing Clause, Article I, § 8, cl. 1, nor the Necessary and Proper Clause, Article I, § 8, cl. 18, of the Constitution authorizes Congress to establish a national lottery.

April 4, 1986

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

This Office has been asked to comment on H.R. 772, 99th Cong., 1st Sess., the "National Social Security Lottery Act," and H.R. 1878, 99th Cong., 1st Sess., the "National Lottery Act." These bills, which are identical in all pertinent respects, would establish a national lottery to raise money for the federal government. After examining the constitutional authority for these bills, we have concluded that Congress lacks the power to establish a national lottery and, thus, to override the anti-gambling laws of the states.[1]

Both bills would create a National Lottery Commission, which would "establish, operate, and administer" the lottery program. H.R. 772, § 102(a); H.R. 1878, § 2(a).[2] The Commission would determine the type of lottery to be conducted, the price to be charged for tickets, the manner of selecting the winners, and the amounts of the prizes. H.R. 772, § 102(a); H.R. 1878, § 2(b). Neither bill, however, would give the Commission discretion in deciding how to use lottery revenues. Under § 201 of H.R. 772, those revenues remaining after payment of operating expenses would be deposited in the Federal Old Age

[1] In an earlier memorandum, this Office addressed the constitutionality of the provisions that would preempt any state or local laws prohibiting the operation of a national lottery, and concluded that the Tenth Amendment does not preclude the preemption provisions of the proposed bills. Memorandum from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel to Stephen S. Trott, Assistant Attorney General, Criminal Division (Nov. 14, 1985). Our analysis was premised, however, on the *assumption* that Congress has constitutional authority in the first instance to establish a national lottery. This memorandum examines the validity of that assumption.

[2] Under § 101(a) of H.R. 772, the Commission would consist of five members, each selected for a term of five years. The members would be chosen from among individuals who are "not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Government of the United States." *Id.*

Under H.R. 1872, the five Commission members would serve for terms of six years. *Id.* § 3(c). The Secretary of the Treasury and the Secretary of Health and Human Services would serve on the Commission. *Id* § 3(a). The remaining three members of the Commission would be chosen from among individuals who are "directors of lotteries operated by States or have experience which would provide expertise with respect to the operation of a legitimate lottery which is reasonably equivalent to that of such a director." *Id.* § 3(b).

Both bills provide that members of the Commission may be removed by the President "upon notice and hearing, for neglect of duty or malfeasance in office but for no other cause." H.R. 772, § 101(a)(2); H.R. 1878, § 3(c).

and Survivors Insurance Trust Fund, the Federal Disability Insurance Trust Fund, and the Federal Hospital Insurance Trust Fund.[3] Under §§ 7 and 8 of H.R. 1878, remaining revenues would be divided as follows: (1) 50 percent to be deposited in the Federal Hospital Insurance Trust Fund; and (2) 50 percent to be deposited in the general fund of the Treasury for the purpose of reducing the federal deficit. Both bills provide for the sale of national lottery tickets nationwide, notwithstanding any state law prohibiting lotteries. H.R. 772, § 104(a); H.R. 1878, § 6(a)(1).[4] The preemption provisions do not, however, invalidate any state or local lotteries. H.R. 772, § 104(b); H.R. 1878, § 6(a)(2).

In considering the constitutionality of H.R. 772 and H.R. 1878, we begin by noting that Article I, § 8 of the Constitution does not endow Congress with "all legislative power." The delegates to the Constitutional Convention considered such a broad description of congressional authority, but decided instead that Congress' powers should be specifically enumerated.[5] An act of Congress therefore is invalid unless it is affirmatively authorized under the Constitution. The Tenth Amendment makes explicit the doctrine of enumerated powers, stating: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Under the doctrine of enumerated powers, H.R. 772 and H.R. 1878 are invalid unless the creation of a national lottery falls within one of the limited grants of legislative authority conferred upon Congress.[6] The, Constitution, of

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[3] Under § 201(d)(3), the Secretary of Treasury, after consulting with the Secretary of Health and Human Services, would determine how to allocate lottery revenues among these three trust funds.

[4] The bills provide:

> The Commission shall continuously consult and cooperate with appropriate State and local governmental authorities, particularly those in States and localities having laws or specific public policies relating to lotteries, with the objective of facilitating the operation of the national lottery under this Act and . . . minimizing the impact of the national lottery on State and local activities, laws, and policies bearing directly or indirectly upon the conduct of lotteries in general or of the national lottery under this Act in particular.

H.R. 772, § 104(c); H.R. 1878, § 6(b).

[5] The delegates at the Convention voted twice for a simple description such as that embodied in the Virginia Plan: "[T]he National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate states are incompetent, or which the harmony of the United States may be interrupted by the exercise of individual Legislation." *See* 1 M. Farrand, *Records of the Federal Convention of 1787* 53 (1911).

[6] *See National Prohibition Cases*, 253 U.S 350, 377 (1920) ("Congress is always exercising delegated, limited, circumscribed and enumerated powers, and not the broad and elastic police powers of a State."); *House* v. *Mayes*, 219 U.S. 270, 281 (1911) ("Government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument."); *Kansas* v. *Colorado*, 206 U.S. 46, 81 (1907) ("By reason of the fact that there is no general grant of legislative power, it has become an accepted constitutional rule that this is a government of enumerated powers."), *United States* v. *Harris*, 106 U.S. 629, 635 636 (1882) ("The government of the United States is one of delegated, limited, and enumerated powers . . . . Therefore every valid act of Congress must find in the Constitution some warrant for its passage."); *McCulloch* v. *Maryland*, 17 U S (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted."); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) ("The government . . . of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.").

course, does not explicitly authorize Congress to establish a national lottery. We therefore turn to an examination of the only sources of constitutional authority that even arguably support congressional enactment of a national lottery: the Taxing Clause (Article I, § 8, cl. 1) and the Necessary and Proper Clause (Article I, § 8, cl. 18).

I. The Taxing Clause

Under the Articles of Confederation, the national government lacked authority to lay and collect taxes. Articles of Confederation, Art. IX. Widely blamed for the failure of the Articles of Confederation, *see* L. Tribe, *American Constitutional Law* 5–2 at 225 n.2 (1978), the inability to tax was remedied in Article I of the Constitution, which grants to Congress the authority to impose taxes for governmental purposes:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Art. I, § 8, cl. 1.

The Framers clearly intended for Congress' taxing authority to be very broad. In order to prevent the United States from "resigning its independence and sinking into the degraded condition of a province," *id.*, they granted to Congress "a complete power . . . to procure a regular and adequate supply of revenue." *The Federalist* No. 30, at 188 (A. Hamilton) (C. Rossiter ed. 1961). The Supreme Court has interpreted Congress' taxing power in a manner consistent with this original intent. In *The License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867), for example, the Court stated that Congress' taxing power "reaches every subject." The Court also has noted that Congress' authority in this area is "exhaustive and reaches every conceivable power of taxation." *Brubasher* v. *Union Pacific R. Co.*, 240 U.S. 1, 12 (1916).

Despite the breadth of Congress' taxing power, the fact remains that the terms of Article I do not authorize Congress to fund the activities of the federal government by any means it chooses. Rather, Article I provides quite specifically that Congress may raise revenues by imposing "taxes, duties, imposts, and excises."[7] The Framers obviously were aware that these terms impose some limits on the means by which the national government may raise revenues. Alexander Hamilton, for example, recognized that Congress has the power to tax only "in the ordinary modes." *The Federalist* No. 31, at 195 (C. Rossiter ed. 1961).

[7] Article I, of course, also authorizes Congress "[t]o borrow money on the credit of the United States." U.S. Const. art. 1, § 8, cl. 2. Obviously, establishment of a national lottery cannot be sustained as an exercise of the Congress' power to borrow money.

Although the Framers did not discuss at length the meaning of the terms "taxes," "duties," "imposts," and "excises," it seems clear that these terms were not intended to encompass a government sponsored national lottery. The word "taxes" was used by the Framers to denote "contributions imposed by the government upon individuals." 1 J. Story, *Commentaries on the Constitution of the United States* § 950, p. 676 (4th ed. 1873).[8] A lottery, of course, involves a voluntary, rather than an imposed, contribution. A lottery also does not fit within the definition of a "duty," which likewise denotes an involuntary payment to the government.[9] Indeed, Luther Martin, a Maryland delegate to the Constitutional Convention, was informed by the Committee of Detail that the word "duties" simply meant "stamp duties on paper, parchment, and vellum." 3 M. Farrand, *Records of the Federal Convention of 1787* 203 (1911) (speech to the Maryland legislature). The power to lay and collect "imposts" similarly was intended to be narrow; Martin stated that it authorized Congress to "impose duties on any and every article of commerce imported into these States." *Id.* at 204.[10] Finally, an "excise" was "deemed to be . . . an inland imposition, paid sometime upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before consumption." 1 J. Story, *Commentaries on the Constitution of the United States* § 953, at 680 (4th ed. 1873); *see also Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 151 (1911) (excises are "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges").

Thus, the Framers' usage of the terms "taxes, duties, imports, and excises" in Article 1, § 8, cl. 1 accords with the contemporary usage of those terms, and plainly reflects that a lottery does not fall within the scope of any of the modes of revenue raising enumerated in the Taxing Clause. This conclusion is reinforced by the fact that lotteries were an important source of governmental revenues at the time the Constitution was drafted. During the Colonial period, the colonies sanctioned 158 lotteries. *See* J. Ezell, *supra* note 8, at 54. The funds raised were used to finance bridges,[11] roads,[12] schools,[13] lighthouses,[14]

[8] In 1826, Thomas Jefferson noted that the State of Virginia often has used lotteries to raise money for "useful under- taking[s]," such as schools. 17 *The Writings of Thomas Jefferson* 450 (A. Lipscomb ed. 1904). He stated that money raised in this way was a "tax . . . laid on the willing only, that is to say, on those who can risk the price of a ticket." *Id.* Jefferson apparently was using the word "tax" in a colloquial sense. In any event, he clearly was not expounding on the meaning of the term as it is used in Article I, § 8, cl. 1 of the Constitution.

It is noteworthy that Jefferson's aforementioned reference to lotteries came in a letter strongly defending state authorized lotteries. At the time, he was seeking legislative approval of a private lottery to dispose of his own land. The eighty-three- year old Jefferson was over $80,000 in debt and believed that a lottery was the only way in which he could get a fair price for his acreage. J. Ezell, *Fortune's Merry Wheel* 168 (1960). Only sixteen years earlier, in 1810, Jefferson had condemned lotteries and stated that he had "made it a rule never to engage in a lottery or any other adventure of mere chance." 12 *The Writings of Thomas Jefferson* 386 (A. Lipscomb ed. 1904) (letter to Trustees for the Lottery of East Tennessee College).

[9] *See Webster's Third New International Dictionary* 705 (1976).

[10] According to Justice Story, the Framers probably intended the term "impost" to mean a "duty on imported goods and merchandise." 1 J. Story, *Commentaries on the Constitution of the United States* § 952, at 678–79 (4th ed. 1873).

[11] In 1760, New Hampshire authorized a lottery to raise 4000 pounds to build a bridge over the Exeter

Continued

churches,[15] and the war against the French.[16] The lotteries did not cease when the Declaration of Independence was signed; during the first 13 years of our Nation's independence, the states authorized about 100 lotteries. Prior to 1781, many of these state-sanctioned lotteries financed the war for independence against the British.[17] After General Washington's victory at Yorktown, these lotteries were used to raise funds for internal improvements within the states. The use of lotteries during this period was not confined to the state governments. In 1776, the Continental Congress established a United States lottery to raise $1,005,000 for troops in the field.[18]

The prevalence of lotteries during the Colonial and Confederation periods strongly suggests that the Framers' failure to endow Congress with the authority to establish lotteries was not inadvertent. Instead, this history suggests that the Framers wanted to allow each individual state to decide what lotteries, if any, would be permitted within its borders. By failing to grant Congress the authority to establish lotteries, we believe that the Framers intended that the power to raise revenues by lotteries would be "reserved to the States." U.S. Const. amend. X.

There are two primary reasons that the Framers might have wanted to reserve to the states alone the power to authorize lotteries. First, the Framers may have concluded that a national lottery, by competing with state lotteries, would impede the states' ability to raise revenues by this method. The cost of raising a dollar by lottery is far higher than the cost of raising a dollar by taxation,[19] and state lotteries would become even more inefficient as a means of raising revenue if they were forced to compete with a national lottery. Given the importance of lotteries as a source of governmental funding in 1787, the Framers may have wanted to accord the states the exclusive ability to raise revenues by this method. H.R. 772 and H.R. 1878, by establishing a national

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[11] (. . . continued)

River. J. Ezell, *supra* note 8, at 56. Eight years later, a second lottery was licensed to raise 1000 more pounds to complete the bridge. *Id.*

[12] In 1762, Rhode Island sanctioned a lottery to raise 4000 pounds to repair the road between Providence and Connecticut. J. Ezell, *supra* note 8, at 58.

[13] In 1746, New York authorized a lottery to raise 2,250 pounds for the founding of King's College (later Columbia). J. Ezell, *supra* note 8, at 56. Four subsequent lotteries were sanctioned to raise money for King's College in 1748, 1753 (two), and 1754. *Id.*

[14] In 1760, Connecticut authorized a lottery to raise 500 pounds for the building of a lighthouse at New London. J. Ezell, *supra* note 8, at 55.

[15] In 1769, Pennsylvania authorized a lottery to raise 3099 pounds and 12 shillings for the First, Second, and Third Presbyterian churches in Philadelphia and the German Reformed church at Wooster. J. Ezell, *supra* note 8, at 57.

[16] In 1754, Virginia authorized a lottery to raise 6000 pounds for protection against the French. J. Ezell, *supra* note 8, at 59.

[17] Massachusetts, for example, authorized a lottery to raise $750,000 to reward enlistees in the Continental Army. J. Ezell, *supra* note 8, at 71.

[18] Although initially very popular, this national lottery ultimately was unsuccessful. *See* J. Ezell, *supra* note 8, at 61–63.

[19] It has been reported that "it costs states anywhere from 15 cents to 40 cents to collect one dollar in lottery revenue; the cost of producing a dollar in revenue through conventional means of taxation is less than a nickel." D. Morrison, *Tristate Area Is Gambling Again on More Gambling*, N.Y. Times, July 4, 1976, § 4, at 4.

lottery, almost certainly would diminish lottery revenues in 22 states and the District of Columbia.[20]

The controversial nature of lotteries during the period of the American founding suggests a second and possibly more important reason why the Framers chose not to grant Congress the power to establish a national lottery. Although lotteries were widely permitted in 1787, many groups objected to them on religious and moral grounds. Famous Puritan theologians such as Cotton Mather had argued,[21] as had the Quakers,[22] that the Bible prohibited lotteries. This opposition must have suggested to the Framers the possibility that states and localities might subsequently wish to abolish lotteries. Indeed, shortly after the adoption of the Constitution, this possibility became a reality, as most states adopted legislation abolishing lotteries.[23] In this historical context, and in light of the Framers' clear intent that the states retain primary authority to regulate public morality,[24] it is not surprising that the Constitutional Convention did not authorize Congress to establish a national lottery. Such a lottery presumably would be effective in every state,[25] and therefore would prevent states opposed to lotteries from eliminating this form of gambling or from regulating the national lottery in ways thought to be necessary for protection of the public welfare.

This interpretation of the Taxing Clause is bolstered by the fact that Congress has never established a national lottery pursuant to this constitutional provision. In 1812, Congress enacted a statute that permitted the District of

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[20] Lotteries have again become a very important source of revenues in many states. In 1984, lotteries netted $2.9 billion, on total wagers of $7.1 billion, for 17 states and the District of Columbia. Since then, five other states have launched lotteries, and California's alone grossed $1 billion in the first four months. D. Farney, *More States Bet on Lotteries to Increase Revenue as Popularity of this "Painless Taxation" Grows*, Wall St. J., Feb. 7, 1986, at 42.

[21] Cotton Mather explained:

> [L]ots, being mentioned in the sacred oracles of Scripture as used only in weighty cases and as an acknowledgment of God sitting in judgment . . . cannot be made tools and parts of our common sports without, at least, such an appearance of evil as is forbidden in the word of God.

U.S. Dep't of Justice, *The Development of the Law of Gambling: 1776–1976* at 51 (1977) (quoting H. Chafetz, *Play the Devil* 14 (1960)).

[22] The Quakers, more than any other religious group, were consistent in a their opposition to lotteries. *See* J. Ezell, *supra* note 8, at 18.

[23] In 1833, the Pennsylvania legislature enacted a statute providing that "all and every lottery and lotteries, and device and devices in the nature of lotteries, shall be utterly and entirely abolished, and are hereby declared to be thenceforth unauthorized and unlawful." 1832–1833 Laws of Pennsylvania, Act No. 32, § 1. By 1860, every state except three had followed suit. J. Ezell, *supra* note 8, at 228–29.

[24] *See, e.g.*, *The Federalist* No. 45, at 292–93 (J. Madison) (C. Rossiter ed. 1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."); *House* v. *Mayes*, 219 U.S. 270, 282 (1911) ("that among the powers of the State, not surrendered — which power therefore remains with the State — is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals"); *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1885) (A state exercises its police power "to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."); *Roth* v. *United States*, 354 U.S. 476, 504 (1956) (Harlan, J., concurring and dissenting) ("States . . bear direct responsibility for the protection of the local moral fabric.").

[25] H.R. 772 and H.R. 1878 both provide that the national lottery would be effective even in those states that prohibit all lotteries. *See* H.R. 772, § 104(a); H.R. 1878, § 6(a)(1).

Columbia to authorize lotteries.[26] But this statute did not allow the sale of lottery tickets outside of the District. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 447 (1821). Instead, this lottery was enacted pursuant to Article I, § 8, cl. 17 of the Constitution,[27] which empowers Congress to govern the District of Columbia. 19 U.S. (6 Wheat.) at 424. Thus, the 1812 statute, and a virtually identical provision enacted in 1820,[28] simply permitted the District of Columbia to raise revenues by the same means employed by the states. A "national" lottery was not created.[29]

III. The Necessary and Proper Clause

Article I, § 8, cl. 18 of the Constitution provides that Congress may enact those laws that are "necessary and proper for carrying into Execution" its enumerated powers. In the early years of the Republic, this constitutional provision was the source of heated debate. Jefferson believed that the Necessary and Proper Clause, if interpreted broadly, would "swallow up all the delegated powers, and reduce the whole to one power." G. Gunther, *Constitutional Law* 96 (10th ed. 1980). Hamilton, on the other hand, argued that "[t]he only question must be . . . whether the means to be employed . . . has a natural relation to any of the acknowledged objects or lawful ends of the government." *Id.* The views of Hamilton ultimately prevailed in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which the Supreme Court upheld the power of Congress to charter a second Bank of the United States. The Court refused to interpret the Constitution in a manner that would confine "the choice of means

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[26] *See* Act of May 4, 1812, ch. 75, § 6, 2 Stat. 726:

> That the said corporation shall have full power and authority . . . to authorize the drawing of lotteries for effecting any important improvement to the city, which the ordinary funds or revenue thereof will not accomplish; *Provided*, That the amount to be raised in each year shall not exceed the sum of ten thousand dollars: *And provided also*, That the object for which the money is intended to be raised shall be first submitted to the President of the United States, and shall be approved by him.

[27] Article I, § 8, cl. 17 of the Constitution provides that Congress shall

> exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.

This clause gives Congress "the combined powers of a general and of a State government in all cases where legislation is possible." *O'Donoghue* v. *United States*, 289 U.S. 516, 539 (1933) (quoting *Stoutenburgh* v *Hennick*, 129 U.S. 141, 147 (1889)).

[28] The District of Columbia's New Act of Incorporation provided in pertinent part:

> That the said corporation shall have full power and authority . . . to authorise with the approbation of the President of the United States, the drawing of lotteries for the erection of bridges and effecting any important improvements in the city which the ordinary revenue thereof will not accomplish, for the term of ten years: *Provided*, That the amount so authorised to be raised in each year shall not exceed the sum of ten thousand dollars, clear of expenses.

Act of May 15, 1820, ch. 104, § 8, 3 Stat. 588.

[29] At least thirteen lotteries were authorized by the District of Columbia and approved by the President. The first lottery, which was approved by President Madison on November 23, 1812, was designed to raise money for the establishment of two public schools in the City of Washington. *Laws of the Corporation of Washington* 110 (Burch 1823). The second lottery was to raise funds for a local penitentiary; the third, a city hall *Id.* at 110–11 The ten subsequent lotteries were established to produce revenues for the same three government projects. *Id.* at 111–12; *Laws of the Corporation of Washington* 278–79, 283 (Rothwell 1833).

to [the] narrow limits" proposed by Jefferson. *Id.* at 413. Chief Justice Marshall wrote:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Id. at 420. *See also Perez* v. *United States*, 402 U.S. 146, 151 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *Wickard* v. *Filburn*, 317 U.S. 111, 124 (1942). *Cf. Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 564–65 (1985) (Powell, J., dissenting).

The language used by Chief Justice Marshall in *McCulloch* clearly shows that the Necessary and Proper Clause does not remove all limitations on Congressional power. The means chosen to attain a legitimate governmental end must be consistent with the "letter and spirit of the Constitution." In recent years, the Supreme Court has reemphasized that the Necessary and Proper Clause cannot be used to circumvent other constitutional prohibitions, either explicit or implicit. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court held that even though the creation of the Federal Election Commission was a legitimate end, Congress could not encroach on the Executive's authority to appoint "officers of the United States." In rejecting a claim that the legislation could be justified under the Necessary and Proper Clause, the Court stated:

> [T]he claim that Congress may provide for this manner of appointment under the Necessary and Proper Clause of Article I stands on no better footing than the claim that it may provide for such manner of appointment because of its substantive authority to regulate federal elections. Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in section 9 of Article I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

424 U.S. at 135.

Here, there can be no doubt that the raising of revenue for governmental programs is a "legitimate end." Nevertheless, like the legislation considered in *Buckley*, H.R. 772 and H.R. 1878 use means that are inconsistent with "the letter and spirit of the Constitution." As previously discussed, the Framers omitted lotteries from the list of powers in the Taxing Clause, and thus reserved this method of raising revenue exclusively to the states. U.S. Const. amend. X. Thus, here, as in *Buckley*, the allocation of governmental authority underlying the Taxing Clause cannot be circumvented by invoking the Necessary and Proper Clause.

Conclusion

For the foregoing reasons, it is the opinion of this Office that Congress lacks authority under the Constitution to establish a national lottery. We accordingly believe that both H.R. 772 and H.R. 1878 are unconstitutional.[30]

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[30] In addition to the overriding constitutional defect discussed in the text of this memorandum, these bills include an unconstitutional limitation on the President's removal power. In *Myers* v. *United States*, 272 U.S. 52 (1926), the Supreme Court held that Congress cannot limit the President's power to remove officers of the United States who are appointed by him with the consent of the Senate. To be sure, *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935) and *Wiener* v. *United States*, 357 U.S. 349 (1958), hold that Congress can limit the President's power to remove officers who perform quasi-legislative, quasi-judicial, or adjudicatory functions. The commissioners provided for in these bills, however, would not perform such functions. The commissioners would have the power to issue regulations, a power that is plainly executive in nature and, indeed, is possessed by the heads of most executive agencies. In the words of Chief Justice Marshall, the commissioners would merely "fill up the details." *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). It is therefore our view that those provisions would unconstitutionally restrict the President's removal power.

Constitutionality of South African Divestment Statutes Enacted by State and Local Governments

In response to conditions in South Africa, a number of state and local governments passed statutes or ordinances requiring the divestment of pension funds from companies that do business in South Africa or prohibiting governmental bodies from entering into contracts with such companies. The divestment laws survive constitutional scrutiny.

The divestment laws do not place an impermissible burden on foreign commerce. Under the market participation doctrine, the Supreme Court has held that proprietary, as opposed to governmental, actions of state and local governments may be shielded from the strictures of the Commerce Clause. The divestment laws fall within that doctrine. Nor do such laws represent an unconstitutional interference with the federal government's foreign affairs power. Finally, such laws are not preempted by either the Export Administration Act or Executive Order No. 12532, which imposes certain economic sanctions on South Africa.

April 9, 1986

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This memorandum addresses the question whether certain state and local divestment laws are subject to constitutional challenge. These laws vary in their scope, but their general characteristics are that they either (a) require the divestment of state or local employee pension funds from companies which do business in South Africa;[1] or (b) restrict or prohibit a city or a state from entering into contracts with companies that have investments, licenses, or operations in South Africa.[2] We are not aware of state or local statutes that seek directly to regulate the activities of companies doing business in South Africa. This memorandum is therefore limited to evaluating the constitutionality of statutes in which the state exercises its proprietary authority to invest funds under its control and to award city financed contracts in a manner that discriminates against companies with South African operations.[3]

[1] *See, e.g.*, 1985 New Jersey Laws, Act 308 (directing that the state treasurer not invest pension funds under state control in any institution which has outstanding loans to the Republic of South Africa, or in the stocks, securities or other obligations of any company engaged in business in the Republic and directing that such existing investments be divested within three years); Rhode Island General Laws Chapter 35–10 (requiring divestment of state funds and pension funds invested in any financial institution lending money to or any corporation doing business in South Africa).

[2] *See, e.g.*, New York City Local Law 19 (1985) (imposing certain conditions relating to South Africa on companies bidding for city contracts).

The rationales offered for the divestment statutes are also varied. The legislative intent of the New Jersey law is "to encourage retreat by companies essential to the economy of South Africa and thus encourage it to alter its ways." Op. N J. Att'y Gen. (Dec. 19, 1985). In contrast, the stated purpose of Michigan's law is to achieve the state's goal of ending discrimination Our discussion will apply to all divestment statutes, whatever the intent with which they were passed, except when we indicate otherwise.

[3] Such statutes will be referred to collectively in this memorandum as "divestment statutes."

These statutes may be subject to constitutional challenge on the grounds (1) that state divestment legislation is an impermissible burden on foreign commerce; (2) that such legislation constitutes an impermissible intrusion into a field, foreign affairs, that is uniquely the concern of the federal government; and (3) that the state and local statutes are preempted either by Executive Order No. 12532, which prohibits certain transactions with South Africa, or by the Export Administration Act, which declares that free trade is, in general, the policy of the United States.

Although each of these challenges presents a complex legal issue, we believe that state divestment statutes of the type described above are constitutional. First, we believe that a Commerce Clause challenge to divestment statutes would, and should, fail. In developing what has come to be known as the market participant doctrine, the Supreme Court has distinguished, quite properly, between the exercise of proprietary powers — powers which are not unique attributes of sovereignty, but rather are held in common with other persons and entities — and regulatory power — power to impose regulations pursuant to the sovereign power to govern. The Court has shielded proprietary actions from the strictures of the Commerce Clause. State divestment statutes represent, we believe, an exercise of proprietary power to spend or invest state funds in a manner that reflects their citizens' moral sentiments or economic interests, and accordingly ought to escape invalidation under the Commerce Clause.[4]

Nor do these statutes violate any specific prohibition against state intrusion into the area of foreign affairs imposed by Article I, § 10 of the Constitution, such as the prohibition against entering into treaties with foreign nations. While the Supreme Court has suggested that a general principle against state intrusion into foreign affairs, a principle going beyond these specific textual prohibitions, may be derived from the federal government's extra-constitutional sovereignty, this principle has never been applied to a state's exercise of proprietary powers. Indeed, the Court has applied this principle to a state statute only once. In *Zschernig* v. *Miller*, 389 U.S. 429 (1968), the Court struck down a probate law that permitted state courts to inquire into the operation of foreign law, to evaluate the credibility of foreign officials, and to engage in persistent criticism of foreign countries in order to deny citizens of those nations' American legacies. Because the Court has upheld state regulatory statutes that have an indirect impact on foreign affairs, we believe that this single case represents the Court's reaction to a particular regulatory statute, the operation of which intruded extraordinarily deeply into foreign affairs. It does not imply that the Court would strike down regulatory statutes having a less direct impact on foreign affairs. In any event, the principle in *Zschernig* should not be extended to invalidate exercises of state proprietary, as opposed to regulatory, powers.

[4] Although the Court expressly reserved the question of whether the market participant doctrine applies to the state statutes that affect foreign, as opposed to interstate, commerce, we believe that the rationale for the distinction — that the Commerce Clause was intended to restrict a state's ability to regulate but not its ability to participate in markets — applies equally to statutes that affect foreign commerce.

Finally, under ordinary preemption analysis, Executive Order No. 12532 and the Export Administration Act do not preempt state regulation of trade with South Africa. Neither the Order nor the Act represents a comprehensive scheme to regulate trade with South Africa, nor do they reflect an intent to displace the state's traditional authority to invest its funds and make contracts as it chooses.

I. The Commerce Clause

The Supreme Court has shielded state proprietary activity from the strictures of the Commerce Clause under the market participation doctrine. The first case to enunciate the market participant analysis was *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976).[5] There the Court upheld a Maryland program of paying a bounty for recycling abandoned cars (hulks) formerly titled in Maryland. To receive a bounty under the program, scrap processors were required to submit title documentation, but the documentation requirements for Maryland processors were more lenient than those for non-Maryland processors. Distinguishing cases in which it had invalidated state statutes that had "interfered with the natural functioning of the interstate market through prohibition or through burdensome regulation," 426 U.S. at 806, the Court noted that Maryland neither prohibited nor regulated the sale of hulks, but rather was acting as a "market participant to bid up their price." *Id.* The Court concluded that "[n]othing in the purposes animating the Commerce Clause prohibits a state, in the absence of congressional action, from participating in the market and exercising its right to favor its own citizens over others." *Id.* at 810.[6]

[5] The proprietary/regulatory distinction, however, is not of recent vintage or limited to Commerce Clause analysis, but appears in other areas of Supreme Court jurisprudence. In *Atkin* v. *Kansas*, 191 U.S. 207 (1903), the Court dismissed a challenge to a statute requiring contractors hired by a state agency to limit their employees to an eight-hour day. The Court stated:

> [W]e can imagine *no possible ground* to dispute the power of the state to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. *On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.*

191 U.S. at 222 (first emphasis added; other emphasis in original). The emphasis in *Atkin* on proprietary powers was of great significance, because two years later in *Lochner* v. *New York*, 198 U.S. 45 (1905), the Court, composed of the same members, invalidated under the Due Process Clause of the Fourteenth Amendment a statute in which the state exercised its regulatory powers to prohibit employing a baker for more than sixty hours a week.

In 1972 the Court summarily affirmed a lower court ruling that permitted the state of Florida to favor Florida-based publishing houses in purchases of school textbooks. *See American Yearbook Co.* v. *Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd*, 409 U.S. 904 (1972).

[6] In enacting state divestment statutes, states are not acting to favor their own citizens *over* others. Instead state divestment decisions are intended to advance the moral or economic interests of its citizens. Since their inception states have legislated to reflect the moral sentiments of their communities, and we find nothing in logic or case law to suggest that the representation of community sentiments may not be a legitimate basis for state investment or contractual decisions, particularly in an area in which the Supreme Court has acknowledged that the state is acting as a "guardian and trustee of its people." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 483 (1980).

Continued

In *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), the Court upheld South Dakota's right to restrict the sale of state-produced cement to state residents. The Court not only affirmed the market participant doctrine in *Alexandria Scrap* as "good sense and sound law," but expanded on its rationale. Noting that the Commerce Clause was not intended "to limit the ability of the States themselves to operate freely in the free market," the Court emphasized that "restraint in this area is counseled by considerations of state sovereignty, 'the role of each state as guardian and trustee of its people.'" *Id.* at 437–38 (quoting *Atkin* v. *Kansas*, 191 U.S. 207, 222–23 (1903)). The Court also suggested that in light of "the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal," states acting in a proprietary capacity "similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* at 438–39 (citations omitted).

In its most recent majority opinion on the market participant doctrine in the Commerce Clause, the Court again reaffirmed that "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 210 (1983). In that case the Court upheld a city order requiring each contractor on city financed or city administered construction projects to employ Boston residents in numbers equal to at least fifty percent of its total workforce. The Court was unmoved by the dissenters' arguments that by imposing these requirements the city was taking action that was indistinguishable from regulating the employment market between private contractors and their labor force.[7]

The reasoning of these opinions, and in particular the rationales articulated in *Reeves* for the market participant doctrine, logically extend to state divestment statutes and, in our view, shield them from scrutiny under the Commerce Clause. While the Court has not defined the exact scope of the market participation doctrine, *see infra* Part I.B., and has therefore not fully developed a test to distinguish between a state's regulatory and proprietary powers, we believe

[6] (. . . continued)

Indeed, it would be peculiar to assert that the market participant doctrine is limited to shielding actions in which the state is trying to discriminate against other citizens in favor of its own. In light of the holding that local legislation which intends to discriminate against citizens of other states for the benefit of its own citizens is "almost *per se* illegal" under the Commerce Clause, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970), the state action protected in *Hughes* would seem more problematic than state action in the market that is taken without any intent to discriminate for the economic benefit of its own citizens.

[7] In *White*, the Court did agree that there are some limits "on a state's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," 460 U.S. at 211 n.7, but declined to identify those limits. For the reasons stated in Part I.A., we believe that state divestment legislation falls within any principled limitation to the doctrine. Some commentators believe that the principled limit to the government's ability to impose restrictions arises when the government has monopoly power in the market in which it participates. If the government does have monopoly power it has a coercive power to impose conditions on third parties that is hard to distinguish from the coercive power to regulate that it possesses as a sovereign. If it does not possess monopoly power, its power to impose conditions is not different in kind from private entity. *See* Gillien, *A Proposed Model of the Sovereign/Proprietary Distinction*, 133 U. Pa. L. Rev. 661, 680 (1985) (proposing to distinguish between proprietary and sovereign power by determining whether power is "coercive").

that, given the rationale for the distinction, state divestment statutes are plainly proprietary in nature. In refusing to invest its funds in or contract with corporations doing business in South Africa, a state is exercising the prerogatives and the powers that any private person or entity enjoys as a matter of contract and property rights. The state is not employing the sovereign power that it uniquely enjoys in its jurisdiction to compel action under the threat of punishment. All corporations doing business in jurisdictions that have passed divestment statutes continue to be entirely at liberty to do business in South Africa.[8]

Notwithstanding the fact that the state divestment statutes at issue here are clearly within the logic of the market participation doctrine, there is language in some of the cases suggesting limitations on the doctrine's applicability in this area. First, the *Reeves* Court noted that "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged," and expressly reserved the issue of whether the market participation doctrine applies to foreign commerce. 447 U.S. at 437–38 n.9.[9] Second, in *South Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82 (1984), a plurality of the Court refused to apply the market participation doctrine to a state requirement that purchasers of state-owned timber process the timber in mills located in the state. Distinguishing between the market for the sale of timber and the market for the processing of timber, the plurality stated that the state's participation in the former did not permit it to impose "downstream restrictions" in the latter. 467 U.S. at 99. Finally, in *Wisconsin Dep't of Industry, Labor, and Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986), the Court held that the National Labor Relations Act (NLRA) preempted a Wisconsin statute forbidding certain repeat violators of the NLRA from doing business with the state. In the course of that opinion, the Court stated the state statute was "tantamount to regulation." *Id.* at 289.

For the reasons that follow, we believe that the market participant doctrine applies to state proprietary activity affecting foreign as well as interstate commerce and that the state divestment laws at issue here are constitutional exercises of the states' proprietary authority.

A. The Application of the Market Participation Doctrine to the Foreign Commerce Clause

The rationales underlying the market participant doctrine apply no less to the Foreign than to the Interstate Commerce Clause. The historical evidence no more suggests that the Commerce Clause was intended to limit the ability of states to purchase goods (including securities) and services in the marketplace when their operations indirectly affect foreign commerce than it indicates such

[8] Although the Supreme Court has not yet addressed any case in which the state acts as investor rather than a buyer or seller in a market, we believe that rationales given for the doctrine apply to the state as an investor as well as to the state as a buyer or seller. An investor, at bottom, is simply a purchaser of securities.

[9] The plurality opinion in *South Central Timber*, *infra*, also supports its position that Alaska's restrictions on the timber market are invalid by reference to the stricter scrutiny under the Foreign Commerce Clause. 467 U.S. at 100.

an intent when their operations affect domestic commerce. To be sure, statements of the Framers suggest that they were more immediately concerned with state restrictions on foreign commerce than on interstate commerce.[10] Consequently, it may be plausibly, although not indisputably, argued that Congress was given "a larger range of action" over foreign than over interstate commerce. *See* Abel, *supra* note 10, at 465–75.[11] But nothing in the historical record suggests that the Framers were concerned with state *proprietary* actions affecting either foreign or interstate commerce.[12] To the contrary, the Commerce Clause was designed by the Framers to address the problems caused by exercises of state regulatory power, generally the power to impose imposts and taxes on commerce. *See* U.S. Const. art. I, § 10, cl. 2; *see also The Federalist* No. 42, at 267–68 (C. Rossiter ed., 1961). *See generally* Abel, *supra* note 10, at 465–75 (citing Framers' discussions of the types of state activities that Commerce Clause was designed to prevent).[13]

The other rationales for the market participation doctrine cited by *Reeves* also apply to participation affecting foreign commerce. The role of the state as "guardian and trustee for its people" in spending or investing their funds is as strong when the state's market participation affects foreign as when it affects interstate commerce. The right of a trader or manufacturer to deal with whom

[10] At the Constitutional Convention, state action affecting interstate commerce was mentioned only nine times, while the framers issued a "proliferation of statements . . . where commerce was discussed in a context specifically pointing to foreign commerce." Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 470 (1941).

[11] James Madison himself suggested that the interstate commerce power was of a purely "negative" character and, unlike the power over foreign commerce, was not to be used "for the positive purposes of government." Letter of Feb. 13, 1829 to J.C. Cabell, 3 Farrand, *The Records of the Federal Convention of 1787* 478 (1966). For a contrasting view of the historical evidence, *see* Corwin, *The Commerce Power Versus State Rights* ix (1936) ("In 1789 Congress was deemed to have the same power over commerce among the states as over that with foreign nations, the same right to restrain the other for what it thought to be the good of the country").

[12] It may be argued that at the time of the drafting and ratification of the Constitution that there was no distinction made between proprietary activity and regulatory powers of states. The Supreme Court, however, has implicitly endorsed a distinction between proprietary and regulatory powers as a mater of original intent. In *Reeves*, the Court noted that it was no part of the "constitutional plan to limit the ability of states themselves to operate freely in the free market." *Reeves*, 429 U.S. at 437 (1980). Such a distinction, while not discussed at the Convention or in the Federalist Papers, was plainly understood at the time of the drafting of the Constitution. In 1787, as today, states engaged in marketplace activity that was indistinguishable from that of private entities. They also exercised uniquely sovereign power to regulate the conduct of persons within their jurisdictions. That discussions of the Commerce Clause invariably centered on the latter type of power is therefore significant.

[13] In *The Federalist*, Alexander Hamilton wrote that:

> The principal purposes to be answered by the union are these — the common defense of the members; the preservation of the public peace, as well against internal convulsions and external attacks; regulation of commerce with other nations and between the states; the superintendence of our intercourse, political and commercial with foreign countries.

The Federalist No. 23, at 153 (C. Rossiter ed. 1961). In *The Federalist* No. 22, Hamilton discusses the need for federal "superintendence" at length. His concern is evidently that states will erect tariffs in contravention of agreements entered into by the national government. *See The Federalist* No. 22, at 144 (C. Rossiter ed. 1961) ("No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, conceding on their part privileges of importance, while they were apprised that the engagements on the part of the Union might at any time be violated by its members. . . ."). The concern that states will impose tariffs in violation of national agreements is obviously quite distant from the concern that states will refuse to invest in American companies that do business in a foreign country.

he chooses is as great when his decision affects foreign as when it affects interstate commerce. Therefore, we believe that the rationale for the market participation doctrine ineluctably leads to the conclusion that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause, whether Foreign or Interstate.

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979), the most recent authority for the proposition that scrutiny is stricter under the Foreign Commerce Clause, does not suggest the contrary. In that case, the Supreme Court struck down a state *ad valorem* tax assessed on shipping containers within the state which were used exclusively in foreign commerce. The Court did not dispute that the tax might be constitutional if applied to containers used in interstate commerce, but held that a "more extensive inquiry is required" when a regulation affects foreign commerce. 441 U.S. at 445–46. To justify its strict scrutiny, the Court first noted that the tax resulted in multiple taxation of the instrumentalities of foreign commerce. Second, the Court determined that the tax at issue interfered with the ability of the nation to pursue a uniform policy in light of a treaty with Japan that forbade the taxation of containers.

Japan Lines does not address the issue of whether the Commerce Clause applies to a state's action as a market participant. One of the rationales for the decision — the danger that states may subject foreigners to multiple regulation or taxation — clearly does not apply to state divestment statutes. As we will discuss in Part III, the national interest in uniformity is not impaired by these divestment statutes, because no statute or treaty purports to regulate proprietary decisions with respect to doing business with companies that operate in South Africa.

More recently, in *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. 159 (1983), the Court distinguished *Japan Lines* and upheld a unitary tax on the subsidiaries of foreign corporations, noting that no statute or treaty prohibited the tax, and that the risk of retaliation seemed slight. The Court stated that while it would review the state tax at issue, it had "little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the states tax as they please." *Id.* at 194. Such sentiments confirm our conclusion that courts would be justifiably reluctant to strike down an exercise of state proprietary power on account of potential interference with foreign affairs when Congress and the President have not acted to prohibit state divestment statutes.

B. Possible Restrictions on the Scope of the Market Participant Doctrine

In *South-Central Timber Dev., Inc.* v. *Wunnicke*, *supra*, four Justices suggested that they would restrict the scope of the market participant doctrine.[14]

[14] Justice White wrote the plurality opinion; he was joined by Justices Brennan, Blackmun and Stevens. Justice Rehnquist, joined by Justice O'Connor, dissented from the plurality's views on the issue of whether Alaska was acting as a market participant, stating that the market participant doctrine should shield the

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They refused to uphold an Alaskan statute which required that timber purchased from Alaska be processed in the state. The plurality opinion sharply distinguished the market for timber sales and the market for timber processing and stated that Alaska's participation in the former market did not immunize from Commerce Clause scrutiny restrictions imposed "downstream" on the latter market. 467 U.S. at 98–99. Citing the law on restraints on alienations, the plurality opinion first reasoned that the market participant doctrine should not apply because a state as a private trader intuitively has a "greater interest as a 'private trader' in the immediate transaction than it has in what its purchaser does with the goods after the State no longer has an interest in them." *Id.* at 98. Second, the Court stated that "downstream restrictions" have greater regulatory effect than limitations on the immediate transaction." *Id.*

We believe that even were *South-Central Timber* a majority holding, it would not prevent the application of the market participation doctrine to state divestment statutes. The requirements that the state divestment statutes impose on those who contract with or receive investment capital from the state are more like the requirements imposed on construction firms in *White* v. *Massachusetts Council of Constr., supra,* than the requirements imposed by Alaska on buyers of timber. The state divestment statutes do not attach continuing conditions on the use of a natural resource once that resource passes out of the control of the states and into the hands of a private trader. Instead these statutes impose conditions precedent on companies who are competing for state contracts or investments. They thus are not comparable to restraints on alienation.

Nor do we believe that state divestment statutes generally constitute regulation because of their "downstream effects" in a market in which the state is not a market participant. The plurality opinion in *South-Central Timber* rested on the finding that Alaska was not a participant in the timber processing market. According to Justice White, Alaska's contractual condition demanding that its timber be processed in-state was therefore to be scrutinized for regulatory effects. In contrast, state divestment statutes do not impose conditions in markets in which the state is not participating. For instance, in refusing to buy computers from a certain computer manufacturer, the state is acting in a way that affects the market for computers — a market in which it is *ex hypothesi* a participant. In refusing to invest in the computer company, the state is simply affecting the market for securities — a market in which the state is participating as an investor.[15]

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[14] (. . . continued)
Alaskan statute from Commerce Clause scrutiny. Chief Justice Burger and Justice Powell dissented, arguing that the court should remand the case to the Ninth Circuit to permit that court to consider the market participant issue. Justice Marshall did not participate.

[15] Although the plurality opinion does not fully explicate the reasons that the imposition of this particular contractual condition caused "downstream effects" amounting to regulation, a plausible rationale would be that Alaska has monopoly power in the Alaskan timber market. This would be consistent with the argument of some commentators that a state should be treated as a regulator when it exercises monopoly power. *See supra* note 7. Because of its monopoly position, Alaska was in a position to coerce the contractors in a manner that is difficult to distinguish from the coercive effect of sovereign regulatory power. The conditions required by

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The plurality opinion in *South-Central Timber*, however, is not binding precedent, and we believe that not all of its reasoning flows logically from the structure of the market participation doctrine. Wherever the state exercises its power as a buyer or investor to impose some contractual term on a company with which it deals, it is acting as in its proprietary rather than regulatory capacity. The kind of contractual condition the state chooses to impose should not affect the application of the market participation doctrine, given the rationales supporting the doctrine. In imposing requirements on companies with which it is doing business, the state is still acting as "a guardian and trustee of its people," *Reeves*, 447 U.S. at 438, and is still acting with the freedom permitted private businesses in the absence of state or federal legislation to the contrary. Thus, the legality of the state's contractual condition is more logically evaluated under legal provisions, which Congress has enacted to regulate exercises of proprietary power, than under the Commerce Clause. *See South-Central Timber*, 467 U.S. at 102–03 (Rehnquist, J., dissenting). Therefore we believe that if the Court follows the sound logic of its majority opinions interpreting the market participation doctrine, the South African divestment statutes will be upheld.

Finally, it may be argued that in *Wisconsin Dep't of Industry, Labor and Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986), the Supreme Court implicitly restricted the scope of the market participant doctrine in Commerce Clause analysis. In that case, the Supreme Court held that the National Labor Relations Act (NLRA) preempted a Wisconsin statute, which suspended Wisconsin's business dealings with persons or firms who had violated the NLRA three times within a 5–year period. The Court reasoned that because the Wisconsin debarment statute functioned as a supplemental sanction for violations of the NLRA, it conflicted with the National Labor Relations Board's comprehensive regulation of industrial relations in the same way as would a state prohibition on private parties doing business with repeat labor law violators. Thus the holding in *Gould* rests explicitly on the preemptive force of the NLRA and is not premised in any way on the dormant Commerce Clause.

Nevertheless, in response to the argument that preemption analysis was inappropriate, the Court briefly discussed the market participation doctrine only to dismiss it as inapposite. It held that "the market participant doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in *areas where Congress has acted.*" *Id.* at 289 (emphasis added). Emphasizing that "what the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what the States may do with the Act in

[15] Continued
the divestment statutes, however, are not imposed from a position of monopoly power No state approaches having monopoly power in the capital markets and therefore state statutes directing the manner of the investment of their funds are in no sense coercive. Moreover, because states rarely have monopoly power in markets in which they purchase goods and services, most divestment statutes which take the form of refusing to contract with companies doing business with South Africa are readily distinguishable from *South-Central Timber.*

place," the Court held that in passing the NLRA, Congress intended to prohibit the states from interfering in any way with the "interrelated federal scheme of law, remedy, and administration." *Id.* (citations omitted).

The only support for arguing that *Gould* restricted the scope of the market participation doctrine in the Commerce Clause comes from a single sentence at the start of the Court's discussion of the applicability of the doctrine to preemption analysis under the NLRA:

> We agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators, Wisconsin "simply is not functioning as a private purchaser of services," 750 F.2d at 614; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation.

Id. We do not read this sentence as indicating that the Supreme Court would consider a refusal to contract with companies doing business in South Africa to be regulation under the Commerce Clause.

First, the most logical interpretation of this sentence is that the Court viewed the Wisconsin statute as regulation because the statute specifically linked the state's decisions to violations of the NLRA, a federal *regulatory* scheme. This reading is supported by the Court's citation to the appellate court's opinion, which in its discussion of preemption stated:

> Wisconsin simply is not functioning as a private purchaser of services. The question is the rationale underlying Wisconsin's law. When the policy the law promotes is not efficient use of state funds but the intent *to effect compliance with the NLRA*, the regulation is preempted by the NLRA's establishment of a comprehensive regulatory scheme meant to preclude state action.

Gould v. *Wisconsin Dep't of Industry, Labor and Human Relations*, 750 F.2d 608, 614 (7th Cir. 1984) (emphasis added). The South African divestment laws do not depend for their operation on reference to a federal or state regulatory scheme. Moreover, unlike a regulatory scheme, the statutes do not disqualify companies from eligibility for state contracts on the basis of past actions, but rather make the continuing eligibility of the companies subject to certain conditions with which they can comply. Thus, these statutes do not operate like the statute at issue in *Gould*, but rather like the statute at issue in *White* v. *Massachusetts Council of Constr. Employers*, *supra*, in which the City of Boston refused to do business with contractors who did not satisfy certain conditions. Because *Gould* reaffirmed the continuing validity of *White*, *see* 475 U.S. at 289, we do not believe that *Gould* may be fairly interpreted to deny that such conditional refusals to deal enjoy protection from Commerce Clause scrutiny.

Second, *Gould* carefully distinguished the sound foundations of the market participation doctrine in Commerce Clause analysis from the inappropriateness of its extension in the area of preemption analysis under the NLRA. The Court

reaffirmed that the Commerce Clause is not intended to "limit the ability of the States themselves to operate freely in the free market," *id.* (quoting *Reeves*, 447 U.S. at 437), and emphasized that the NLRA, in contrast, was intended "in large part to entrust the administration of the labor policy for the Nation to a centralized administrative agency." *Id.* at 289–90 (citations omitted). What is deemed to be regulation in analyzing the preemptive effect of the NLRA therefore is not a guide to what will be considered regulation under Commerce Clause analysis. Finally, it is hardly conceivable that the Court wished to shed light on the scope of the market participation doctrine in the Commerce Clause by means of a single sentence in a preemption case. As we have seen from the discussion in *South-Central Timber*, the scope of the doctrine is highly controversial and at least two of the Justices have taken a position that is flatly inconsistent with treating a debarment statute as "regulation" under the Commerce Clause. *See South-Central Timber*, 467 U.S. at 101–02 (Rehnquist, J., dissenting). We therefore do not believe that *Gould* sheds appreciable light on the scope of the market participation doctrine.[16]

II. Interference with the Federal Government's Foreign Affairs Power

No provision of the Constitution furnishes the federal government with a general power to conduct foreign affairs. The President, of course, is Commander in Chief of the armed forces of the United States and is also authorized to enter into treaties and to appoint and receive ambassadors. U.S. Const. art. II, § 2. Congress is given authority to regulate foreign commerce, to define offenses against the law of nations and to declare war. *Id.*, art. I, § 8.[17] The state divestment statutes do not interfere with any of these enumerated foreign affairs powers of the President or Congress.

Nor does the Constitution contain a general prohibition against state actions that interfere with the federal government's conduct of foreign affairs. The Constitution imposes the following specific prohibitions on the states in the area of foreign affairs:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal.
>
> * * *
>
> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be

[16] In any event, even on its broadest reading, the sentence in *Gould* does not suggest that a refusal to *invest* in a certain class of companies is tantamount to regulation. A refusal to contract with a company has the effect of denying the company a discrete amount of sales that it would otherwise have enjoyed. Such a refusal therefore has the potential to change the company's behavior so that it may receive the city contract. The refusal to invest in a company, particularly a company with a nationwide market for its securities, has considerably less effect, because market forces will lead others to purchase the securities at the same or marginally lower prices. Because a refusal to invest has such limited potential impact, it cannot seriously be called regulation even in a figurative sense of that term.

[17] The Foreign Commerce Clause is discussed above. *See supra* Part I.

> absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.
>
> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded or in such imminent Danger as will not admit of delay.

U.S. Const. art. I, § 10, cls. 1–3. None of these prohibitions puts any explicit limit on the use of state regulatory or proprietary power that affects foreign governments and consequently the conduct of foreign affairs.

Nevertheless, the Supreme Court has recognized a general principle of federal governmental power to conduct foreign affairs beyond the powers enumerated in the Constitution. This general power has been derived from the proposition that the power to regulate international affairs never resided in the states and therefore was not transmitted to the federal government by the Constitution. Instead, the federal government inherited this general power as a successor to Great Britain. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).[18]

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[18] The Court explained its theory as follows:

> It will contribute to the elucidation of the question if we first consider the difference between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.
>
> The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 294. That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

Curtiss-Wright Corp., 299 U.S. at 315–16 (Sutherland, J.) (emphasis in original).

Justice Sutherland's argument has been justly criticized as a misreading of the historical evidence. The framers seem to have believed that federal power in foreign affairs rested on explicit and implicit constitutional grants of authority. *See generally*, C. Lofren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 Yale L. Rev. 1 (1973).

A. The Effect of Zschernig v. Miller

The Court has only once employed this general power to strike down an exercise of state police power that affected foreign affairs. In *Zschernig* v. *Miller*, 389 U.S. 429 (1968), the Court invalidated an Oregon statute as an unconstitutional intrusion into the federal field of foreign affairs, even though, as the federal government itself admitted, the statute did not conflict with any federal treaty or statute. The state statute at issue provided that a nonresident alien could not inherit property from an Oregon decedent unless three conditions were satisfied: (1) the alien's government must accord Americans the right to inherit on equal terms with its citizens; (2) the alien's government must give Americans the right to receive payment in the United States of funds from foreign estates; and (3) the nonresident alien must be able to receive "the benefit, use or control" of the proceeds of the Oregon estate "without confiscation" by his government. The Court concluded that this type of probate law *as enforced in the Oregon courts* had "a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. Justice Douglas stressed that the federal government's foreign policy prerogatives were offended because the state courts made persistent inquiries into the actual administration of foreign laws and in doing so questioned the credibility of foreign officials and made ad hoc decisions based on "foreign policy attitudes" toward particular governments. *See* 389 U.S. at 437 ("As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata").

Zschernig stands for the proposition that the Court will scrutinize state statutes to determine whether such statutes have a direct impact on foreign relations; the case may not fairly be interpreted to mean that the court will strike down any state exercise of authority that has some indirect impact on foreign affairs or that is intended to affect the behavior of foreign governments. *Zschernig* did not overrule *Clark* v. *Allen*, 331 U.S. 503 (1947), in which the Court, in an opinion also written by Justice Douglas, upheld the facial validity of a California statute similar to the first two sections of the Oregon law.[19] Although the California statute was clearly designed to influence foreign countries to change their laws to allow Americans to inherit, the Court dismissed the challenge to the statute as "farfetched." *Id.* at 517.[20] Emphasizing that "rights of succession" were peculiarly a matter of local law, the Court agreed that "what California has done will have some incidental or indirect effect on foreign countries," but concluded "that is true of many state laws which none would claim cross the forbidden line." *Id.*

[19] The California statute requires (1) that the alien's government must accord Americans the right to inherit on equal terms with its citizens; and (2) that the alien's government must give Americans the right to receive payment in the United States of funds from foreign estates.

[20] The Court analogized the case to *Blythe* v *Hinckley*, 180 U.S. 333 (1901), which rejected the claim that a statute granting aliens an unqualified right to inherit property constituted, in the absence of a treaty, a forbidden intrusion into foreign affairs.

Read together, *Zschernig* and *Clark* suggest that even in scrutinizing state statutes that have an impact on foreign affairs, the Court will balance the degree to which the statute intrudes on foreign affairs against the degree to which the exercise of the state power falls within traditional state powers. In both *Clark* and *Zschernig*, states were performing a traditional state function in establishing a rule of inheritance. What distinguished the cases was that the California statute had only an indirect influence on foreign affairs because the state legislature's judgment could be implemented simply through the "routine reading of foreign law." *Zschernig*, 389 U.S. at 433. The Oregon statute, on the other hand, by forcing state courts to assess the actual operation of foreign laws allowed state courts to evaluate the credibility of foreign representatives and engage in persistent "judicial criticism" of foreign states — actions that are outside the state court's ordinary competence and which have a direct impact on foreign relations.

Application of such a balancing test to divestment statutes yields the conclusion that they do not impermissibly encroach into the realm of foreign affairs. First, like the statute at issue in *Clark*, and unlike the statute at issue in *Zschernig*, the implementation of the South African divestment statute would require no investigation by state officials into the operation of South African law and require no assessment of the credibility of South African officials. Second, the statute would fall directly on American companies and only indirectly on South Africa. Moreover, in deciding how it will invest funds under its control, a state acts as "guardian and trustee of its people," *see Reeves*, 447 U.S. at 438, and therefore the state should be given greater latitude to express its citizens' views than in regulatory measures.

Finally, in evaluating the impact of state investment decisions on foreign policy, it should be noted that a state is necessarily involved in the investment of state funds. States do not have to put reciprocity clauses in their probate statutes, but a state must decide to invest state funds on some basis. A state for instance, may decide not to invest in a company doing business in South Africa because it believes that there is a large risk of revolution and, thus, of expropriation in that country. The decision would have an impact on South Africa and on national policy toward that country identical to a decision to divest on the basis of moral opposition to South Africa's system of apartheid.[21] But surely no one would suggest that states are constitutionally forbidden from making such investment decisions. We therefore question the proposition that state divestment statutes should be subject to challenge simply because they have some impact on South Africa and our foreign policy toward that country. If state investment decisions are subject to invalidation for intrusion into foreign policy, we perceive no limiting principle to prevent constant judicial scrutiny of those decisions for consistency with some perceived foreign policy.

[21] It might be argued that a decision to divest based on moral grounds had a greater stigmatizing effect than such a decision based on purely economic grounds. We believe, however, that a refusal to invest on economic grounds represents a vote of no-confidence in South Africa's future and therefore has a stigmatizing effect. In any event, no case suggests that the moral views of the community may not be a basis for legislation relating to the state's investment practices or its business dealings. *See supra* note 6.

B. Zschernig v. Miller and the Market Participant Doctrine

Although we believe that South African divestment statutes should and would survive application of the principle embodied in *Zschernig* v. *Miller*, we do not think the principle should be extended to state proprietorial action.

We believe that the reasoning underlying the market participant doctrine in the area of the dormant Commerce Clause has general applicability.[22] Any constitutional principle or privilege relied on to preempt state exercise of proprietary power must be analyzed to determine whether the principle or privilege was specifically aimed at constraining proprietary power.[23] In the absence of any such intent, it is inappropriate to strike down a state's exercise of proprietary power unless the federal government affirmatively invokes its authority to regulate the state's market dealings to the extent and in the same manner that it may regulate any other participant.[24]

The historical rationale for the general federal power over foreign affairs does not imply the displacement of state proprietary power. Although, according to *Curtiss-Wright*, the states never had any power to conduct foreign relations and consequently the federal government received such powers as

[22] *Gould*, 475 U.S. 282, is not to the contrary. There the Court rejected the extension of the market participant doctrine to preemption analysis under the NLRA, reasoning that the NLRA's comprehensive regulatory scheme reflects an intent to prevent state action that supplements the penalties prescribed by the Act. The Court specifically contrasted the NLRA with the Commerce Clause, which does not interfere in and of itself with the power of the states to contract freely in the open market. Therefore the market participation doctrine may be extended to legal provisions or principles that are not intended to constrain state proprietary as opposed to regulatory power.

[23] We do not believe, of course, that the regulatory/proprietary distinction should be applied to diminish the constitutional protections that apply directly to the states. A state could not, for instance, grant contracts on the basis of racial preference simply because it was exercising proprietary rather than regulatory powers. Similarly, because most of the protections of the Bill of Rights have been applied directly to states by the Supreme Court, state action of whatever kind — proprietary or regulatory — is subordinate to those rights. In contrast, the legal provisions at issue here — the Commerce Clause, the general federal power over foreign affairs, and Executive Order No. 12532 — impose no explicit prohibition on the states' exercise of power. In attempting to determine the extent to which the negative implications of these provisions should forestall the exercise of state power, the proprietary/regulatory distinction is useful because it bears both on the strength of the state interest in exercising power and the federal interest in constraining that power. *See* Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 Va. L. Rev. 1073, 1134–35 (1980)

[24] *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is not inconsistent with the application of the proprietary/regulatory distinction to limit the use of negative implications of constitutional principles to prohibit state action. In *Garcia*, the Supreme Court held that notions of state sovereignty did not prevent the federal government from imposing minimum wage and overtime provisions on employees of state mass transit systems. The *Garcia* Court explicitly overruled *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which held that "traditional governmental functions of the state" were immune from federal regulation. In arguing that state divestment statutes are not preempted by the federal foreign affairs power, the Commerce Clause, or any federal statute, we do not argue that a state's actions as a market participant cannot be regulated or prohibited if Congress chooses to do so.

Indeed, the underlying rationale of *Garcia* supports the argument that the representative branches of the federal government rather than the courts should decide whether the state may divest from or refuse to contract with companies which do business in South Africa. In *Garcia*, the Court reasoned that there was no need for the judiciary to protect state sovereignty because "the [national] political process ensures that laws that unduly burden the states will not be promulgated." 469 U.S. at 556. The protection of national political process is rendered illusory, however, if the state proprietorial actions are struck down by the negative implications of unexercised federal powers rather than affirmative action of the federal government.

successor to Great Britain, the states have always possessed proprietary powers. As the Supreme Court has emphasized, the power to impose conditions on state contractors derives from the power of any corporate entity, private or public, to deal with whomever it chooses. *See, e.g., Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("Like private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies and to determine with whom it will deal and to fix the terms and conditions upon which it will make the needed purchases"). Because states, like any corporate entity, possessed proprietary powers at the time of the Constitution, these powers should not be displaced unless they are prohibited by a specific limitation imposed by the Constitution or federal legislation passed pursuant to a constitutional grant of power to the federal government.[25]

Moreover, the functional rationale for displacing state regulatory power does not apply fully to a state's exercise of proprietary power. A state regulation prohibiting certain corporations (*e.g.*, those organized under the state's laws, or those doing business within the state's borders) from undertaking business in a foreign country would directly affect that foreign country and might have a large potential influence on that country's attitudes toward the United States. In contrast, the state's power to refuse to deal locally with companies doing business in a foreign country is by its nature limited, because it leaves the ultimate decisions whether to continue to do business in the foreign country with the corporations themselves.

IV. Preemption

The final ground on which the divestment statutes may be attacked is that of preemption. It has been suggested that both the Export Administration Act and Executive Order No. 12532 demonstrate an intent by the federal government to preempt any exercise of state power that affects companies doing business with South Africa. Neither Executive Order No. 12532 nor the Act, however, represents a comprehensive regulation of trade or investment with South Africa, nor do they display any intent to displace the traditional power of the state to make investment and contracting decisions.

The touchstone of a preemption claim is the intent of Congress. *See Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978). When the state law at issue in a preemption case is enacted "in a field which the states have traditionally . . . occupied we start with the assumption that historic . . . powers of the states [are] not to be [ousted] by the Federal Act unless that were the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The exercise of proprietary powers to contract with and invest in companies of their choice is, to say the least, a field traditionally occupied by

[25] As we have discussed above, *see supra* notes 12, 13, when the Framers discussed the danger of state intervention in foreign affairs, the danger to which they specifically referred invariably arose from an exercise of state regulatory power, usually in the form of tariffs. Our research has revealed no evidence that Framers were concerned with the effects of decisions by states as market participants.

the states. Therefore, it should be inferred that Congress or the President intended to preempt state proprietary powers only when such an intent is explicit or "where the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress [or the President] left no room to supplement it." *Id.*

Here, however, neither Executive Order No. 12532 nor the Export Administration Act explicitly prevents the state from investing or contracting with companies it chooses, even if those choices are based on its views toward South Africa. Nor does either Executive Order No. 12532 or the Export Administration Act demonstrate an intent to occupy the field of investment or contractual decisions so as to raise any inference that the state divestment statutes are preempted.[26]

The Export Administration Act permits the President to control exports for reasons of national security, foreign policy and short supply. *See* 50 U.S.C. app. §§ 2404–2406. The Act outlines the factors governing invocation of the Act and establishes various procedures for reporting to Congress. The legislation is thus principally designed to authorize the President to curtail trade in a national emergency. Although the Export Administration Act does state that it is the policy of the United States to encourage free trade, *see* 50 U.S.C. app. § 2401, it does not purport generally to regulate the proprietary decisions of entities — public or private — with respect to companies doing business in any particular nation.[27] Therefore, whatever the preemptive effect of the statute on state *regulation* of companies doing business in South Africa, the Export Administration Act cannot be deemed to preempt state divestment statutes.

The recent case of *Wisconsin Dep't of Industry* v. *Gould, Inc.*, *supra*, does not strengthen the case for preemption by the Export Administration Act. The NLRA represents a "'complex and interrelated federal scheme of law, remedy

[26] *Hines* v. *Davidowitz*, 312 U.S. 20 (1941) is therefore inapposite. In that case, the Supreme Court struck down a Pennsylvania law that required aliens living in the state to register on the grounds that Congress had already passes a "complete system for alien registration." *Id.* at 51. Here Congress has passed no legislation comprehensively regulating investment or contractual decisions.

[27] The Export Administration Act forbids corporations from joining a boycott against one foreign nation initiated by another foreign nation. Section 2407 of the Export Administration Act authorizes the President to issue regulations prohibiting entities from

> taking or knowingly agreeing to take . . . [certain] actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country that is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law and regulations.

These boycott provisions are inapplicable here, however, because the states in enacting the divestment statutes are not joining a boycott initiated by another country, but are acting either to safeguard their investments or to reflect the moral views of their citizens toward South Africa's racial policies.

Indeed, the boycott provisions support the proposition that other provisions in general do not preempt state law. Section 2407(c) specifically declares:

> [Section] 2407 and the regulations issued pursuant to it, shall preempt any law, rule, or regulations of any of the several States or the District of Columbia, . . . or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding, restrictive trade practices, or boycotts fostered or imposed by foreign countries against other countries.

The inference through the principle of *inclusio unius est exclusio alterius* is therefore that the other provisions of the Act are not intended to preempt state law.

and administration.'" 475 U.S. at 286; *see San Diego Building Trade Council* v. *Garmon*, 359 U.S. 236 (1969). As a result the NLRA occupies the field of industrial relations and the preemptive effect of labor law has always been given extraordinarily broad scope. As the *Gould* Court itself noted, "it is by now a commonplace that in passing the NLRA, Congress largely displaced state regulation of industrial relations." 475 U.S. at 286. In contrast, the Export Administration Act does not represent a complex scheme of regulation: its essential function is simply to permit the President under certain conditions to regulate trade with certain countries.

Moreover, the essential premise of *Gould* was that the Wisconsin statute acted as a supplemental remedy to the NLRA because it specifically conditioned the suspension of state business dealings on a violation of the NLRA. Because the NLRA already provided a comprehensive and integrated set of remedies, Wisconsin's debarment statute, viewed as an additional sanction, was preempted. *See Garner* v. *Teamsters*, 346 U.S. 485, 498–99 (1953) (stating that the "conflict [between state and federal law] is imminent" whenever "two remedies are brought to bear on the activity"). State divestment statutes, however, do not provide remedies for violations of a federal statute which itself provides a comprehensive remedial scheme.

In our view, Executive Order No. 12532 is an even weaker reed on which to rest a preemption claim. Executive Order No. 12532 declared a national emergency pursuant to the International Emergency Economic Powers Act of 1977 (50 U.S.C. §§ 1701 *et seq.*) (IEEPA). Using authority granted under IEEPA, the President imposed certain economic sanctions on South Africa. He also required United States companies operating in South Africa to conduct their business there according to certain principles. Nothing in Executive Order No. 12532, however, purported to require entities to continue to do business with South Africa or with companies doing business in South Africa. Nor does it represent a comprehensive scheme which is designed to regulate contractual or investment decisions relating to South Africa.

Moreover, as the President himself stated, Executive Order No. 12532 "reflected Congressional concerns" underlying proposed legislation designed to forbid certain transactions with South Africa. *See* Message of the President to the Congress of the United States: Transmitting Notification of a Declaration of a National Emergency with Respect to South Africa (Sept. 9, 1985). In the course of the congressional debate on the statutory proposals, many proponents stated that the legislation was not intended to preempt state divestment legislation. *See, e.g.*, 131 Cong. Rec. 18824 (1985) (remarks of Senator Cranston). In the absence of language to the contrary, this background strongly suggests that Executive Order No. 12532 was not intended to preempt state legislation.[28]

[28] Given that Executive Order No. 12532 does not on its face regulate state contracts or state investments, courts likely would not take a preemption claim seriously unless the Administration filed a brief stating that the Executive Order was intended to preempt state laws. *Cf. Container Corp.*, 463 U.S. at 195 n.33 (absence of Solicitor General's brief claiming that California tax interfered with execution of United States foreign policy was factor in court's decision not to strike down tax). Therefore, in filing a brief arguing for the

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Conclusion

For the reasons stated, we believe that state divestment legislation is constitutional. We therefore do not believe that the United States should file suit to invalidate these laws or file any amicus brief on behalf of those seeking to invalidate them.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[28] (. . . continued)
preemptive effect of the Executive Order and, to a lesser extent, in making other arguments in favor of the preemption of state divestment, the Administration would inevitably be making a policy choice — one that would not comport with its general policy of favoring federalism.

Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act

With one narrow exception, the Attorney General may not disclose to Congress the contents of any application or report filed with the court pursuant to the Independent Counsel Act unless the court agrees.

All congressional requests for information about a decision regarding the appointment of an independent counsel must be supported by a legitimate legislative purpose. In addition, before such disclosures are made other considerations, such as whether or not to assert executive privilege, whether the information is covered by the attorney-client privilege, and whether the information must be kept confidential to preserve the integrity of the prosecutorial function, must be reviewed.

Congress may not, as a matter of statutory or constitutional law, invoke the criminal contempt of Congress procedure against the head of an Executive agency acting on the President's instructions to assert executive privilege in response to a congressional subpoena.

An assertion of executive privilege must be based upon an evaluation of the Executive Branch's interest in keeping the requested information confidential, the strength of Congress' need for the information, and whether those needs can be accommodated in some other way.

April 28, 1986

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

I. Introduction and Summary

You have asked this Office to review the legal principles that should inform the Department's response to congressional inquiries about any decision regarding appointment of an independent counsel under the Independent Counsel Act, 28 U.S.C. §§ 591 *et seq.* (Act). The scope and nature of any such response would, of course, depend on the facts of the particular situation, including the scope and nature of the request, the congressional interests at stake, the status of the investigation and/or decision-making process within the Department, and your judgment as to the particular harm that would result from release of the requested information. To some extent the decision whether or how to respond to such congressional requests must weigh factors, such as political constraints that affect the Department's position vis-a-vis Congress, which are beyond our expertise. Our discussion here is therefore necessarily quite general and is limited to those constitutional and legal considerations that should be

reflected in the Department's response to possible congressional inquiries into decisions made under the Act. As we discuss below, we believe that the Department's response to any such inquiry must take account of: (1) the provisions of the Independent Counsel Act requiring that memoranda, reports, and other documents filed with the special division of the court remain confidential unless otherwise authorized by the court; (2) the scope of Congress' legitimate interest in obtaining the information; and (3) the Justice Department's responsibility to protect the integrity of ongoing criminal investigations and of prosecutorial decision-making. These considerations, which flow largely from the constitutionally mandated principle of separation of powers, would also shape any formal Presidential claim of executive privilege, in the unlikely event such a claim proves necessary to resist a congressional subpoena.

In addition to our discussion of the substantive legal principles, we outline below the procedural steps that would be involved if Congress pursued its requests through a subpoena, and possible defenses that could be raised to any such subpoena.

II. Confidentiality Requirements of the Independent Counsel Act

The Independent Counsel Act itself contains strict confidentiality requirements. Section 592(d)(2) broadly provides:

> No application or any other documents, materials, or memorandums supplied to the division of the court . . . shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

28 U.S.C. § 592(d)(2).

Other, narrower provisions limit the disclosure of any report finding no grounds for appointment of an independent counsel,[1] as well as the report required to be filed by the independent counsel at the completion of his investigation.[2] Even the name and prosecutorial jurisdiction of any independent counsel appointed by the court remain confidential until an indictment is returned or a criminal information is filed, unless the Attorney General requests public disclosure prior to that time or the court determines "that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice." 28 U.S.C. § 593(b).

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[1] If the Attorney General notifies the court under § 592(b)(1) that "there are no reasonable grounds to believe that further investigation or prosecution is warranted," the memorandum filed with the court summarizing the Department's investigation "shall not be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court." 28 U.S.C. § 592(b)(3).

[2] The independent counsel must file a report with the court describing "fully and completely . . . the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted." The court may release this report "to the Congress, the public, or to any appropriate person," subject to "such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution." 28 U.S.C § 595(b)(2), (3).

The confidentiality provisions were regarded as "crucial to the general scheme" of the Act. S. Rep. No. 170, 95th Cong., 2d Sess. 58 (1978). Congress recognized that "[j]ust because a person holds a high level position does not justify making unsubstantiated allegations of criminal conduct public, no[r] does it justify publicly announcing the initiation of a criminal investigation at a very early stage of the investigation." *Id.* In fact, Congress contemplated that there would be situations in which an independent counsel would be appointed "when the public is not at all aware that a criminal investigation is underway." Assuming that the independent counsel's investigation does not result in prosecution, "[i]t is conceivable that this whole process could take place without the public even knowing that there were serious allegations against such a high level official." *Id.*

In cases in which there has already been considerable publicity about the allegations and the requirements of the Independent Counsel Act, Congress recognized that "there does not appear to be any purpose to keeping the fact that application for a special prosecutor has been made confidential." S. Rep. No. 170, *supra*, at 58. However, even if the court agrees to disclose that an application has been made or to announce the identity and jurisdiction of an independent counsel, "there may still be justification for keeping the contents of an application for a special prosecutor . . . confidential because of unsubstantiated allegations and other information which may be contained in the application for appointment." *Id.*

The language of the Act's confidentiality provisions that the documents "shall not be revealed to any individual outside the division of the court or the Department of Justice" is carefully drafted, and on its face prohibits disclosures to Congress no less than disclosures to the public. The legislative history of the Act supports this interpretation of the statute's unambiguous language. "The contents of the report by the Attorney General after a preliminary finding of some impropriety is to remain secret, available only to the court and I presume, to the special prosecutor, but may not be released to the public *or to Congress* without of special leave of this new court." 124 Cong. Rec. 3462 (1978) (remarks of Rep. Wiggins) (emphasis added).[3]

In general, then, the Act restricts the Attorney General's ability to of disclose to Congress the contents of any application or report filed with of the court, unless and until the court agrees. This blanket confidentiality requirement, however, is subject to a narrow exception triggered when Congress requests under § 595(e)[4] that the Attorney General apply for an independent counsel. If the Attorney General receives such a request, he is required to "provide written notification of any action . . . taken in response to such request and, if no

[3] Although the language of the confidentiality provisions refers only to documents actually filed with the court, the provisions obviously cannot lawfully be circumvented by disclosing the contents of the documents. *See* 124 Cong. Rec. at 3462 ("The contents of the report . . . [are] to remain secret . . . ."); S. Rep. No. 170, *supra*, at 58.

[4] Section 595(e) of the Act authorizes "[a] majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress" to request the Attorney General to apply for the appointment of an independent counsel. 28 U.S.C. § 595(e).

application has been made to the division of the court, why such application was not made." 28 U.S.C. § 595(e). Because such a notification must necessarily disclose at least some information that is included in the confidential report filed with the court, § 595(e) appears to create a narrow exception to the general rule of confidentiality.[5]

The legislative history of this provision suggests, however, that the scope of the required notification is very limited; disclosure of particular details of the investigatory findings and the prosecutorial decision is not contemplated:

> [T]he Attorney General might respond that he had already applied for the appointment of a special prosecutor or he might respond that upon the conclusion of a preliminary investigation, he made a finding and filed the requisite memorandum indicating that the matter was so unsubstantiated as to not warrant further investigation or prosecution. If no application for the appointment of a special prosecutor has been made to the division of the court, the Attorney General is required to explain the specific reasons why a special prosecutor is not required under the standard set forth in § 592(e). *If the reason for not appointing a special prosecutor is the fact that the matter is so unsubstantiated as to not warrant further investigation or prosecution, the Attorney General's explanation under this subsection need only state that fact. The Committee does not intend that the Attorney General go into any detail with regard to the basis for the decision made in the exercise of his prosecutorial discretion that a matter simply did not warrant any further investigation or prosecution after the conclusion of a preliminary investigation.*

S. Rep. No. 170, *supra*, at 72 (emphasis added). That history also makes clear that Congress contemplated that the names of implicated individuals would be included in the required notification.[6]

Based on this legislative history and the overriding concern reflected in the Act with preserving confidentiality, we believe that, unless the court has approved disclosure, the notification required by § 595(e) need (and may) encompass only a statement that an application for an independent counsel has been filed as to a particular individual or individuals, or that after investigation the Attorney General determined that the allegations against particular individuals did not warrant further investigation. Obviously, if the Attorney General determined, on some ground other than the sufficiency and credibility of the evidence, that he need not apply for an independent counsel — for example,

[5] Disclosure is not authorized to the public, although the committee may, either "on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual." 28 U.S.C. § 595(e).

[6] In discussing cases in which the information contained in the notification should be kept confidential by Congress, the Senate Report specifically notes that "the Committee . . . may decide to delete the names of individuals mentioned in the notification especially if those individuals are not the subject of the alleged criminal activity." S. Rep. No. 170, *supra*, at 73.

if he determined that the facts, if true, would nonetheless not constitute a non-petty criminal offense or that the individual is not covered by the Act — the notification to Congress would set forth that rationale.[7]

The Act also contemplates that the independent counsel will provide "from time to time" reports to Congress and to the public containing "such information as [the] independent counsel deems appropriate," 28 U.S.C. § 595(a), and that the independent counsel "shall advise the House of Representatives of any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment." *Id.* § 595(c). Oversight jurisdiction "with respect to the official conduct of any independent counsel" is given to the "appropriate committees of Congress" and the independent counsel "shall have the duty to cooperate with the exercise of such oversight jurisdiction." *Id.* § 595(d). The legislative history of these provisions governing disclosures by the independent counsel is sparse and provides little guidance as to what extent the independent counsel would be bound by the Act's confidentiality restrictions when making such disclosures.

III. Protecting the Integrity of Criminal Investigations

A separate consideration is how disclosure of information about any independent counsel decision would affect the Attorney General's responsibilities as the Nation's chief law enforcement officer and the ability of the Department to investigate and prosecute criminal offenses.[8] There are a number of factors, arising out of the separation of powers between the executive and legislative branches, that should be weighed in making that determination.

A. Constitutional Division of Responsibilities

Article II of the Constitution places the power to enforce the laws solely in the Executive Branch of government. The executive therefore has the exclusive authority to enforce the laws adopted by Congress, and neither the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the Executive Branch by directing the executive to prosecute particular individuals.[9] *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Confiscation*

[7] Similarly, if the Attorney General applies for an independent counsel for an individual not named in § 591(b), because investigation by the Department "may result in a personal, financial, or political conflict of interest," 28 U.S.C. § 591(c), he would have to provide some specific description of the facts giving rise to the conflict.

[8] Obviously, to the extent the confidentiality provisions of the Independent Counsel Act bar disclosure, the more generalized considerations we outline here need not be considered. However, there may be some information such as details of the deliberative process that are not encompassed by the confidentiality restrictions of the Act, or are not reflected in the report filed with the court. Moreover, at some point the court might authorize disclosure of some or all information contained in the report, which would remove any statutory bar to further disclosures.

[9] For this reason the executive branch has expressed constitutional qualms about the Act itself, which allows an individual not appointed by the President or an officer of the executive branch nonetheless to carry out prosecutorial functions. Despite these doubts, the Department of Justice has thus far taken the position

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Cases, 74 U.S. (7 Wall.) 454, 457 (1869); *Smith* v. *United States*, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); *United States* v. *Samango*, 607 F.2d 877, 881 (9th Cir. 1979); *accord Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967). The Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. *See United States* v. *Lovett*, 328 U.S. 303, 317 (1946); *INS* v. *Chadha*, 462 U.S. 919, 961–62 (1983) (Powell, J., concurring).[10] "'When the legislative and executive powers are united in the same person or body,' says [Montesquieu] 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.'" *The Federalist* No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original).

The constitutional role of Congress is to adopt general legislation that will be implemented — "executed" — by the Executive Branch. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). The courts have recognized that this general legislative interest gives Congress broad rein to investigate. Both Houses of Congress have broad power, "through their own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." *McGrain* v. *Daugherty*, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function "has long been held to be a legitimate use by Congress of its power to investigate," *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504 (1975), provided that the investigation is "related to, and in furtherance of, a legitimate task of the Congress." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957). *See also McGrain* v. *Daugherty*, 273 U.S. at 177 (inquiry must pertain to a subject "on which legislation could be had"). This sphere of legitimate legislative activity "is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1959). *See also Watkins* v. *United States*, 354 U.S. at 187. The power of investigation can be delegated by either House of Congress to committees, subcommittees, or even individual legislators, *see Eastland* v. *United States Servicemen's Fund*, 421 U.S. at 505; *Watkins* v. *United States*, 354 U.S. at 200–01, as long as "the instructions to an

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[9] (. . . continued)
that it will abide by the provisions of the Independent Counsel Act. *See* Letter to Michael Davidson, Senate Legal Counsel from William French Smith, Attorney General (Apr. 17, 1981), *reprinted in Hearings on the Ethics in Government Act Amendments of 1982 before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 115 (1982).

[10] In fact, the Constitution specifically excludes Congress from the decision whether to prosecute particular cases. A legislative effort to require prosecution of a specific individual has many of the attributes of a bill of attainder and would seem to be inconsistent with many of the policies upon which the Constitution's prohibition against bills of attainder was based. *See Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 853–54 (1984); *United States* v. *Brown*, 381 U.S. 437, 447 (1965); *United States* v. *Lovett*, 328 U.S. at 315.

investigating committee spell out that group's jurisdiction and purpose with sufficient particularity." *Id.* at 201. The scope of judicial inquiry on these matters is narrow, and "'should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.'" *Eastland* v. *United States Servicemen's Fund*, 421 U.S. at 506 (quoting *Tenny* v. *Brandhove*, 341 U.S. 367, 378 (1951)).

Nonetheless, the investigative power of Congress is not unlimited. Congress cannot, for example, inquire into matters "which are within the exclusive province of one of the other branches of Government . . . . Neither can it supplant the Executive in what exclusively belongs to the Executive." *Barenblatt* v. *United States*, 360 U.S. at 111; *see also Kilbourn* v. *Thompson*, 103 U.S. 168, 192 (1881) (Congress cannot exercise judicial authority). Congress must be able to articulate a legitimate legislative purpose for its inquiry; if Congress lacks constitutional authority to legislate on the subject (or to authorize and appropriate funds), arguably Congress has no jurisdiction to inquire into the matter.[11]

Accordingly, a threshold inquiry that should be made upon receipt of any congressional request for information is whether the request is supported by any legitimate legislative purpose.[12] The clearest application of this constraint on congressional requests for information is with respect to matters that are vested exclusively in the President (such as the removal of executive officers).[13] Given the breadth of Congress' legislative jurisdiction, particularly its authority regarding the appropriation of funds, it may be difficult to articulate more precise limits. With respect to decisions made by the Attorney General under the Independent Counsel Act, we believe that Congress could not justify an investigation based on its disagreement with the prosecutorial decision regarding appointment of an independent counsel for a particular individual. Congress simply cannot constitutionally second-guess that decision. Congress does, however, have a legitimate legislative interest in overseeing the Department's enforcement of the Independent Counsel Act and relevant criminal statutes and in determining whether legislative revisions to the Act should be made. Given the general judicial reluctance to look behind congressional assertions of legislative purpose, such an assertion would likely be deemed sufficient to meet the threshold requirement for congressional inquiry.

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[11] Moreover, there must be a subject matter for the inquiry, the investigation must be authorized by Congress, there must be a valid legislative purpose, the witness must be accorded certain constitutional protections, and the information demanded must be pertinent to the inquiry. *See Gojack* v. *United States*, 384 U.S. 702, 704–05, 714 (1966); *Wilkinson* v. *United States*, 365 U.S. 399, 408–09 (1961); *Barenblatt* v. *United States*, 360 U.S. at 111; *Watkins* v. *United States*, 354 U.S. at 187; *United States* v. *Rumely*, 345 U.S. 41, 44–46 (1953); *McGrain* v. *Daugherty*, 273 U.S. at 173, 176; *Kilbourn* v. *Thompson*, 103 U.S. at 190.

[12] The relevance of this inquiry is not limited to the question *whether* the Department should respond, but affects also *how* it should respond. If Congress' legitimate legislative interest is relatively narrow, the Department may be able to satisfy the inquiry without disclosing confidential information.

[13] For example, the Director of the Office of Personnel Management recently refused to answer questions asked by a congressional subcommittee concerning the removal of the Deputy Director of OPM, on the ground that the removal was a judgment that rested exclusively with the President. The *appointment* of officers presents a somewhat more difficult problem, at least for those officers who must be appointed with the advice and consent of the Senate In such cases, the Senate can claim a legitimate interest in obtaining information about the nominee.

B. Executive Privilege

Assuming that Congress has a legitimate legislative purpose for its inquiry, the Executive Branch's interest in keeping the information confidential must be assessed. That interest is usually discussed in terms of "executive privilege," and we will use that convention here. The question, however, is not strictly speaking just one of executive privilege. Although the considerations that support the concept and assertion of executive privilege apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to an informal congressional request for information, the Executive Branch is not necessarily bound by the limits of executive privilege.

1. Constitutional Basis of Executive Privilege

The Constitution nowhere states that the President, or the Executive Branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution, has been asserted by numerous Presidents from the earliest days of our Nation, and has been explicitly recognized by the Supreme Court. *United States* v. *Nixon*, 418 U.S. at 705–06.

2. Protection of Law Enforcement Files

Although the principle of executive privilege is well established, there are few clear guidelines regarding its practical application. The privilege has most frequently been asserted in the areas of foreign affairs and military and domestic secrets, but it has also been invoked in a variety of other contexts. In 1954, President Eisenhower asserted that the privilege extends to deliberative communications within the Executive Branch. In a letter to the Secretary of Defense, he stated:

> Because it is essential to effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications or any documents or reproductions concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions . . . .

1954 *Pub. Papers* 483–84 (May 17, 1954).

Moreover, the policy of the Executive Branch throughout our Nation's history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances. This policy with respect to Executive Branch investigations was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files. *See* "History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress" (Part I), 6 Op. O.L.C. 751 (1982).

This policy is grounded primarily on the need to protect the government's ability to prosecute fully and fairly. Attorney General Robert H. Jackson articulated the basic position over forty years ago:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941). Similarly, this Office has explained that "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation." Memorandum for Edward L. Morgan, Deputy Counsel to the President from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 19, 1969). Other grounds for objecting to the disclosure of law enforcement files include the potential damage to proper law enforcement that would be caused by the revelation of sensitive techniques, methods, or strategy; concern over the safety of confidential informants and the chilling effect on other sources of information; sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law; and well-founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process.

Quite apart from the concern that disclosure would prejudice the particular prosecution prompting congressional inquiry is the purely internal concern that disclosure might hamper prosecutorial decision-making in *future* cases. *Cf. United States* v. *Nixon*, 418 U.S. at 708. Employees of the Department would likely be reluctant to express candidly their views and recommendations on controversial and sensitive matters if those views could be exposed to public scrutiny by Congress upon request.

In addition, potential targets of enforcement actions are entitled to protection from premature disclosure of investigative information. It has been held that there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." *Delaney* v. *United States*, 199 F.2d 107, 114 (1st Cir. 1952). Pretrial publicity originating in Congress, therefore, can be attributed to the government as a whole and can require postponement or other modification of the prosecution on due process grounds. *Id.* Moreover, a person who is ultimately not prosecuted may be subjected to unfair and prejudicial publicity — and thus suffer substantial and lasting damage to his professional and community standing — based on unfounded allegations.[14]

There are, of course, circumstances in which the Attorney General may decide to disclose to Congress information about his prosecutorial decisions. Once an investigation has been closed without further prosecution, many of the considerations previously discussed lose some of their force. Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution; likewise, if no prosecution will result, concerns about the effects of undue pretrial publicity on a jury would disappear. Still, such records should not automatically be disclosed to Congress. Obviously, much of the information in a closed criminal enforcement file, such as unpublished details of allegations against particular individuals and details that would reveal confidential sources, and investigative techniques and methods, would continue to need protection (which may or may not be adequately afforded by a confidentiality agreement with Congress). In addition, the Department and the Executive Branch have a long-term institutional interest in maintaining the integrity of the prosecutorial decision-making process. The Supreme Court has recognized that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States* v. *Nixon*, 418 U.S. at 705. It therefore is important to weigh the potential "chilling effect" of a disclosure of details of the deliberative process against the immediate needs of

[14] Department of Justice officials, as attorneys, are directed to observe the Code of Professional Responsibility to the extent it does not prevent their loyal service to the United States. *See* 28 C.F.R. § 45 735–1. The Code prohibits a lawyer who is associated with an investigation from making or participating in making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration" already public or highly generalized information about the matter. Model Code of Professional Responsibility, DR 7–107(A) (1979).

Congress and of the Department. After assessing all of these factors, on occasion the Department has briefed Congress on prosecutorial decisions and has disclosed some details of the underlying investigation, once the investigation has been closed.

3. Attorney-Client Communications

Some of the communications relevant to an Independent Counsel Act decision could conceivably fall within the scope of the common law evidentiary privilege for attorney-client communications.[15] Although the attorney-client privilege may be invoked by the government in litigation and under the Freedom of Information Act separately from any "deliberative process" privilege,[16] it is not generally considered to be distinct from the executive privilege in any dispute between the executive and legislative branches. The interests implicated under common law by the attorney-client privilege generally are subsumed by the constitutional considerations that shape executive privilege, and therefore it is not usually considered to constitute a separate basis for resisting congressional demands for information. As this Office has previously noted, for the purpose of responding to congressional requests, communications between the Attorney General, his staff, and other Executive Branch "clients" that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications. *See* "Confidentiality of the Attorney General's Communications in Counseling the President," 6 Op. O.L.C. 481, 490 & n.17, 494 & n.24 (1982).[17]

Nonetheless, when the Attorney General is acting in his role as the President's chief legal adviser, his communications to the President may warrant greater confidentiality than those of some other Cabinet advisers because of the nature of the Attorney General's responsibilities to the executive and his special areas of expertise, *e.g.*, legal advice and law enforcement. This Office has previously emphasized the particular importance of protecting the President's ability to receive candid legal in advice:

[15] The attorney-client privilege generally embraces confidential disclosures of a client to his attorney, made in order to obtain legal assistance and not for the purpose of committing a crime or tort. 8 Wigmore, *Evidence* § 2290 (McNaughton rev. 1961). In order to prevent inadvertent disclosures, either directly or by implication, of information which the client had previously confided to the attorney, as well as to foster the attorney's ability to give sound and informed professional advice, the privilege has generally been extended to include an attorney's communications to his client. *Mead Data Central* v. *Department of the Air Force*, 566 F.2d 242, 252–55 (D.C. Cir. 1977).

[16] *See, e.g., Brinton* v. *Department of State*, 636 F.2d 600, 605 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Mead Data Central, Inc.* v. *Department of the Air Force*, 566 F.2d at 252; *Coastal States Gas Corp.* v. *DOE*, 617 F.2d 854, 865 (D.C. Cir. 1980); 5 U.S.C. § 552(b)(5) (documents exempted from mandatory disclosure under the Freedom of Information Act include those "which would not be available by law to a party . . . in litigation with the agency").

[17] Likewise, communications that would be protected in litigation or under the Freedom of Information Act by the work product privilege would generally be considered part of the government's deliberative process, and therefore subsumed under executive privilege, for the purpose of responding to congressional requests for information. *See generally* 6 Op. O.L.C. at 497–98 n.32.

> [T]he reasons for the constitutional privilege against the compelled disclosure of executive branch deliberations have special force when legal advice is involved. None of the President's obligations is more solemn than his duty to obey the law. The Constitution itself places this responsibility on him, in his oath of office and in the requirement of article II, section 3 that "he shall take Care that the Laws be faithfully executed." Because this obligation is imposed by the Constitution itself, Congress cannot lawfully undermine the President's ability to carry it out. Moreover, legal matters are likely to be among those on which high government officials most need, and should be encouraged to seek, objective, expert advice. As crucial as frank debate on policy matters is, it is even more important that legal advice be "candid, objective, and even blunt or harsh," *see United States* v. *Nixon*, 418 U.S. 683, 708 (1974), where necessary. Any other approach would jeopardize not just particular policies and programs but the principle that the government must obey the law. For these reasons, it is critical that the President and his advisers be able to seek, and give, candid legal advice and opinions free of the fear of compelled disclosure.

Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel 26 (Jan. 13, 1981).

4. Independent Counsel Act Decisions

We believe that these considerations we have outlined apply to decisions whether to recommend appointment of an independent counsel no less than they apply to any other prosecutorial decision made by this Department. Although the ultimate decision whether to prosecute a particular individual rests with the independent counsel, the threshold decisions whether to investigate and whether to recommend appointment of an independent counsel are critical steps in that ultimate prosecutorial judgment. The decision whether "there are reasonable grounds to believe that further investigation or prosecution is warranted" is quintessentially a prosecutorial decision, akin to those made every day in the course of the Department's enforcement of the criminal laws. In fact, the Act specifically recognizes that the Attorney General's decision whether to seek appointment of an independent counsel is unreviewable by the courts, like any other exercise of prosecutorial discretion.[18]

[18] The Act provides that the Attorney General's decision to apply for appointment of an independent counsel "shall not be reviewable in any court." 28 U.S.C. § 592(f). The nonreviewability provision applicable to the Attorney General's decision not to seek appointment is phrased in somewhat different terms Under § 592(b)(1), if the Attorney General reports to the court that "there are no reasonable grounds to believe that further investigation or prosecution is warranted," the court "shall have no power to appoint an independent

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A decision not to apply for an independent counsel could be treated as a closed investigation, in accordance with the Department's practice. If the Attorney General seeks appointment of an independent counsel, however, the investigation would be very much alive, as the independent counsel would step into the Department's shoes and continue the investigation into the allegations of wrongdoing.[19] In fact, the Department could still be quite involved in assisting the independent counsel, including providing information, personnel, and other resources. *See* 28 U.S.C. § 594(d). It seems clear, therefore, that all the considerations that counsel against disclosure of information relevant to open investigations being conducted by the Department itself apply equally when the investigation is being conducted by the independent counsel.

The more difficult question is whether any distinction between "closed" and "open" investigations could or should be drawn in a case in which the Attorney General determines that the evidence warrants further investigation of some, but not all, of those individuals against whom allegations have been directed. That determination would rest in large part on the facts and documents at issue and would in most cases probably require a particularized judgment as to whether some information relating to "closed" cases could be reasonably segregated and disclosed to Congress without undue risk of prejudicing the independent counsel's "open" investigation. We are obviously not in a position to make that judgment, and would defer to the Criminal Division. It seems to us, however, that in many, perhaps most, cases the evidence may be so intertwined that no separation is possible. In other cases, especially those of a simple nature in which the allegations against particular individuals are only marginally related, separation may be feasible.

In addition, because the Attorney General's decision not to seek an independent counsel for particular individuals must be based on his determination that "there are no reasonable grounds to believe that further investigation or prosecution is warranted, "the interests of those individuals in continued confidentiality would seem particularly strong. Moreover, even though the decision by the Attorney General not to seek appointment of an independent counsel is nonreviewable, in an interrelated investigation the possibility always exists that the independent counsel's investigation may uncover new information that will result in further investigation.[20]

[18] (. . . continued)
counsel." *Id.* § 592(b)(1). In *Banzhaf v Smith*, 737 F.2d 1167, 1169 (D.C. Cir. 1984), the Court of Appeals held that this provision was intended by Congress to bar any "judicial review, at the behest of members of the public, of the Attorney General's decisions not to investigate particular allegations and not to seek appointment of independent counsel."

[19] It could be argued that even if the Attorney General applies to the court for appointment of an independent counsel, the Department's investigations may technically be considered "closed," because § 597(a) requires the Department to "suspend all investigations and proceedings regarding [a] matter [within the prosecutorial discretion of an independent counsel]" unless the independent counsel "agrees in writing that such investigation or proceedings may be continued by the Department of Justice." For the reasons set forth above, we believe this argument is without merit.

[20] The independent counsel's jurisdiction is, of course, limited to that specified by the court, based on the application filed by the Attorney General. *See* 28 U.S.C. §§ 592(d)(1), 593(b), 594(a). Although the language
Continued

Thus, we believe there are strong constitutional and policy considerations, flowing from the doctrine of separation of powers, the obligation to preserve the integrity of the prosecutorial function, and the need to protect the rights of those who are the target of criminal investigations, that should inform and guide the Department's response to a congressional request for information about independent counsel decisions. It may be that any such request could be accommodated through a process of negotiation with Congress. Only rarely do congressional requests for information result in a subpoena of an Executive Branch official or in any congressional action. In most cases the informal process of negotiation and accommodation mandated by President Reagan in his November 4, 1982, Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" is sufficient to resolve any dispute.[21] On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee. At that point, it would be necessary to consider what procedures and defenses are available to the Executive Branch.

We outline below some of the issues that would be raised if Congress subpoenaed the Attorney General in connection with a congressional request for information about an independent counsel decision. Our particular focus here is on the House of Representatives, because it is far more likely that such action would be taken by the House than by the Senate.

IV. Subpoena Authority of the House of Representatives

A. Basis of Subpoena Authority

As previously noted, Congress has a broad, but not unlimited, investigative authority. *See McGrain* v. *Daugherty*, 273 U.S. at 174. This investigative

[20] (. . . continued)
of the Act, *see* 28 U.S.C. §§ 592(d)(1), 593(b), and its legislative history, *see* S Rep. No. 170, *supra*, at 64, suggest that the court may have some flexibility in defining the independent counsel's jurisdiction, we do not believe that the court can grant the independent counsel — or that the independent counsel can assume — any jurisdiction in excess of that recommended by the Attorney General. Any other interpretation would completely circumvent the clear congressional judgment that the Attorney General's decision whether to seek an independent counsel be unreviewable. In addition, the Act itself provides several avenues by which the jurisdiction of the independent counsel could be expanded, all of which require the participation of the Attorney General For example, if the Attorney General receives additional information "sufficient to constitute grounds to investigate about the matter to which such memorandum related," his obligation to investigate and report is renewed, *see* 28 U.S.C. § 592(c)(2); the Attorney General may ask the independent counsel "to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction," *id.* § 592(e); and the independent counsel himself may ask the Attorney General or the court to "refer matters related to [his] prosecutorial jurisdiction" or "may accept referral of a matter by the Attorney General," *see id.* § 594(e). Finally, our constitutional qualms about the role of the independent counsel would be considerably exacerbated if the critical decision as to what individuals and offenses may be prosecuted were taken completely out of the hands of the Attorney General

[21] That memorandum states that "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches."

authority necessarily presupposes some means of compelling the cooperation of contumacious witnesses:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it. Experience has taught that mere requests for such information are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

Id. at 175. Because the subpoena power is regarded as inherent in Congress' Article I power, it does not require enactment of a statute. Nonetheless, the exercise of subpoena power must be authorized by the relevant House. *See, e.g., Reed* v. *County Commissioners*, 277 U.S. 376, 389 (1928); *McGrain* v. *Daugherty*, 273 U.S. at 158.

Since 1974, the House Rules have given standing committees and subcommittees the authority to authorize and issue subpoenas.[22] House Rule XI(m)(1)(B) authorizes any committee or subcommittee "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary." Subpoenas may be issued by a committee or subcommittee "only when authorized by a majority of the members voting, a majority being present," except that " the power to authorize and issue subpoenas . . . may be delegated to the chairman of the committee pursuant to such rules and under such limitations as the committee may prescribe." House Rule XI(m)(2)(A). Any authorized subpoena must be signed by the chairman of the committee or by a member designated by the chairman. *Id.* The rules of each standing committee flesh out somewhat the requirements for issuance of a subpoena, specifying in particular if, or under what circumstances, the chairman of the full committee may issue a subpoena without a vote of the committee.

B. Enforcement of Subpoenas

If a subpoenaed witness refuses to respond fully to a subpoena, the subcommittee or committee, as the case may be, can vote to hold the witness in contempt of Congress. As a matter of consistent historical practice, a contempt of Congress vote by a subcommittee is referred to the full committee, although there appears to be no technical requirement to interpose committee approval

[22] Prior to adoption of the Hansen proposals in 1974, subpoena authority was granted only on a case-by-case basis. *See* Congressional Quarterly, *Guide to the Congress* 164 (1982).

between a subcommittee contempt resolution and referral to the full House.[23]

By operation of House Rule XI(m)(2)(B), any action to enforce compliance with a committee or subcommittee subpoena must be approved by and the House. *See In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 790 (5th Cir. 1979) (House approval required for intervention in private antitrust suit to gain access to documents subpoenaed by subcommittee from a party to the litigation); *see generally Wilson* v. *United States*, 369 F.2d 198, 201 (D.C. Cir. 1966) (suggesting that referrals under 2 U.S.C. §§ 192–194 require a vote of the full House or Senate, except during adjournments).

The House would have three alternatives available to enforce the subpoena: (1) referral to the United States Attorney for prosecution under 2 U.S.C. §§ 192–194; (2) arrest by the Sergeant-at-Arms; or (3) a civil suit seeking declaratory enforcement of the subpoena. The first two of these alternatives may well be foreclosed by advice previously rendered by this Office.

1. Referral Under 2 U.S.C. §§ 192–194

The criminal contempt of Congress statute contains two principal sections, 2 U.S.C. §§ 192 and 194.[24] Section 192, which sets forth the criminal offense of contempt of Congress, provides in pertinent part:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than 1 month nor more than 12 months.[25]

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[23] The courts have underscored the importance of the procedural safeguards built into the contempt of Congress process and, in particular, the multiple steps of review that must take place before a contempt of Congress prosecution is brought. *See Wilson* v. *United States*, 369 F.2d 198, 203 (D.C. Cir. 1966); *see also United States Fund* v. *Eastland*, 488 F.2d 1252, 1260 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 491 (1975); *Sanders* v. *McClellan*, 463 F.2d 894 (D.C. Cir. 1972); *Ansara* v. *Eastland*, 442 F.2d 751, 754 (D.C. Cir. 1971). It could therefore be argued that committee consideration of a subcommittee contempt resolution would be necessary in order to provide an additional check upon the contempt of Congress process. No court, however, has so held, and we have not found any requirement in the House or any committee rules for referral to the full committee. Neither have we found any instance in which a subcommittee referred a contempt resolution directly to the House, without seeking approval from the full committee. For example, the contempt resolution voted by the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation against EPA Administrator Burford was referred to the full Committee, and reported by that Committee to the House.

[24] A third provision, 2 U.S.C. § 193, denies the existence of any testimonial privilege for a witness to refuse to testify on the ground that his testimony would disgrace him.

[25] This statute has been found constitutionally valid as a punitive supplement to Congress' inherent coercive power to imprison for contempt. *See, e.g., United States* v. *Fort*, 443 U.S. 670, 677 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 942 (1971).

Section 194 imposes certain responsibilities on the Speaker of the House or the President of the Senate, as the case may be, and on the United States Attorney to take actions leading to the prosecution of persons certified by a House of Congress to have failed to produce information in response to a subpoena. It provides:

> Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House . . . or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States Attorney, whose duty it shall be to bring the matter before the Grand Jury for its action.

Under this provision, the committee would refer a resolution of contempt to the House, which would then have to approve the resolution and instruct the Speaker to certify the contempt to the United States Attorney for presentation to the grand jury.[26]

The contempt of Congress procedure has been used only once against an Executive Branch official who refused to comply with a subpoena on executive privilege grounds. In 1982, EPA Administrator Burford, acting at the President's direction, refused to release certain enforcement sensitive documents in response to a subpoena from the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation. The Subcommittee and subsequently the full Committee approved a contempt of Congress resolution, and on December 16, 1982, the full House adopted the resolution. On December 17, Speaker O'Neill certified the contempt to the United States Attorney for the District of Columbia for prosecution under § 192. The United States Attorney declined to refer the contempt citation to the grand jury, pending resolution of a lawsuit filed by the Executive Branch to block enforcement of the subpoena[27] and completion of negotiations between the executive and legislative branches to reach a compromise settlement.[28]

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[26] By its terms, § 194 would permit the Speaker (or President *pro tempore*) to certify a contempt without the approval of the House, if the House were not in session. This option, however, would appear to be foreclosed by the House rules, which clearly require full House approval for any enforcement action

[27] *United States* v. *House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

[28] Those negotiations eventually resulted in an agreement and withdrawal of the contempt citation.

During the EPA matter, this Office rendered advice to the Attorney General, since memorialized in a memorandum, on the applicability of §§ 192 and 194 to Executive Branch officials who assert claims of executive privilege on behalf of the President.[29] In brief, we concluded that a United States Attorney is not required to refer a contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who is carrying out the President's instruction to assert executive privilege. Our conclusion rested partly on the need to preserve traditional prosecutorial discretion, *i.e.*, that Congress may not direct the executive to prosecute a particular individual without leaving any discretion in the executive to determine whether a violation of the law has occurred. We also concluded more broadly, however, that the contempt of Congress statute simply was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege. We noted that neither the legislative history nor the subsequent implementation of §§ 192 and 194 suggest that Congress intended the statute to apply to executive officials who carry out a Presidential assertion of executive privilege. Moreover, as a matter of constitutional law, we concluded that the threat of criminal prosecution would unduly chill the President's ability to protect presumptively privileged Executive Branch deliberations:

> The President's exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Because many of the documents over which the President may wish to assert a privilege are in the custody of a department head, a claim of privilege over those documents can be perfected only with the assistance of that official. If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim were valid, the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks, even the threat of a criminal prosecution for asserting the claim is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.

8 Op. O.L.C. at 102. Therefore, Congress could not, as a matter of statutory or constitutional law, invoke the criminal contempt of Congress procedure set out in 2 U.S.C. §§ 192 and 194 against the head of an Executive Branch agency, if he acted on the instructions of the President to assert executive privilege in response to a congressional subpoena.

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[29] *See* "Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege," 8 Op. O.L.C. 101 (1984).

2. Inherent Contempt Power of Congress

The second alternative is for the House to instruct the Sergeant-at-Arms to arrest the Executive Branch official and detain him in the Capitol guardroom. The arrest could then be challenged by application for a writ of habeas corpus. 28 U.S.C. §§ 2241 *et seq.*

The Supreme Court has ruled in the past that Congress has the inherent constitutional authority to imprison individuals for contempt. *See Jurney* v. *MacCracken*, 294 U.S. 125 (1935); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821). The authority is one of self preservation and is accordingly limited to "the least possible power adequate to the end proposed." *Id.* at 231.

Although the authority has been cited by a court as recently as 1970, *see United States* v. *Fort*, 443 F.2d at 676, Congress has not attempted to use it for approximately 50 years[30] and it seems most unlikely that Congress would dispatch the Sergeant-at-Arms to arrest and imprison an Executive Branch official who claimed executive privilege. Moreover, while Supreme Court precedents support the right of Congress to imprison individuals for contempt, there is some question whether such authority would continue to be upheld. In recent years the Supreme Court has been more wary of Congress' exercising judicial authority:

> Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment.

United States v. *Lovett*, 328 U.S. at 317; *see also United States* v. *Brown*, 381 U.S. 437 (1965); *INS* v. *Chadha*, 462 U.S. at 962, 966 (Powell, J., concurring). The Court has also been careful in recent cases to restrict Congress to its legislative functions and not to permit it to exercise authority belonging to another branch. *See INS* v. *Chadha, supra*; *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The current Court therefore may not afford Congress the same latitude with respect to its inherent contempt power that was provided during the 19th and early 20th centuries. *See* Memorandum for the Deputy Attorney General from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (Oct. 18, 1984).

In any event, the same considerations that inform the analysis of the applicability of §§ 192 and 194 to Executive Branch officials are relevant to an exercise of Congress' inherent contempt power. In our 1984 memorandum to the Attorney General discussing §§ 192 and 194, we noted that the reach of the criminal contempt statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect the penalties imposed), and concluded that "the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well." 8 Op. O.L.C. at 140 n.42.

[30] *See Marshall* v. *Gordon*, 243 U.S. 521 (1917); Congressional Quarterly, *Guide to the Congress* 162 (1982).

3. Civil Suit for Enforcement of a Subpoena

The most likely route for Congress to take would be to file a civil action seeking enforcement of the subpoena. There is no statute that expressly grants the federal courts jurisdiction over such suits.[31] There are, however, at least two precedents for bringing such civil suits under the grant of federal question jurisdiction in 28 U.S.C. § 1331. In 1973, the Senate Select Committee on Presidential Campaign Finances sought civil enforcement of its subpoena for tapes and documents; the Committee urged, *inter alia*, that § 1331 provided subject matter jurisdiction. The district court found that the $10,000 jurisdictional amount in controversy requirement was not met and held that jurisdiction was therefore lacking under section 1331. The court did not be suggest that there was any other basis for denying federal question jurisdiction. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51, 59–61 (D.D.C. 1973). Legislation was subsequently enacted to authorize jurisdiction over that particular suit. *See Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 727 (D.C. Cir. 1974). Section 1331 has since been amended to be eliminate the $10,000 amount in controversy limitation in actions brought against the United States. Pub. L. No. 96–486, § 2(a), 94 Stat. 2369 (1980).

General federal question jurisdiction was also used as a basis for the be civil suit filed by the Department of Justice against the House in the EPA matter. *See United States* v. *House of Representatives*, C.A. No. 82–3583 (D.D.C. 1983). The Department took the position in that case that the controversy arose under the Constitution and laws of the United States, because resolution "depend[ed] directly on construction of the Constitution [and the] Court has consistently held such suits are authorized by [section 1331]." *Powell* v. *McCormack*, 395 U.S. 486, 516 (1969). Relying upon the decision in *United States* v. *AT&T Co.*, 551 F.2d 384 (D.C. Cir. 1976), which held that an action brought by the United States to block a response by a third party to a congressional subpoena met the threshold jurisdictional requirements of section 1331, the Department argued

[31] Under 2 U.S.C. § 288d, the Senate Legal Counsel "[w]hen directed to do so [by the Senate] . . . shall bring a civil action . . . to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpoena or order issued by the Senate or a committee or a subcommittee of the Senate authorized to issue a subpoena or order." The United States District Court for the District of Columbia has jurisdiction over such actions, but its jurisdiction does not extend to any actions brought "to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity." 28 U.S.C. § 1364(a).

The argument could be made that this authority provides the exclusive route for either House to bring a civil action to enforce its subpoenas, and thus, that no route exists for civil enforcement against an executive branch officer. The legislative history of these statutes, however, counsels against that conclusion. The legislative history specifically notes that the jurisdictional exception for executive branch subpoenas "is not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the Federal Government," but rather was intended specifically to provide the Senate with a less drastic remedy than criminal contempt for refusals by private citizens to comply with subpoenas, and to avoid reliance on the Department of Justice to enforce such subpoenas. *See* S. Rep. No. 170, 95th Cong., 2d Sess. 88–89 (1978).

that subject matter jurisdiction similarly exists in a suit to halt enforcement of a subpoena addressed directly to the Executive Branch.[32] The rationale used by the Department in that suit would appear to apply equally to suits filed by a House of Congress seeking enforcement of its subpoena against executive privilege claims.

In addition, the courts may be willing to entertain a civil suit brought by the House in order to avoid any question about the possible applicability of the criminal contempt provisions of §§ 192 and 194. When a possible impairment of the President's constitutional prerogatives is involved, the courts are particularly careful to construe statutes to avoid a constitutional confrontation. In *United States* v. *Nixon*, for example, the Court construed the limitation in 28 U.S.C. § 1291 (that appeals be taken only from "final" decisions of a district court) to permit the President to appeal an adverse ruling on his claim of executive privilege without having to place himself in contempt of court:

> [T]he traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government.

418 U.S. at 691–92. The U.S. Court of Appeals for the District of Columbia has stated on several occasions that criminal contempt proceedings are an inappropriate means for resolving document disputes, especially when they involve another governmental entity. *See Tobin* v. *United States*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962); *see also United States* v. *Fort*, 443 F.2d at 677–78. The Fifth Circuit appears to have held that no government official need subject himself to contempt in order to obtain review of his claim that the government is privileged to refuse to comply with a court's demand for documents. *See Cates* v. *LTV Aerospace Corp.*, 480 F.2d 620, 622 (5th Cir. 1973); *Carr* v. *Monroe Manufacturing Co.*, 431 F.2d 384, 387 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); *but see In re the Attorney General*, 596 F.2d 58, 62 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979). Thus, although the civil enforcement route has not been tried by the House, it would appear to be a viable option.[33]

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[32] The decision of the district court in *United States* v *House of Representatives* does not directly address the jurisdictional question, although it casts considerable doubt on whether the Executive Branch can seek review in a civil action, when the legislative branch has chosen to use the criminal contempt provisions. 556 F. Supp. at 153. Nonetheless, the court did not foreclose any civil actions by the House:

> Judicial resolution of this constitutional claim, however, will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding *or other legal action taken by Congress*

Id. (emphasis added).

[33] Any notion that the courts may not or should not review such disputes is dispelled by *United States* v. *Nixon*, 418 U.S. at 703–05, in which the Court clearly asserted its role as ultimate arbiter of executive

Continued

It is also possible that Congress might attempt to invoke the provisions of the Independent Counsel Act, which require the Attorney General to conduct an investigation "whenever he receives information sufficient to constitute grounds to investigate" that any of the enumerated Executive Branch officials "has committed a violation of any Federal criminal law other than a violation constituting a petty offense." 28 U.S.C. § 591. The crime of contempt of Congress is a non-petty criminal offense. *See* 2 U.S.C. § 192; 18 U.S.C. § 1. Thus a contempt citation against a covered official would arguably trigger the Attorney General's obligation under the Act. Invocation of the Act would not, however, necessarily require the Attorney General to apply for the appointment of an independent counsel. As this Office has advised on prior occasions, the Attorney General retains a certain measure of discretion with respect to whether to apply for an independent counsel.

B. Defenses to Congressional Subpoenas

1. Lack of Jurisdiction

As we discussed above, Congress' investigative power, while broad, is not unlimited. Thus, short of asserting executive privilege, there may be other lines of defense against a subpoena. The most promising line is that the subcommittee has no jurisdiction to request the information, either because Congress as a whole has no authority to inquire into the matter, or because Congress has not given the committee the requisite authority.

a. Scope of Congress' Jurisdiction

The Supreme Court has not articulated with precision whether there are particular limits to the jurisdiction of Congress to request information from the Executive Branch. Nonetheless, as we have previously set forth, Congress must at a minimum be able to articulate a legitimate legislative purpose for its inquiry. We will not repeat that discussion here, except to say that if the matter either falls exclusively within the province of another branch, *see Kilbourn* v. *Thompson*, 103 U.S. at 192, or Congress cannot point to some rational nexus between the inquiry and its legislative power, *see Barenblatt* v. *United States*, 360 U.S. at 111, we believe the subpoena would be held invalid for lack of authority, and could be challenged on that basis.

b. Scope of Committee's Jurisdiction

Not only must the investigation fall within Congress' jurisdiction, but the committee or subcommittee must also have been specifically authorized by the

[33] (. . . continued)
privilege questions. The need for judicial review in fact was emphasized by this Department in the *United States* v. *House of Representatives* litigation as a basis for the court to entertain the suit. The Department argued that, in some circumstances, only judicial intervention can prevent a stalemate between the other two branches that could result in a partial paralysis of government operations.

relevant House to conduct the investigation. Since defiance of a subpoena raises the possibility of criminal prosecution, "a clear chain of authority from the House to the questioning body is an essential element of the offense." *Gojack* v. *United States*, 384 U.S. at 716. It "must appear that Congress empowered the Committee to act, and further that at the time the witness allegedly defied its authority the Committee was acting within the power granted to it."[34] *Id.* (quoting *United States* v. *Lamont*, 18 F.R.D. 27 (S.D.N.Y. 1955), *aff'd*, 236 F.2d 312 (2d Cir. 1956)). *See also Watkins* v. *United States*, 354 U.S. at 204–05, 214–15; *Eastland* v. *United States Servicemen's Fund*, 421 U.S. at 505–06. Thus, a witness cannot be compelled to answer questions that fall outside of the investigative jurisdiction of a committee or subcommittee. *See United States* v. *Rumely*, 345 U.S. at 44–45; *Bergman* v. *Senate Select Committee on Aging*, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975); *United States* v. *Cuestra*, 208 F. Supp. 401, 406 (D.P.R. 1962).

Although this general principle is well recognized by the courts, in practice they have given considerable deference to a committee's definition of its jurisdiction. In cases in which the courts have refused to enforce a subpoena because the inquiry fell outside of the committee's jurisdiction, the primary defect was that the investigative authority given to the committee was simply so broad and ill-defined that it gave the witness no fair notice of the scope of the inquiry. *See, e.g., Watkins* v. *United States*, 354 U.S. at 204; *United States* v. *Rumely*, 345 U.S. at 43. In many cases, the courts have considered the "legislative history" of the committee's investigation (*e.g.*, the language and background of the authorizing resolution, remarks made by the chairman or members of the committee to outline the scope of the investigation, the existence and scope of similar investigations) to determine whether a particular matter falls within a committee's jurisdiction. "Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite context furnished them by the course of congressional actions." *Barenblatt* v. *United States*, 360 U.S. at 117. *See also Wilkinson* v. *United States*, 365 U.S. at 408; *Tobin* v. *United States*, 306 F.2d at 275–76; *United States* v. *Fort*, 443 F.2d at 682. This analysis, of course, cuts both ways. If a committee has historically exercised investigative jurisdiction over a particular subject, and makes the nexus between its investigative jurisdiction and the particular subject matter clear, the courts may hesitate to second guess to that judgment. *See, e.g., Barenblatt* v. *United States*, 360 U.S. at 119–20. On the other hand, if the committee has not previously asserted investigative jurisdiction over the subject matter, and the subject matter to is not clearly linked to the committee's jurisdiction, the courts may lean to in favor of protecting the

[34] Because the legality of the committee's action is judged as of the time the witness defies the subpoena, a subsequent vote by the full House to enforce the subpoena (through contempt or otherwise) will not cure any jurisdictional defect. *Gojack*, 384 U.S. at 175 n.12.

witness' prerogative to refuse to testify, particularly if constitutional interests are implicated.[35] *See Tobin* v. *United States*, 306 F.2d at 275–76.

The courts have also suggested that the power of either the witness or the court to define for itself the scope of a committee's jurisdiction is limited. In *Barenblatt*, 360 U.S. at 124, the Court noted that it "goes without saying that the scope of the Committee's authority was for the House, not a witness, to determine, subject to the ultimate reviewing responsibility of this Court." Similarly, "it is appropriate to observe that just as the Constitution forbids the Congress to enter fields reserved to the Executive and Judiciary, it imposes on the Judiciary the reciprocal duty of not lightly interfering with Congress' exercise of its legitimate powers." *Hutcheson* v. *United States*, 369 U.S. 599, 622 (1962). *See also McSurely* v. *McClellan*, 521 F.2d 1024, 1038 (D.C. Cir. 1975) (prerogative of the judiciary to determine whether the investigation is within the jurisdiction of a particular committee is "extremely limited").

Nevertheless, it is clear that a witness may refuse to answer on the ground that the inquiry has not been authorized by the relevant House. Particularly where constitutional concerns are raised by compelled testimony, courts may be reluctant to countenance a far-ranging inquiry by a particular committee or subcommittee that does not appear to fall within the jurisdiction granted by Congress.

2. Executive Privilege

Finally, the subpoena could be resisted on the ground that the information requested is protected by the executive privilege. It is important to remember, however, that assertion of the privilege does not just involve an evaluation of the Executive Branch's interest in keeping the information confidential; it also involves an evaluation of the strength of Congress' need for that information, and whether those needs can be accommodated in some other way.

Thus, Congress must be able to articulate its need for the particular materials — to "point[ ] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and to show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d at 731, 733. In *Senate Select Committee*, for example, the court held that the committee had not made a sufficient showing of need for copies of the Presidential tape recordings, given that the President had already released transcripts of the recordings. The committee argued that it

[35] The judicial decisions dealing with Congress' subpoena authority have for the most part involved refusals by private individuals to testify. In those cases the courts have been sensitive to First, Fourth, and Fifth Amendment concerns raised by the defendants, and have weighed those interests in the balance in determining how specific Congress must be in authorizing a committee's investigation. *See, e.g., United States* v. *Rumely*, 345 U.S. at 45; *Watkins* v. *United States*, 354 U.S. at 204–05. Although the constitutional interests implicated by a subpoena of an executive branch official arise from Articles I and II, rather than the Bill of Rights, a court should be equally sensitive to those constitutional concerns.

needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. But the court answered that in order to legislate a committee of Congress seldom needs a "precise reconstruction of past events." *Id.* at 732. "The Committee has . . . shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain." *Id.* at 733. For this reason, the court stated, "the need demonstrated by the Select Committee . . . is too attenuated and too tangential to its functions" to override the President's constitutional privilege. *Id.*

Moreover, in cases in which Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each branch to accommodate the legitimate needs of the other. *See United States* v. *AT&T Co.*, 567 F.2d 121, 130 (D.C. Cir. 1977).

Here, the considerations outlined above — particularly the need to preserve the position of the Executive Branch as the sole entity that enforces the criminal laws — would weigh strongly in favor of nondisclosure by the Executive Branch. Ultimately it would be those interests in maintaining confidentiality that must be balanced against Congress' interest in gaining access to particular information for legitimate legislative purposes. As noted above, it is difficult for us to speculate as to what legitimate interests Congress would have in gaining access to the details of a prosecutorial decision made by the Attorney General — a decision that Congress constitutionally could not alter or interfere with. The decision to assert executive privilege in response to a congressional subpoena, however, is the President's to make. Under the terms of the Reagan Memorandum, executive privilege cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President. That decision must be based on the specific facts of the situation, and therefore it is impossible to predict in advance whether executive privilege could or should be claimed as to any particular types of documents or information.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Legislative Proposal to Nullify Criminal Convictions Obtained Under the Ethics in Government Act

A proposed bill would have the effect of nullifying all criminal convictions obtained under the Ethics in Government Act since that Act was passed in 1978. Under the Pardon Clause of the Constitution, U.S. Const. art. II, § 2, cl. 1, the President has broad power to take action to relieve individuals who have violated federal laws. By contrast, the Constitution gives Congress no authority to legislate a pardon for any particular individual or class of individuals. Therefore, the proposed bill exceeds Congress' power to legislate and would be an unconstitutional infringement on the President's pardon power.

June 3, 1986

MEMORANDUM OPINION TO THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS

We have reviewed the provisions of S. 2214, "A bill to clarify that a civil penalty is the exclusive penalty for violations of the ethics in government act." We defer to other components of the Department on the desirability as a policy matter of making civil penalties the exclusive remedy for enforcing the provisions of the Ethics Act. However, we have serious objections to the provision of the bill that purports to make it effective "on the date of enactment of the Ethics in Government Act." We understand that this provision is intended by the sponsors of S. 2214 to have the effect, *inter alia*, of nullifying all criminal convictions under the Act since its passage in 1978.[1] We believe that Congress has no authority to enact such a measure, and in addition, that it would be an unconstitutional intrusion on the President's constitutional power to pardon.

Under Article II of the Constitution, the President has the power to "grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." U.S. Const. art. II, § 2, cl. 1. The President's constitutional pardon power is derived from, and has been interpreted in light of, the English Crown authority to alter and reduce punishments as it existed in 1787. *See generally Schick* v. *Reed*, 419 U.S. 256 (1974). The Presidential pardon power is multifaceted, and embraces a wide variety of acts that may relieve individu-

[1] We assume that the bill's "effective date" provision is also intended to effect the dismissal of all pending criminal investigations and prosecutions, as well as to estop any future ones. Our analysis here focuses only on the attempted legislative exoneration of persons *convicted* by judicial process of a crime under the Act.

Of course, if S. 2214 is intended to apply only where no government prosecution has been commenced, and not where an investigation or prosecution has been initiated or a conviction obtained, as a policy matter it would raise a serious question of disparate treatment.

als who have violated the law. A pardon may take the form of release from prison, remission of fines and forfeitures, commutation or alteration of a sentence, restoration of civil rights, dismissal of a prosecution, or a grant of immunity from prosecution. It may be absolute or conditional, and extended to a specific individual or to an entire class or community. It includes but is not limited to the power to grant amnesty or immunity from prosecution.[2]

By contrast, the Constitution gives Congress no authority to legislate a pardon for any particular individual or class of individuals. In the first case to be decided involving the President's pardon power, Chief Justice Marshall explained that a pardon is "an act of grace, *proceeding with the power entrusted with the execution of the laws*, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." *United States* v. *Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (emphasis supplied). Because the President's pardon power flows directly from the Constitution, it is not dependent on a legislative enactment, and cannot be infringed by Congress. *See Schick* v. *Reed*, 419 U.S. at 267; *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1872).[3] Although there is some support in the case law and historical precedent for congressional power in certain limited circumstances to effect the same result that would flow from an exercise of the President's pardon power, these circumstances are limited to those involving prospective grants of amnesty or immunity, or restoration of civil rights, to persons who have not yet been subjected to prosecution by the executive.[4] In no case we have found has Congress been held to have the power through self-executing legislation to grant relief in the form of remission of a prison sentence or monetary fine to individuals who have been convicted of violating a criminal statute.[5]

We know of only one previous occasion on which Congress has even attempted to legislate the release of convicted individuals. In S. 1145, a bill introduced in the 94th Congress to provide amnesty to persons who failed to register for the draft, included a provision directing the release from prison of

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[2] There has been considerable discussion of and confusion over the difference between pardon and amnesty. *See, e.g.*, Freeman, *A Historical Justification and Legal Basis for Amnesty Today*, 1971 Ariz. St. U. L.J. 515, 524–527 (1971). As a general matter, amnesty is understood as referring only to preprosecution relief extended to whole classes or communities. The relief available through the President's pardon power may of course include this anticipatory immunity or forgiveness, but is not so limited. *See United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) (President's power to offer amnesty to former rebels); 20 Op. Att'y Gen. 330 (1892) (President's power to extend general amnesty to persons residing in Utah who had been guilty of polygamy).

[3] Congress has been held to have the power to enact laws empowering executive officers other than the President (though responsible to him) to remit fines or penalties incurred for violations of the law. *See The Laura*, 114 U.S. 411 (1885).

[4] For example, in the post-Civil War period Congress enacted several pieces of legislation restoring civil rights to former rebels. Indeed, its power to take such action is specifically recognized in the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 3. In *Brown* v. *Walker*, 161 U.S. 593 (1896), the Supreme Court upheld a statute requiring witnesses subpoenaed in connection with Interstate Commerce Commission proceedings to testify in return for a grant of absolute immunity from any subsequent prosecution. *See Burdick* v. *United States*, 236 U.S. 79, 94 (1915), describing the "substantial" differences between "legislative immunity" and a Presidential pardon.

[5] A number of state courts have held that acts of general amnesty passed by the legislature are invalid as an invasion of the executive's pardoning power. *See* 20 Op. Att'y Gen. 330 (1892) (collecting cases).

persons convicted and serving a sentence for so failing to register. The Department testified in opposition to this legislation, taking the position that Congress has no power to effect release from prison, through legislation or otherwise, and that it may not encroach upon the President's power in this regard. *See* Memorandum from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel to the Assistant Attorney General, Criminal Division (May 13, 1975).[6]

In sum, insofar as S. 2214 would have the effect of voiding or modifying in any respect criminal penalties imposed as a result of violations of the Ethics in Government Act, we believe it exceeds Congress' power to legislate, and would be an unconstitutional intrusion on the President's pardon power.[7]

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

[6] This Office also objected on the same grounds to provisions of the bill granting immunity to those who failed to register and to deserters, requiring the dismissal of all pending legal proceedings against such persons, and allowing persons serving a term of reconciliation service pursuant to President Ford's Clemency Proclamation 8313 to be released from such service. We did not object to provisions of the bill that granted an honorable discharge to all such persons who had served in the armed forces, and restoring the citizenship of former citizens who had renounced their citizenship because of disapproval of United States involvement in Indochina. With respect to the latter act, we remarked that "[t]o restore the original citizenship of such persons may be an act of amnesty, but it is certainly not the constitutional equivalent of an Article II 'pardon.'" Memorandum from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel to the Assistant Attorney General, Criminal Division (May 13, 1975). As authority for such a legislative enactment, we cited Congress' plenary power over citizenship and naturalization under Article I, § 8, cl. 4 of the Constitution.

[7] It could also be argued that such legislation would infringe the courts' power to interpret and apply the law, and intrude upon the integrity of the judicial process. *Compare United States* v. *Klein*, 80 U.S. at 146–47 (legislation attempting to withdraw court's jurisdiction to consider the effect of a Presidential pardon infringes judicial power and violates principle of separation of powers) *with Ex Parte Grossman*, 267 U.S. 87 (1925) (upholding a Presidential pardon of a contempt of court against an argument that it violated separation of powers).

Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission

A part-time consultant for the Nuclear Regulatory Commission occupied a position of profit or trust under the United States such that he could not, consistent with the Emoluments Clause of the Constitution, accept employment with a private domestic corporation to perform work on a contract with a foreign government.

June 3, 1986

MEMORANDUM OPINION FOR THE GENERAL COUNSEL,
NUCLEAR REGULATORY COMMISSION

This responds to your request that this Office provide a written opinion giving the legal basis for our prior oral advice that Mr. A, a part-time staff consultant to the Nuclear Regulatory Commission (NRC), may not accept employment with a private domestic corporation to perform work on a contract with the government of Taiwan, consistent with the Emoluments Clause of the Constitution.[1]

At the time that you originally requested our advice on this matter, you informed us that the Taiwanese government must approve Mr. A's participation on this contract and that Mr. A would be paid by the corporation out of funds it receives from the contract. As you recognized, under prior opinions of this Office such an employment arrangement would appear to be proscribed, unless Mr. A does not hold an "office of profit or trust" within the meaning of the Emoluments Clause.[2] *See* "Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act," 6 Op. O.L.C. 156 (1982).

[1] The Emoluments Clause provides:

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

U.S. Const. art. I, § 9, cl. 8.

[2] It is well established that compensation for services performed for a foreign government constitutes an "emolument" for purposes of Article I, § 9, cl 8. *See* 40 Op. Att'y Gen. 513 (1947); 44 Comp Gen. 130 (1964).

In March 1985, we advised your office orally that this was a difficult question of constitutional analysis and that we would be unable to respond fully in writing in time for Mr. A to make a decision with regard to the proposed employment. We also indicated our preliminary conclusion that Mr. A did hold an "office of profit or trust" within the meaning of the Emoluments Clause, even though he worked for the NRC on a part-time basis only. We therefore suggested that he decline the Taiwanese government's offer of employment.

Based upon our recent thorough review of the history and purpose of this constitutional provision, we conclude that, in light of the nature of Mr. A's employment with the United States government, Mr. A holds an "office of profit or trust" within the meaning of that provision and that, therefore, he could not have accepted the proposed employment without the consent of Congress.[3]

I. History and Purpose of the Emoluments Clause

The Emoluments Clause, adopted unanimously at the Constitutional convention of 1787, was intended by the Framers to preserve the independence of foreign ministers and other officers of the United States from corruption and foreign influence. 3 Farrand, *The Records of the Federal Convention of 1787* 327; *see also* 2 Farrand, *supra*, at 389. As Governor Randolph explained during the ratification debate in the Virginia convention:

> [This] restriction restrains any persons in office from accepting of any present or emolument, title or office, from any foreign prince or state. This restriction is provided to prevent corruption. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. An accident which actually happened, operated in producing the restriction. A box was presented to our ambassador by the king of our allies.[4] It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding emoluments from foreign states. I believe, that if at that moment, when we were in harmony with the King of France, we had supposed he was corrupting our ambassador, it might have disturbed that confi-

[3] This opinion addresses only the constitutional issue under Article I, § 9, cl. 8. It does not purport to deal with any other statutory or regulatory restrictions that Mr. A's proposed employment may have implicated. We note, however, that you have expressed the view that the proposed employment would not have contravened NRC's conflict of interest regulations.

[4] "Dr. [Benjamin] Franklin is the person alluded to by Randolph. In the winter of 1756, in Philadelphia, under the roof of a venerable granddaughter of Dr. Franklin, I saw the beautiful portrait of Louis XVI, snuff-box size, presented by that king to the doctor. As the portrait is exactly such as is contained in the snuff-boxes presented by crowned heads, one of which I have seen, it is probable that this portrait of Louis was originally attached to the box in question, which has in the lapse of years been lost or given away by Dr. Franklin " H.B. Grigsby, *History of the Virginia Federal Convention of 1788* (Virginia Historical Society Collections, Vols. 9–10) 264.

> dence, and diminished that mutual friendship, which contributed to carry us through the war.

3 Farrand, *supra*, at 327. Although no court has yet construed the Emoluments Clause, its expansive language and underlying purpose, as explained by Governor Randolph, strongly suggest that it be given broad scope. Consistent with a broad interpretation, past Attorneys General have stated that the Clause is "directed against every kind of influence by foreign governments upon officers of the United States," 24 Op. Att'y Gen. 116, 117 (1902), in the absence of consent by Congress. 40 Op. Att'y Gen. 513 (1947). *See* 5 U.S.C. § 7342.

Prior opinions of this Office have assumed without discussion that the persons covered by the Emoluments Clause were "officers of the United States" in the sense used in the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.[5] Nevertheless, in 1982, we did advise that a person may hold an "office of profit or trust" under the Emoluments Clause without necessarily being an "officer of the United States" for purposes of the Appointments Clause. At that time, we explained that the language and the purposes of the two provisions are significantly different. The Appointments Clause, which is rooted in separation of powers principles, had been construed to require that "any appointee exercising significant authority pursuant to the laws of the United States" is an "officer of the United States" who must be appointed in the manner prescribed by Article II. *Buckley* v. *Valeo*, 424 U.S. 1, 124–37 (1976). Employees are "lesser functionaries" subordinate to officers. *Id.* By contrast, the Emoluments Clause is a prophylactic provision, and hence, was intended to apply not merely to those appointees exercising "significant authority" but to "lesser functionaries" as well. Thus, although the possibility of corruption and foreign influence of foreign ministers apparently was of particular concern to the Framers, they expressly chose not to limit the prohibition on accepting emoluments from foreign governments to foreign ministers. They recognized that such a prohibition was also necessary for other officials and, accordingly, drafted the Clause to require undivided loyalty from *all* persons holding offices of profit or trust under the United States.[6]

We believe that the relevant inquiry, therefore, is not whether Mr. A should be considered an "officer of the United States" in the Appointments Clause sense. Rather, under the Emoluments Clause, the inquiry is whether Mr. A's part-time position at the NRC could be characterized as one of profit or trust under the United States — a position requiring undivided loyalty to the United States government.

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[5] In prior memoranda, it was unnecessary for this Office directly to address the issue whether the Emoluments Clause applies to employees or "lesser functionaries," as well as officers.

[6] We also indicated in 1982, as support for this proposition, that in enacting the Foreign Gifts and Decorations Act of 1966, 5 U.S.C. § 7342, Congress assumed without discussion that the Emoluments Clause requires congressional consent before any government employee may accept a gift from a foreign government. *See* 6 Op. O.L.C. at 158. *See also* S. Rep. No. 1160, 89th Cong., 2d Sess. (1966); H.R. Rep. No. 2052, 89th Cong., 2d Sess. (1966). The Foreign Gifts and Decorations Act was extended in 1977 to apply to experts an consultants hired by the government under 5 U.S.C. § 3109. *See* 5 U.S.C. § 7342(a); S. Rep. No. 294, 95th Cong., 1st Sess. (1977).

II. Mr. A's Position

Although this Office expressed the view in 1982 that the Emoluments Clause applies to all government employees, *see* 6 Op. O.L.C. at 158, the clause need not be read so broadly to resolve the matter at hand. The information that you have provided concerning the nature of Mr. A's employment strongly suggests that Mr. A holds a position of trust within the meaning of the Emoluments Clause.

We understand that the NRC selected Mr. A on the basis of his personal qualifications and his particular expertise.[7] The NRC considered the renewal of Mr. A's appointment "essential to the conduct of the agency's mission." His assignments may involve high priority, quick turn-around issues, and the NRC furnishes him with various materials and documentation. Mr. A's position requires a security clearance, *see* 42 U.S.C. § 2165, and he is required to and has taken an oath of office. You have supplied us with a copy of the NRC's "Employment Conditions for Consultants and Advisers," which provides that Mr. A must conform to NRC policy and regulations regarding employee conduct, conflict of interest, non-disclosure of confidential information, and political activity. Mr. A is also required to report to the NRC any change in his private employment or financial interests. Finally, you note that he is "on call to serve the agency." All of these factors together indicate that Mr. A is highly valued for his abilities and that, in the course of his employment, he may develop or have access to sensitive and important, perhaps classified, information. Even without knowing more specifically the duties of his employment, these factors are a sufficient indication that the United States government has placed great trust in Mr. A and requires and expects his undivided loyalty. Therefore, we believe the Emoluments Clause applies to him.

Finally, we recognize that for purposes of the federal conflict-of-interest laws only, Mr. A is classified as a "special government employee." *See* 18 U.S.C. § 202. This classification, without more, however, does not exempt Mr. A from the constitutional prohibition in the Emoluments Clause. The legislative history of the conflict-of-interest laws reveals that Congress intended to create a category of special government employees for whom the restraints upon regular government employees would be relaxed. This category would permit the government to employ part-time or intermittent consultants with less difficulty. *See* H.R. Rep. No. 748, 87th Cong., 1st Sess. 4–5 (1961); S. Rep. No. 2213, 87th Cong., 2d Sess. 16 (1962) (individual views of Sen. Carroll). Nonetheless, special government employees are covered by broad prophylactic statutes which, like the Emoluments Clause, are aimed at preventing corruption and extra-government influence. For example, special government employees are included within the coverage of 18 U.S.C. § 207 (governing post-employ-

[7] *See* 15 Op. Att'y Gen. 187, 188 (1877) (Commissioners appointed by the President for the Centennial Exhibition hold offices of "trust" within the meaning of the Emoluments Clause, even though their duties are of a special and temporary character, because they have been entrusted with those duties "on account of their personal qualifications and fitness for the place.").

ment activities) and 18 U.S.C. § 208 (governing acts affecting a personal financial interest), as well as 18 U.S.C. §§ 203 and 205 in certain cases. The conflict-of-interest laws do not address whether a special government employee may accept simultaneous employment with a foreign government. We do not read 18 U.S.C. § 202 as an implied expression of congressional consent under the Emoluments Clause to such employment, particularly when, pursuant to that Clause, Congress has expressly consented to the acceptance of gifts of minimal value from foreign governments by all employees, including experts and consultants. *See* 5 U.S.C. § 7342.

In our view, the policy behind the Emoluments Clause, requiring the undivided loyalty of individuals occupying positions of trust under our government, has as much force with respect to part-time employees as it does with respect to full-time employees. Although we do not doubt that Mr. A is worthy of the trust placed in him by the NRC, we believe that his proposed employment with a domestic corporation on a contact with a foreign government is within the proscription of the Emoluments Clause.

Conclusion

For the foregoing reasons, we conclude that the Emoluments Clause of the Constitution prohibits Mr. A from accepting employment under a contract with a foreign government, absent express congressional consent.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements

New York City Local Law 19, which allows bidders who do not make the lowest bid to be awarded contracts in cases where the lowest bidder has not signed an anti-apartheid certificate, is incompatible with § 112 of the Federal Aid Highway Act, which requires that contracts for federally funded highway projects be awarded on the basis of competitive bidding. The Department of Transportation is therefore obligated to withhold funding for such contracts awarded subject to Local Law 19.

When Congress elects to distribute federal funds to states it may attach conditions to their distribution and, so long as those conditions are valid and clearly expressed, a state has no sovereign right to obtain or retain those federal funds without complying with the stated conditions. The Act's conditioning of federal highway construction grants on compliance with competitive bidding requirements is valid and clearly expressed.

By imposing disadvantages on a class of responsible contract bidders, Local Law 19 discourages responsible contractors from bidding and undermines the competitive bidding process. This departure from competitive bidding procedures was not justified by considerations of cost-effectiveness, as required by the Act.

June 30, 1986

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

I. Introduction and Summary

This memorandum responds to your request for the opinion of the Attorney General on the question whether the Secretary of Transportation must withhold approval for payments under the Federal Aid Highway Act (Act) for any contract which has been awarded pursuant to a bidding process subject to New York City Local Law 19 (Local Law 19).[1] Section 112 of the Federal Aid Highway Act of 1958, as amended, 23 U.S.C. § 112, requires the Secretary to withhold approval for contracts for locally administered highway construction projects funded in whole or in part by the federal government unless the contracts are awarded through competitive bidding.

The provisions of Local Law 19 impose certain disadvantages in the bidding process for city contracts on bidders who fail to sign an anti-apartheid certificate stating that they have not, within the previous twelve months and for the

[1] The Attorney General has delegated his responsibility for rendering opinions to government agencies to the Assistant Attorney General, Office of Legal Counsel. 28 C.F.R. § 0.25.

term of the impending contract, done business with, and have neither bought from nor sold goods to certain agencies of the government of the Republic of South Africa or Namibia. Moreover, in the case of a contract to supply goods, the City requires the contractor to certify that none of the goods to be supplied to the City originated in South Africa or Namibia. 13 N.Y.C. Code § 343.11.0(a).[2] These certification conditions are not required by any federal law or executive order.[3]

Section 343.11.0(b) provides that if a bidder complying with the anti-apartheid certification makes a bid no more than five percent higher than a low bid submitted by a non-complying contractor, both bids are to be passed on to the New York Board of Estimate which "may determine that it is in the public interest that the contract shall be awarded to other than the lowest responsible bidder."[4] New York City has declared that it will apply Local Law 19 to federally funded projects.

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[2] Section 343.11.0(a) provides:

> With respect to contracts described in subdivision b and c of this section, and in accordance with such provisions, no city agency shall contract for the supply of goods or services with any person who does not agree to stipulate to the following as material conditions of the contract if there is another person who will contract to supply goods or services of comparable quality at the comparable price:
>
> (1) that the contractor and its substantially owned subsidiaries have not within the twelve months prior to the award of such contact sold or agreed to sell, and shall not during the term of such contract sell or agree to sell, goods or services other than food or medical supplies directly to the following agencies of the South African government or directly to a corporation owned or controlled by such government and established expressly for the purpose of procuring such goods and services for such specific agencies: (a) the police, (b) the military, (c) the prison system, or (d) the department of cooperation and development; and
>
> (2) in the case of a contract to supply goods, that none of the goods to be supplied to the city originated in the Republic of South Africa or Namibia.

Although the term "comparable price" in this section is not defined, § 343.11.0(b) makes clear that an agency must refer any contract in which a complying bid is within five percent of a non-contract bid to the Board of Estimate, which will make the final decision as to its award.

[3] Executive Order No. 12532 forbids government agencies from providing export aid to corporations doing business in South Africa unless they certify that they are adhering to certain principles of nondiscrimination with respect to their employees. The order also forbids the supply of computers to certain South African agencies but contains no general prohibition against contracting with these agencies. *See* 21 Weekly Comp. Pres. Doc. at 1051–54 (Sept. 9, 1985).

[4] Section 343.11.0(b) provides:

> In the case of contracts subject to public letting under sealed bids pursuant to section 343 of the charter, whenever the lowest responsible bidder has not agreed to stipulate to the conditions set forth in subdivision a of this section and another bidder who has agreed to stipulate to such conditions has submitted a bid within five percent of the lowest responsible bid for a contract to supply goods or services of comparable quality, the contracting agency shall refer such bids to the board of estimate which, pursuant to such rules as it may adopt, and in accordance with subdivision b of section 343 of the charter, may determine that it is in the public interest that the contract shall be awarded to other than the lowest responsible bidder.

Section 343 of the N.Y.C. Charter requires a two-thirds vote and the approval of the corporation counsel and the comptroller before any such decision is made. New York City observes that § 343 of the charter applies to all contracts for goods and services exceeding $5,000 and thus allows the Board of Estimate to award contracts to contractors other than the low bidder regardless of the applicability of Local Law 19. Therefore, New York City argues, Local Law 19 cannot be deemed to violate § 112, because it does no more than refer certain contracts for consideration under a standing procedure to which the Secretary of Transportation has not heretofore objected. The short answer to this argument is that the Secretary is not disabled from

Continued

We conclude that application of Local Law 19 to federally funded highway projects administered by New York City would violate 23 U.S.C. § 112. Section 112 clearly reflects a congressional judgment that the efficient use of federal funds afforded by competitive bidding is to be the overriding objective of all procurement rules for federally funded highway projects, superseding any local interest in using federal funds to advance a local objective, however laudable, at the expense of efficiency. By imposing disadvantages on a class of responsible bidders, Local Law 19 distorts the process of competitive bidding in order to advance a local objective unrelated to the cost-effective use of federal funds. Accordingly, the Department of Transportation is obligated to withhold funding for highway construction contracts subject to Local Law 19.[5]

II. Analysis

Under the Supremacy Clause,[6] state or local action must give way to federal legislation passed pursuant to one of Congress' enumerated powers where the "act of Congress fairly interpreted is in actual conflict with the law of the State" or state subdivision. *Florida Lime & Avocado, Inc.* v. *Paul*, 373 U.S. 132, 142–43 (1963). It is well-settled that Congress, pursuant to its taxing and spending powers under Article I, § 8 of the Constitution, is authorized to disburse federal funds to the states for particular programs and to "fix the terms on which it shall disburse federal money." *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981). Accordingly, when Congress elects to distribute federal funds to states, it may attach conditions to their distribution. So long as the conditions are valid and clearly expressed, *id.*, "[r]equiring States to honor their obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). "If the conditions [are] valid, the State has no sovereign right to retain [federal] funds without complying with those conditions." *Id.* at 791.

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[4] (. . . continued)
challenging the application of a provision to federal contracts which has not been brought to her attention previously. While the issue of the legality of § 343, considered by itself, is not directly before us, we believe that its application to federally funded highway projects would raise many of the same issues as does application of Local Law 19. We note, however, that Local Law 19 is different from § 343 in that it singles out a specific group of contractors and declares that, in certain circumstances, their low bids *must* be referred to the Board of Estimate for potential disapproval. Therefore, the Secretary is wholly justified in being more concerned about Local Law 19 than § 343, because the latter does not single out a particular class of contracts for mandatory reference to the Board of Estimate.

[5] This Office has been informed that legislation is being considered by Congress that would direct the Secretary to approve payments under the Federal Aid Highway Act for contracts entered by New York City before October 1, 1986, regardless of the application of Local Law 19. The stated purpose of this legislation is to provide time for the Department of Justice to render an opinion on the issue of the legality of the application of Local Law 19 to federal programs. Our opinion, of course, considers the legality of Local Law 19 under existing federal law and does not purport to evaluate the effect of pending legislation on the Secretary's obligation or authority to withhold approval for New York City highway construction projects using federal funds.

[6] U.S. Const. art. VI, § 2.

The Supreme Court has specifically upheld Congress' attachment of conditions to the distribution of federal highway funds. In *Oklahoma* v. *United States Civil Service Comm'n*, 330 U.S. 127 (1947), the Court upheld a federal denial of highway funds to Oklahoma because of the state's failure to observe the requirements of the Hatch Act. Congress had conditioned states' receipt of federal highway funds on compliance with that Act. The Court stated: "While the United States is not concerned with, and has no power to regulate, local political activities of state officials, it does have the power to fix the terms upon which its money allotments to states shall be disbursed." *Id.* at 143.

New York City does not dispute that the competitive bidding conditions imposed by § 112 of the Federal Aid Highway Act are valid exercises of the congressional spending power and conditions which DOT is therefore obligated to enforce. Careful examination reveals that Local Law 19 is in clear conflict with these conditions.[7]

Section 112 applies to all highway projects using federal funds "where construction is to be performed by the State highway department or under its supervision." 23 U.S.C. § 112(b).[8] The first two sentences of § 112(b) provide:

> Construction of each project . . . shall be performed by contract awarded by competitive bidding, unless the State highway department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility.[9]

A version of this provision has governed the process for awarding highway contracts since 1954, when the Senate insisted on amending the Federal Aid

[7] Because our opinion rests on the actual conflict between Local Law 19 and 23 U.S.C. § 112, we need not reach the question whether application of Local Law 19 to federally funded projects impermissibly burdens foreign commerce or intrudes into a field of foreign affairs which is uniquely the concern of the federal government.

[8] Section 112(d) makes clear that the phrase "under [the] supervision [of the State highway department]" in § 112(a) is intended to make that section apply to local subdivisions, such as New York City, as well as to State highway departments. Section 112(d) provides:

> No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State highway department *or local subdivision of the State* without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(Emphasis added.)

[9] The last sentence of § 112(b) provides:

> No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder for a project, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

This sentence was added to the Federal Highway Act of 1968, Pub. L. No. 90–495, 82 Stat. 830 (1968), in order to assure that the federal requirements of equal employment opportunity mandated by Executive Order No. 11246 be advertised before the bidding so that contractors would know what was expected of them. *See* S. Rep. No. 1340, 90th Cong., 2d Sess. 16–18 (1968). The provision is manifestly not a *carte blanche* for the state to impose additional requirements of its own choosing unrelated to cost-effective use of federal funds. By the terms of this provision, any state requirement must be "otherwise lawful" and therefore cannot interfere with the competitive bidding requirement established by the first two sentences of the section.

Highway Act of 1954 to require competitive bidding "unless the Secretary finds some other method is in the public interest." Pub. L. No. 83–350, § 17, 68 Stat. 71 (1954).[10]

The Surface Transportation Assistance Act of 1982, Pub. L. No. 97–424, 96 Stat. 2106 (1983), strengthened the competitive bidding requirement by eliminating the public interest exception and imposing the current requirement that departures from competitive bidding be justified by a demonstration by the local highway department that the alternative is more cost-effective. The legislative report accompanying the amendment reflects the concern of Congress that cost-effectiveness be the only criterion by which to award contracts to responsible bidders for highway projects funded by the federal government. *See* H.R. Rep. No. 555, 97th Cong., 2d Sess. 11 (1982). The 1982 amendments therefore make clear that the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is to be tested.

Local Law 19 contravenes the clear requirement of § 112 that all contracts be awarded through a process of competitive bidding to the responsible bidder who submits the lowest bid; the local ordinance frustrates the manifest congressional mandate reflected in the statute and its legislative history to make the most cost-effective use of federal highway funds.[11] By imposing disadvantages on a certain class of contractors, New York City discourages responsible contractors from bidding and undermines the competitive bidding process.[12] New York City has failed to justify, as required by the statute, its departure from competitive bidding procedures by considerations of cost- effectiveness.[13]

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[10] The Senate proposed the amendment requiring competitive bidding. *See* S. Rep. No. 1093, 83d Cong , 2d Sess 14 (1954) (stating that the requirement is designed to prevent "collusion or any other action in restraint of free competitive bidding"). After the House acceded to the Senate amendments, one Senator hailed the bidding provision as one of the most important achievements of the entire bill. 100 Cong. Rec. 5124 (1954) (remarks of Sen. Gore).

[11] New York City argues that this congressional mandate is somehow undercut by 23 U.S.C § 145, which states:

> The authorization of the appropriation of Federal funds or their availability under this chapter will in no way infringe on the sovereign rights of the States to determine which projects will be financed. The provisions of this chapter provide for a federally-assisted State program.

A provision permitting states to choose their own projects obviously has no bearing on the issue of whether Congress has restricted the permissible procurement procedures for such projects in the interest of the cost-effective use of federal funds.

[12] There can be no doubt that an otherwise qualified contractor who fails to furnish an anti-apartheid certificate is still a "responsible" bidder. Local Law 19 itself acknowledges that the requirements of the anti-apartheid statute are not criteria of responsibility, because § 343.11.0(b) refers to "the lowest *responsible* bidder who has not agreed to [the anti-apartheid certificate]." (Emphasis added.)

[13] Indeed, because the primary purpose of the anti-apartheid certification requirement is "to send a message to the government of the Republic of South Africa and to encourage those who do business there to support change," *see* New York City Local Law 19, § 2, Local Law 19 is not designed to promote cost efficiency, but to express a well-justified abhorrence of apartheid. To be sure, the ordinance states that it "also seeks to protect the financial interest of the city by limiting the number of city contracts which may depend for their satisfaction on the internal security of South Africa, where relentless oppression has led to increasing civil disturbances, making sabotage of business interests and even revolution possible." Under certain circumstances, such considerations may very well affect the cost-effectiveness of a given contractual arrangement. New York City has not, however, provided the Secretary with any evidence for the proposition that a particular company's contractual agreement with an agency in South Africa will endanger an unrelated contractual agreement to be performed in New York City on a highway construction project.

New York City has attempted to defend the legality of its ordinance by observing that all contractors that have bid for its contracts have furnished the anti-apartheid certificate and that there is no evidence that any potential bidder would not be able to comply with the requirement. Thus, the City argues that its anti-apartheid certification requirement has not been shown to affect adversely the efficient use of federal funds. This argument is unavailing, however, because it attempts to reverse the burden of proof that § 112 requires to justify departures from competitive bidding. In order to satisfy this burden, New York City must demonstrate that its procedures lead to a more cost-effective use of federal funds; it cannot shift the burden to the Secretary of Transportation to demonstrate that the City's procedures detract from cost-effectiveness.[14]

Second, New York City argues that its ordinance does not violate § 112 because it is not an absolute bar to the award of contracts to contractors who submit the lowest bid for a project but fail to provide an anti-apartheid certificate. According to the provisions of Local Law 19, a non-complying bidder is awarded the contract unless a complying bidder is within five percent of the low bid. Moreover, New York City emphasizes that even when there is less than a five percent differential between a complying and non-complying bidder, the Board of Estimate must still vote by a two-thirds majority to award the contract to the complying bidder rather than the non-complying bidder. The short answer to this argument is that § 112 requires that the contracts be awarded through a process of competitive bidding, not simply that contracts be awarded by a process that may lead to the award of the contract to the lowest bidder. This distinction is important, because the knowledge that a contract will be awarded through a strict process of competitive bidding in itself contributes to the cost-effective use of federal funds by encouraging the submission of bids by contractors who might not otherwise participate. Conversely, a contractor's knowledge that he may submit the low bid and yet not win the contract would deter him from entering the bidding process and incurring bid preparation costs.[15] Only a process which strictly adheres to the competitive bidding requirement comports with Congress' overriding objective of cost-effective-

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[14] We do not read 28 C.F.R. § 635 108 as a decision by the Secretary through regulation to shoulder the burden of proof on the issue of cost-effectiveness. Section 635.108 provides:

> No procedure or requirement for prequalification or licensing of contractors will be approved which, in the judgment of the Federal Highway Administration, *may* operate to restrict competition, to prevent submission of a bid by, or to prohibit the consideration of a bid submitted by, any responsible contractor whether resident or nonresident of the state wherein the work is to be performed.

(Emphasis added.)

Because the administrator must still disapprove the procedure if the procedure may restrict competition (*i.e.*, has the potential to restrict competition), the burden of showing that the procedure does not restrict competition still rests with the locality.

[15] The contractor who does not sign the anti-apartheid certificate knows that in the event of a complying bid that is within five percent of his bid, he will have to persuade the Board of Estimate to award the contract to him, notwithstanding his refusal to comply. The rational bidder would therefore revise his price to reflect the costs associated with lobbying the Board of Estimate on this issue. Thus, even if the contract is awarded to the non-complying bidder, it is reasonable to expect that his bid would be higher than it would be without the application of Local Law 19.

ness by maximizing the number of contractors who will bid for the contract and increasing the likelihood that the contract will be let for the lowest possible price.[16]

Since the provisions of Local Law 19 conflict with the requirement of competitive bidding contained in § 112(b), it is clear that 23 U.S.C. § 112(d) requires the Secretary to withhold approval for contracts let subject to the provisions of Local Law 19.

For the foregoing reasons, we believe that the Secretary of Transportation is obligated to withhold federal funds under the Federal Aid Highway Act for the payment of contracts whose award is subject to the procurement provisions of Local Law 19.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[16] New York City's argument that the Secretary of Transportation may not disapprove contracts awarded under Local Law 19 until New York City actually withholds a contract from a low bidder under that ordinance merits a similar response. The Secretary is obligated to act when New York City's procurement procedures depart from the process of competitive bidding required by federal law, rather than when New York City declines to accept a low bid.

Nominations for Prospective Vacancies on the Supreme Court

Under Article II, § 2, cl. 2 of the Constitution, the appointment process for judges consists of three steps: nomination by the President, advice and consent of the Senate, and appointment by the President. A President may nominate, and the Senate may confirm, a person to an office in anticipation that the office will be vacant during the President's term of office. Confirmation without appointment does not confer any rights on the nominee; the President remains free to decide that he does not want to appoint a confirmed nominee. When the anticipated vacancy does not arise, no appointment of the confirmed nominee is possible..

July 9, 1986

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to your request for an opinion of this Office on whether the President may nominate, and the Senate may confirm, individuals for *prospective* vacancies on the Supreme Court. This issue arose in 1968 in connection with President Johnson's nominations of Justice Fortas to be Chief Justice and Judge Homer Thornberry of the Fifth Circuit to be Associate Justice. At that time, this Office prepared a legal opinion concluding that the President has the power to nominate, and the Senate has the power to confirm, in anticipation of a vacancy. *See* Department of Justice Memorandum re: Power of the President to Nominate and of the Senate to Confirm Mr. Justice Fortas to be Chief Justice and Judge Thornberry to be Associate Justice of the Supreme Court (July 11, 1968) (1968 Justice Department Memorandum), *reprinted in Hearings before the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., App. Ex. 1 (1968) (Hearings). We believe that the analysis and conclusion of the 1968 Justice Department Memorandum are still sound.

I. The Senate's Consideration of a Nominee for a Prospective Vacancy is Consistent With the Appointments Clause

A prospective vacancy on the Supreme Court arises when a Justice announces his or her intention to retire on a specific date, or upon the qualification of a successor.[1] A prospective vacancy also arises when an incumbent Justice is nominated for elevation to a higher position, *i.e.*, to be Chief Justice. In any of these instances, the President has the power to nominate, and the

[1] 28 U.S.C. § 371(b) provides in relevant part that "[t]he President shall appoint, by and with the consent of the Senate, a successor to a justice or judge who retires." This section does not prescribe the procedures or timetable for such appointments.

Senate the power to confirm, in anticipation of the vacancy. This practice is entirely consistent with the constitutional plan. In addition, it advances the important goal of continuity in judicial administration.

Article II, § 2, cl. 2 of the Constitution provides that the President shall:

> nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

As explained in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 153–57 (1803), the constitutional appointment process consists of three major steps: (1) the nomination by the President; (2) the Senate's advice and consent; and (3) the appointment by the President, of which the appointee's commission is merely the evidence. Each step is essential to assumption of authority by the officer or Justice, as the case may be. *Id.*[2] Thus, as a constitutional matter, nothing precludes the nomination and confirmation of a successor while the incumbent still holds office. Confirmation does not confer any rights on the nominee; the President remains free to decide that he does not want to make the appointment, which is not legally completed until the execution of the commission. *See, e.g.*, Memorandum for John D. Calhoun, Assistant Deputy Attorney General from Robert Kramer, Assistant Attorney General, Office of Legal Counsel (Apr. 7, 1960).

This practical interpretation of the Constitution is supported by a line of Supreme Court cases holding that appointment by and with the advice and consent of the Senate of a successor to a removable officer has the effect of displacing the incumbent. *Wallace* v. *United States*, 257 U.S. 541, 545 (1921); *Mullan* v. *United States*, 140 U.S. 240, 245–46 (1891); *McElrath* v. *United States*, 102 U.S. 426, 438–39 (1880); *Blake* v. *United States*, 103 U.S. 227, 236–37 (1880). In these cases, the Court assumed that the preliminary steps of nomination and confirmation to an office may take place before the office is vacant.

Consistent with this interpretation, the President may nominate, and the Senate may confirm, a person to an office in anticipation that the incumbent will be elevated to another office. If the Senate later fails to confirm the incumbent for his new position, thereby preventing the creation of a vacancy, the appointment, of course, cannot go forward. *See* Memorandum for the

[2] *See also* 4 Op. Att'y Gen. 217, 219–20 (1843):

> The nomination is not an appointment; nor is that nomination followed by the signification of the advice and consent of the Senate, that it should be made sufficient of themselves to confer upon a citizen an office under the constitution. They serve but to indicate the purpose of the President to appoint and the consent of the Senate that it should be effectuated. To give a public officer the power to act as such, an appointment must be made in pursuance of the previous nomination and advice and consent of the Senate, the commission issued being the evidence that the purpose of appointment signified by the nomination has not been changed.

See also 12 Op. Att'y Gen. 32, 41–42 (1866); 36 Op. Att'y Gen. 382, 384–85 (1931).

Acting Attorney General from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel (Oct. 25, 1966).[3]

III. Historical Practice Supports the Nomination and Consideration of Persons for Prospective Vacancies

In 1968, this Office set forth in detail the historical practice up to that time with regard to nominations of judges and Justices for prospective vacancies. For example, Justice Shiras submitted his resignation to take effect on February 24, 1903. On February 19, President Roosevelt nominated (a) Circuit Judge Day to be Associate Justice of the Supreme Court, *vice* Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, *vice* Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, *vice* Solicitor General Richards. All three nominations were confirmed on February 23, 1903, one day prior to the effective date of Justice Shiras' resignation. 34 *Journal of the Executive Proceedings of the Senate*, 202, 215 (hereinafter "*Journal*"). Similarly, on June 2, 1941, Chief Justice Hughes announced that he would retire from active service on July 1. 313 U.S. v (1941). On June 12, President Franklin Roosevelt nominated Associate Justice Stone to be Chief Justice, and Attorney General Robert H. Jackson "to be an Associate Justice of the Supreme Court, in place of Harlan F. Stone, this day nominated to be Chief Justice of the United States." 87 Cong. Rec. 5097 (1941). The Senate confirmed Chief Justice Stone's nomination on June 27, and Associate Justice Jackson's nomination on July 7, 1941. 314 U.S. iv (1941). *See generally* 1968 Justice Department Memorandum.

On several occasions since 1968, the President has simultaneously elevated a sitting judge and nominated his replacement. For example, on December 11, 1974, President Ford nominated Judge William J. Bauer of the Northern District of Illinois to replace Judge Otto Kerner on the Seventh Circuit. On the same day, the President also nominated Alfred Kirkland to the seat vacated by Judge Bauer's elevation. 116 *Journal* at 805; *see also* 118 *Journal* at 592.[4] Moreover, successors to district court judges who have been elevated to the court of appeals have frequently been nominated while the Senate is still considering the nomination of the incumbent. On December 15, 1970, while the Senate Judiciary Committee was considering the nomination of Judge Wallace Kent to the Sixth Circuit, President Nixon nominated Albert Engel to fill Judge Kent's seat on the district court for the Western District of Michigan. Judge Kent's elevation was approved a few days later. 112 *Journal* at 680, 682. *See also* 118 *Journal* at 335, 534, 655.[5]

[3] For example, the Senate confirmed Judge Harold H. Greene to be Chief Judge of the District of Columbia Court of General Sessions, *vice* Judge John Lewis Smith, Jr., two days before it confirmed Judge Smith to be a District Judge of the United States District Court for the District of Columbia. *See* 112 Cong. Rec. 27397, 28086 (1966).

[4] As another example, on August 26, 1976, President Ford nominated John T. Copenhaver, Jr., *vice* Judge Kenneth Hall, to the district court for the Southern District of West Virginia, and Judge Kenneth Hall, *vice* Judge John Field, Jr., to the United States Court of Appeals for the Fourth Circuit.

[5] Similarly, on August 4, 1976, President Ford nominated John H. Moor II, *vice* Judge Peter Fay of the Southern District of Florida, while the Senate Judiciary Committee was considering Judge Fay's elevation to the Fifth Circuit. Both nominees were approved by the Committee a few days later.

In the 1968 hearings on the nominations of Justice Fortas and Judge Thornberry, Senator Ervin objected to the practice of nominating individuals for vacancies that will not take effect until the qualification of a successor. He argued that Chief Justice Warren had made his retirement contingent on the Committee's confirmation of Justice Fortas as his successor,[6] and that, therefore, there was no vacancy for the Chief Justiceship.[7] Senator Ervin apparently believed that a vacancy occurs only upon the announcement that a Justice will resign as of a date certain. *See* Hearings at 13, 16, 22–24.[8] He expressed the fear that if the President can nominate, and the Senate can confirm, a Justice in the absence of an existing vacancy, the President and an "agreeable" Senate could appoint Justices to take the place of any sitting Justice at such time as the latter retired, resigned, or died. *See* Hearings at 15. To this concern, Attorney General Clark responded that the Constitution permitted the President to make nominations in anticipation of a specific vacancy, although not for positions that will become vacant after his term of office expires. *Id.* at 15–16.

In our view, the President's constitutional power to nominate Justices for anticipated vacancies is limited only by his term of office. A President should not be permitted, as a constitutional matter, to make a prospective nomination for a vacancy that shall occur after his term of office expires because such a power would encroach upon the appointment power of his successor. *See* Memorandum for John D. Calhoun, Assistant Deputy Attorney General from Robert Kramer, Assistant Attorney General, Office of Legal Counsel (Apr. 7, 1960) (citing state court cases). However, no such limitation exists, in the absence of a specific statutory prohibition, where the President nominates an individual for a vacancy which shall occur during his term of office.

Conclusion

For the above reasons, we perceive no constitutional impediment to nomination by the President, and confirmation by the Senate, of individuals for anticipated vacancies on the Supreme Court which shall occur during the President's term of office.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

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[6] President Johnson accepted Chief Justice Warren's retirement effective upon the confirmation of a successor — not Justice Fortas in particular — although he submitted the nomination of Justice Fortas to be Chief Justice on the same day. 114 Cong. Rec. 18790 (1968). Chief Justice Warren stated to the press that he would stay on as Chief Justice if Justice Fortas were not confirmed. Some Senators expressed concern that the Chief Justice should not be given the power to determine his successor by conditioning his retirement upon his successor's confirmation. *See* Hearings at 35.

[7] Some members of the Committee refused to question Judge Thornberry on the ground that there was no vacancy on the Court. *See* Hearings at 250–51. Senator Ervin, however, participated in the questioning. *Id.* at 256. When Justice Fortas' nomination to the Chief Justiceship was withdrawn in October 1968, after the Senate failed to end a filibuster preventing a vote on his elevation, the prospective vacancy for which President Johnson had nominated Judge Thornberry was eliminated.

[8] No one on the Senate Judiciary Committee in 1968 questioned the President's power to nominate in anticipation of a vacancy to occur on a date certain.

Funding of Grants by the National Institutes of Health

The National Institutes of Health may, consistent with 31 U.S.C. § 1502(a), fund an entire research grant out of a single fiscal year's appropriations regardless of how long it takes to complete the work under the grant.

February 11, 1986

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF HEALTH AND HUMAN SERVICES

This responds to the request of your Office for the Department of Justice's opinion whether the National Institutes of Health (NIH) may use the appropriation for one fiscal year to fund a grant when the work under the grant may take two or three fiscal years to complete, or whether NIH must fund each year's work from a separate appropriation. You have asked this question because the Comptroller General has concluded that:

> the executive branch plan to fund some 646 NIH research grants on a 3-year basis with fiscal year 1985 funds is unlawful, because in the absence of specific statutory authority, such actions violate 31 U.S.C. § 1502(a).[1]

For the reasons stated below, we believe GAO's conclusion that NIH may not lawfully fund grants on a multi-year basis is incorrect. We believe, based on the pertinent statutes as well as the principles articulated in prior Comptroller General opinions, that NIH may, under the circumstances outlined below, use the appropriation for one fiscal year to fund the entire cost of a grant made during that fiscal year, regardless of how long it takes to complete work under that grant.

I. Statutory Language

The Comptroller General's conclusion is based on 31 U.S.C. § 1502(a), which provides:

[1] Letter to Hon. Lowell Weicker, Jr., Chairman, Subcommittee on Labor, Health and Human Services, and Education of the Senate Committee on Appropriations from Milton J. Socolar, Office of the Comptroller General, General Accounting Office (GAO) (Mar. 18, 1985) (GAO letter).

> The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with § 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

The plain language of this provision does not support GAO's conclusion that NIH may not use funds appropriated for one fiscal year to pay for work to be done in subsequent years under a multi-year grant. Although 31 U.S.C. § 1502(a) makes no reference to grants, the statute does refer to "contracts," and NIH research grants are a form of contract, as GAO itself has previously recognized.[2] Thus, under § 1502(a), the balance of an appropriation "limited for obligation to a definite period" — such as a particular fiscal year — may be used to "complete grants properly made" within that fiscal year and properly obligated consistent with 31 U.S.C. § 1501.[3] In other words, § 1502(a) contains two requirements: first, that the grant be "properly made" within the fiscal year being charged and, second, that the grant be "obligated" — *i.e.*, recorded as an obligation — consistent with § 1501.

The second of these requirements — that a grant be properly obligated consistent with 31 U.S.C. § 1501 — has no bearing on the general question of NIH funding of multi-year grants, but rather concerns the handling of particular obligations. Moreover, the papers we have reviewed contain no suggestion that the particular NIH grants that gave rise to the NIH-GAO dispute were not obligated consistent with § 1501. Absent facts to the contrary, we assume that issuance of each NIH grant is supported by appropriate documentary evidence and authorized by statute.

We also do not believe that GAO's position is supported by the first requirement, *i.e.*, that each grant be "properly made" within the fiscal year charged. The plain meaning of this statutory language is that it must be proper for NIH to *make* the grant within the fiscal year charged. Applying this interpretation, we see no reason why NIH may not make a multi- year grant during the first year of the grant. Indeed, we do not understand GAO to argue that NIH may not

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[2] *See* 50 Comp. Gen. 470, 472 (1970) ("the acceptance of a grant . . creates a valid contract"). *See also* 62 Comp. Gen. 701, 702 (1983).

[3] Section 1501 states in pertinent part:

> (a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of —
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> * * *
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> (5) a grant or subsidy payable —
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> (A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law; [or]
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> * * *
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> (C) under plans approved consistent with and authorized by law . . . . There is no dispute that the NIH grants at issue here were obligated consistent with these requirements.

make such grants at that time, but only that NIH must spread the cost over the length of the grant. The plain meaning of the "properly made" language, however, does not require such cost spreading.[4]

II. The GAO's Traditional Analysis

We also believe that the conclusion expressed in the GAO letter does not follow from its own prior opinions. Over the years, GAO has added a gloss to § 1502, known as the *bona fide* need rule. As stated in *Principles of Federal Appropriations Law* (GAO 1982) (*Principles*), GAO has taken the position that "[a] fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide* need arising in the fiscal year for which the appropriation was made." *Id.* at 4–9. This principle would appear to require that a multi-year grant meet a *bona fide* need of the fiscal year whose appropriation is being charged.

The GAO letter states that the NIH grants were improperly made because the work done under them in subsequent years will not meet a *bona fide* need of fiscal year 1985. In arriving at this conclusion, GAO cites a series of cases involving funding for "continuous and recurring services [that] are needed on a year-to-year basis," such as repairs of typewriters and delivery of supplies. *Id.* at 6–7. However, as HHS points out:

> Without exception, th[e] decisions [cited by GAO] deal with the provision of materials and services of a routine and recurring nature that should appropriately be funded out of a current year appropriation. None of those decisions involved grants, and none dealt with a discrete project designed to meet a current need the accomplishment of which would take longer than a single fiscal year.

Id. at 6.

While relying on this strained analogy between grants for scientific study and routine office expenses,[5] the GAO letter makes no mention of its extensive body of opinions concerning the application of the *bona fide* need rule to contracts and grants that cannot be completed in one year. This body of opinions is summarized as follows in the GAO's *Principles*, *supra*, at 4–9, 4–10:

> *Bona fide* need questions [frequently] arise where a given transaction covers more than one fiscal year. In the typical situation, a contract is made (or attempted to be made) in one fiscal year, with performance and payment to extend at least in part into the

[4] GAO's position finds no support in case law. Moreover, former Attorneys General, in interpreting the predecessor statutes to § 1502, similarly reached the conclusion that balances of appropriations may be used "to pay dues upon contracts properly made within the former [fiscal] year, even if the contracts be not performed till within the latter or current year." 13 Op. Att'y Gen. 288, 291 (1870). *See also* 18 Op. Att'y Gen. 566, 569 (1887).

[5] The GAO letter itself recognizes the weakness of this analogy: "[W]e recognize that there are fundamental differences between a contract for materials or services and a research grant."

> following fiscal year. The issue is which fiscal year should be charged with the obligation. In this context, the rule is that, in order to obligate a fiscal year appropriation for payments to be made in a succeeding fiscal year, the contract imposing the obligation must have been made within the fiscal year sought to be charged, and the contract must have been made to meet a *bona fide* need of the fiscal year to be charged.
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> * * *
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> It follows from the above statement of the rule that there are situations in which performance or delivery can extend into a subsequent fiscal year with payment to be charged to the prior fiscal year, as long as the need arose in the fiscal year to be charged. This principle applies even though the funds are not to be disbursed and the exact amount owed by the Government cannot be determined until the subsequent fiscal year.

In deciding whether a contract should be charged to the fiscal year in which it is made, GAO has taken the following position:

> The fact that a contract covers a part of two fiscal years does not necessarily mean that payments thereunder are for splitting between the two fiscal years involved upon the basis of services actually performed during each fiscal year. *In fact, the general rule is that the fiscal year appropriation current at the time the contract is made is chargeable with payments under the contract, although performance thereunder may extend into the ensuing fiscal year.*

23 Comp. Gen. 370, 371 (1943) (emphasis added) (*quoted in Principles*, *supra*, at 4–13).

GAO has issued many opinions reiterating this "general rule." *See, e.g.*, 56 Comp. Gen. 351, 352 (1977); 50 Comp. Gen. 589, 591 (1971); 21 Comp. Gen. 822, 823–24 (1951); 20 Comp. Gen. 436, 437 (1941); 16 Comp. Gen. 37, 38 (1936). It has likewise made clear "that the question of whether to charge the appropriation current on the date the contract is made, or to charge the funds current at the time services are rendered, depends on whether the services are 'severable' or 'entire.'" *Principles*, at 4–13. Thus, the "determining factor" for whether a contract (or grant) for a multi-year project is "properly made" is whether the project "represent[s] a single undertaking" and should therefore be viewed as a single project. *Id.* at 4–14.[6] If it is, a *bona fide* need for the project arises in the first fiscal year, and that is the appropriation that should be charged.

The contract at issue in the 1943 opinion, quoted above, provides an example of a contract that was viewed by GAO as a single project. Under that contract,

[6] The GAO letter agrees that the fundamental issue is whether the grants are single research projects or are severable annual projects.

individuals were to prepare the ground, plant rubber-bearing plants, and bring them to harvest. GAO concluded that this contract:

> involved one undertaking, which although extending over a part of two fiscal years, nevertheless was determinable both as to the services needed and the price to be paid therefor at the time the contract was entered into. Such being the case, the fiscal year appropriation current at the time the contract was made was obligated for payments to be made thereunder.

23 Comp. Gen. at 371. GAO therefore rejected a Department of Agriculture voucher that would have divided the cost between the two fiscal years it took to complete the contract.

GAO opinions treating a variety of other contracts as single projects are also illustrative. For example, when the Government contracted in 1938 to have cattle inspected and slaughtered if infected with tuberculosis, GAO concluded that the 1938 appropriation should be charged for recompense paid to farmers for diseased animals found and slaughtered in later years. 18 Comp. Gen. 363 (1938). The need to test the animals arose in fiscal year 1938, and therefore any liability under the contract, regardless of when discovered, had to be charged to the 1938 appropriation. *Id.* at 365.

More recently, in 1980, GAO insisted that a 1977 appropriation be charged for the cost of printing a book for the Commission of Fine Arts even though the printing took three years, from 1977 to 1979. 59 Comp. Gen. 386, 387–88 (1980). GAO explicitly rejected the Commission's argument that the printing costs should be charged against the 1977, 1978, and 1979 GAO appropriations in proportion to the amount of work done each year. GAO said:

> [T]he fact that performance under a contract extends over more than one fiscal year does not mean that payments are to be split among the fiscal years on the basis of services actually performed. Rather, the general rule is that payments due under a Government contract are to be charged to the fiscal year appropriation current at the time the legal obligation arose; that is, the fiscal year in which a bona fide need for the goods or services arose and in which a valid contract or agreement was entered into.

59 Comp. Gen. at 387–88. *See also* 50 Comp. Gen. 589, 591–92 (1971) (lawyers hired for case must be GAO paid from the appropriation for the year in which they were hired, no matter how protracted the litigation); GAO Opinion B-141839–O.M. (May 2, 1960) (NIH contracts for cancer research with Stanford University are "an entire job" and must be paid out of appropriation for fiscal year in which contracts were signed, "even though the period of performance may extend beyond the fiscal year until the object thereof is accomplished."); 31 Comp. Gen. 608, 610 (1952) (FY 1952 appropriation reimbursing states for civil defense expenditures charged although states did

not buy equipment until subsequent years); 23 Comp. Gen. 82, 83 (1943) (FY 1942 appropriation charged although printing of legal opinions not completed until FY 1943); 21 Comp. Gen. 574, 577 (1941) (FY 1940 appropriation charged although telescopes not shipped until FY 1941); 20 Comp. Gen. 436 (1941) (FY 1940 appropriation charged for cost of move although move not completed until FY 1941).

This general rule has also been applied by GAO to grants. For example, GAO concluded in 1940 that all expenses incident to a fellowship granted to South Americans for the study of public health in the United States could be charged "to the fiscal-year appropriation current and available at the time the fellowship is awarded" even though the fellowship extended into the succeeding fiscal year and some expenses, such as travel and maintenance, would not be incurred until the next year. 20 Comp. Gen. 185, 189 (1940). *See also* GAO Opinion B-37609, 267 Manuscript Series 1039 (1943) (grants for cultural programs with South America);[7] GAO Opinion B-34477, 261 Manuscript Series 1960 (1943) (grants to Chinese professors for study in the United States);[8] 39 Comp. Gen. 317 (1959). In this last opinion, the National Science Foundation sought GAO's opinion on issues relating to the obligation of certain appropriations. GAO stated:

> It is explained in the letter that the major portion of funds appropriated to the National Science Foundation is obligated and expended in the form of grants to educational institutions for the purpose of conducting basic scientific research activities. It is stated — *and correctly so* — that such grants are administratively recorded as obligations at the time the funds are formally granted to the grantee by letter, and that there is no deobligation of any unexpended portion of the grants as of June 30 [the end of the fiscal year]. *See* 31 Comp. Gen. 608.

[7] The 1943 opinion states:

> By decision of April 3, 1942, B-2427, . . . it was held, in substance, that a grant of funds . . . constituted a legal obligation of the amount granted, even though the final obligation and expenditure for definite projects in the various American republics was [sic] to be accomplished by the said corporation in the following fiscal year. . . . In the said decision, it was stated:
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> > "Having in view the authority given by the Congress to the Coordinator to make grants . . . the conclusion appears justified that funds so granted . . . were not intended to remain subject to the fiscal year limitation of the appropriations from which the funds were derived, and that, insofar as concerns the Coordinator of Inter-American Affairs, such funds are legally obligated when formally granted to an authorized grantee. . . . *Cf.* 21 Comp. Gen. 498 "
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> * * *
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> [Y]our above-quoted letter appears to be so similar . . as to warrant a similar conclusion — that is, that funds formally granted or formally agreed to be furnished to an institution or facility . . . are legally obligated at the time of the said grant or agreement to grant and *properly may be made available and expended thereafter by the grantee institution or facility without regard to the fiscal year limitation of the appropriations from which the funds were derived.*

267 Manuscript Series at 1041, 1042 (citations omitted; emphasis added).

[8] "It should seem obvious that all expenses connected with the second phase of the program — the bringing of Chinese professors to this country — are chargeable to the funds in question [*i.e.*, to funds from the fiscal year in which the grant was made] . . . ." 261 Manuscript Series at 1963

39 Comp. Gen. at 318 (1959) (emphasis added). *See also* 48 Comp. Gen. 186, 190 (1968) (FY 1968 appropriation "would be the only appropriation legally available to pay amounts due the grantee as a result of any required upward adjustment" in later years); 20 Comp. Gen. 370, 373 (1941) (grants may be used to pay for courses extending over two fiscal years). GAO has embodied this rule for grants in *Principles*, *supra*:

> In order to properly obligate an appropriation for an assistance program, some action creating a definite liability against the appropriation must occur during the period of the obligational availability of the appropriation. In the case of grants, the obligating action will usually be the execution of a grant agreement.
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> * * *
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> Once the appropriation has been properly obligated, performance and the actual disbursement of funds may carry over beyond the period of obligational availability.

Id. at 13–16, 13–17 (citations omitted).

In sum, GAO's opinions and *Principles* hold that § 1502 permits contracts and grants to be charged against the appropriation for a single fiscal year even though payments may extend over more than one year. They also hold that a grant may meet the *bona fide* need of an agency for a single fiscal year, even though work under the grant extends over more than one year. Our review of § 1502 and of GAO's opinions thus leads us to conclude that GAO's recent determination that NIH may not fund multi-year grants from a single appropriation is incorrect.

You have also asked whether a certifying officer who does not follow the Comptroller General's opinion would be liable under 31 U.S.C. § 3528(a)(4).[9] We believe that he would not be liable as, in our view, 31 U.S.C. § 1502 permits NIH lawfully to charge the entire cost of a grant against the appropriation for the fiscal year in which the grant was made. Because payment of the grant is not illegal, the provisions of § 3528(a)(4) are not applicable, and we would so inform GAO if they referred the matter to this Department.

Finally, you have asked whether charging the grant to the appropriation for one fiscal year would violate the Anti-Deficiency Act, 31 U.S.C. § 1341.[10] As

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[9] That section provides.

> (a) A certifying official certifying a voucher is responsible for
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> * * *
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> (4) repaying a payment
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> (A) illegal, improper, or incorrect because of an inaccurate or misleading certificate;
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> (B) prohibited by law, or
>
> (C) that does not represent a legal obligation under the appropriation or fund involved

[10] 31 U.S.C. § 1341 provides in relevant part:

> (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.

we have concluded that charging the grant to the appropriation for a single fiscal year is lawful, we do not believe a grant official following our opinion would violate this section.

Conclusion

For the reasons stated above, we believe that NIH may charge the appropriation for a single fiscal year with the entire cost of a single grant.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Federal Equal Employment Opportunity Reporting Act of 1986

Legislation authorizing the Equal Employment Opportunity Commission (EEOC) to subpoena employees of federal agencies not in compliance with EEOC annual reporting requirements and to seek enforcement of such subpoenas in federal court would violate the doctrine of separation of powers by undercutting the President's power to provide a single voice for the Executive Branch in the enforcement of the laws.

One part of the Executive Branch may not sue another part, as there can be no case or controversy between agencies that are all subject to the direction and control of the President.

The proposed legislation's expansion of EEOC litigating authority would also undercut the Attorney General's ability to speak for the Executive Branch with a single voice in the courts.

August 12, 1986

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

This responds to your request for comments on §§ 4 and 5 of a draft bill, the Federal Equal Employment Opportunity Reporting Act of 1986 (Act).

The bill would require federal agencies to file annual reports with the Equal Employment Opportunity Commission (EEOC) demonstrating their compliance with several equal employment opportunity laws and affirmative action requirements. Sections 4 and 5 of the bill give the EEOC new authority to compel compliance with the reporting requirements. We have three objections to § 4.

First, § 4 authorizes the EEOC to issue a subpoena to any employee of the United States government and to seek enforcement of that subpoena in court.[1] *Id.* § 4(a)(2),(4). We believe the Department should oppose this provision. The issuance of a subpoena to another federal agency raises questions both of constitutionality and propriety. Fundamentally, the Department should oppose this provision because we believe that to permit the EEOC to seek enforcement

[1] The EEOC already has the authority to subpoena individuals being investigated. 42 U.S.C. § 2000e-9 (adopting investigative powers of the National Labor Relations Board, *see* 29 U.S.C. § 161). The EEOC has independent litigating authority. 42 U.S.C. § 2000e-4(b)(2).

of its subpoena in court is unconstitutional. The EEOC is an agency of the federal government, whose members are appointed by the President. 42 U.S.C. § 2000e-4(a). The Constitution provides for a tripartite system of government, with the President as the head of the Executive Branch. The President alone may speak for the unitary interests of that branch. As a result, one part of the Executive Branch may not sue another part; there can be no case or controversy between agencies that are subject to the direction and control of the same person.[2] Therefore, the EEOC may not be authorized to seek the aid of a court in enforcing compliance with its subpoena against another part of the Executive Branch.

As to matters of propriety, the terms of the draft bill indicate that the EEOC would most often issue these subpoenas to the heads of agencies, including, we must assume, cabinet officers. It would be awkward for such senior officials to decline to comply with an EEOC subpoena even on constitutional grounds without adverse publicity, and we do not think the Department should support a bill that would put them in that position.[3]

Second, we object to § 4 because it expands the EEOC's independent litigating authority by removing, for suits against federal employees, the present requirement in 42 U.S.C. § 2000e-4(b)(2) that the Attorney General conduct any EEOC litigation in the Supreme Court. Act, § 4(a)(2)(C). If the Executive Branch is to speak with a single voice to the courts, it is obviously imperative that it be represented in the Supreme Court by one individual — the Solicitor General. The importance of having central direction and control of the government's litigation underlies the Department's traditional resistance to any efforts to erode the Attorney General's litigating authority in the lower courts. The issue becomes even more important when the question is what position the Executive Branch will take before the Supreme Court. Thus, even if there were not constitutional objections to permitting the EEOC to sue a federal employee or agency, we believe that the Department should oppose permitting the EEOC to appear in the Supreme Court without direction from the Attorney General.

Third, we object to § 4 because it provides individuals with a private right of action to compel submission of a tardy agency report. If the EEOC does not issue a subpoena or sue to compel compliance with its subpoena, any employee of, applicant for employment with, or recognized labor organization of the noncomplying agency may sue the agency and collect attorney's fees if the suit is successful. *Id.* § 4(b). Normally, we would of course have no constitutional objection to a private cause of action established by law. We are concerned in this case, however, because § 4(b) essentially permits a third party to step into the EEOC's shoes to pursue a case which we believe it would be unconstitu-

[2] The courts have permitted a limited exception to this rule where it is clear that there is a justiciable case or controversy, usually evidenced by the presence of a truly adverse private party. "Proposed Tax Assessment Against the United States Postal Service," 1 Op. O.L.C. 79 (1977).

[3] Although styled as a command, a subpoena has no effect until a court issues an order directing that the parties comply with it. W. Gellhorn, C. Byse, & P. Strauss, *Administrative Law* 553–54 (1979).

tional for the EEOC to pursue on its own. We believe the Department should oppose the proposed private right of action unless § 4 is redrafted to eliminate our objections to the EEOC's role.

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

Assignment of Army Lawyers to the Department of Justice

The Department of Justice may appoint Army attorneys as special attorneys or Special Assistant United States Attorneys enabling them to perform litigation functions assigned by law to Department of Justice attorneys, provided, however, that the salaries and expenses of Army lawyers so serving must be paid from the Department's own appropriation.

The Department of Justice may use Army attorneys, performing the functions traditionally performed by "agency counsel," to assist the Department in its litigation functions; Army attorneys assisting the Department in this capacity may be paid with Army funds and need not be formally detailed to the Department.

The use of Army lawyers to assist the Department of Justice may violate the Posse Comitatus Act where they perform prosecutorial functions involving direct contact with civilians, unless such Army lawyers are detailed to the Department on a full-time basis and operate under the supervision of Department personnel.

August 22, 1986

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

You have asked for our opinion on the legal issues presented by a proposal to assign lawyers from the Army Judge Advocate General's Corps (JAGC) to the Department of Justice to assist in connection with certain litigation functions. As discussed in greater detail below, we believe that it would be permissible to implement most of the Army proposal, subject to certain conditions.

Our conclusions may be summarized as follows:

1. The Department of Justice may appoint JAGC attorneys as special attorneys or Special Assistant United States Attorneys under 28 U.S.C. §§ 515(b) or 543 so that they may perform litigation functions that are assigned by law to Department of Justice attorneys. If this is done, however, the salaries and expenses of the JAGC lawyers must be paid from the Department's own appropriation.

2. The Department of Justice may use JAGC attorneys to perform litigation functions traditionally performed by "agency counsel." When Army attorneys are functioning as agency counsel, they may be paid with Army funds, and no formal detail to the Department is necessary. The Department of the Army should determine in each case that it has authority to use its appropriation to assist in connection with particular litigation.

3. The Department may use JAGC lawyers to assist in preparing cases and in performing a number of other duties in connection with civil and criminal litigation under our responsibility, without raising issues under the Posse Comitatus Act. However, questions under the Posse Comitatus Act may be raised if military lawyers perform prosecutorial functions involving direct contact with civilians, unless such military lawyers are detailed to the Department on a full-time basis and operate under the supervision of departmental personnel.

II. The Army Proposal

The Army proposal has two components. The first component would involve full-time assignment of JAGC lawyers to the Civil and Criminal Divisions and various United States Attorneys offices for a period of six months to a year. This component of the program would be administered by Army Headquarters. Its purpose would be to "provide full time assistance" to Department of Justice lawyers in "areas requiring specialization, such as medical malpractice and contract fraud." JAGC lawyers would work under the "direct supervision" of Department of Justice attorneys and would function in both "agency counsel" and "trial attorney" capacity. The JAGC lawyer would prosecute or defend only cases "arising out of Army or Department of Defense activities."

The second component of the Army proposal "provides for the Army to furnish, on a part-time basis, Army attorneys to prosecute in U.S. District Court felonies occurring on the Army installation or to assist in defense of [certain] civil suits." This component of the Army proposal would not be administered by Army Headquarters but would be "dependent upon local arrangements between staff judge advocates or command counsel and U.S. Attorneys." JAGC attorneys would be appointed as Special Assistant United States Attorneys, pursuant to 28 U.S.C. § 543, and their duties would "essentially parallel" those of Assistant United States Attorneys. At the same time, they would "also simultaneously perform their normal duties as agency counsel."[1] The United States Attorney would train and supervise the JAGC attorneys in their duties as Special Assistants, and the JAGC lawyers would "work side-by-side" with an Assistant United States Attorney.

The purpose of the Army proposal is "to provide more and better assistance to the Department of Justice in representing Army interests" and, in the Army's view, the "two-component Army attorney program provides the Department of Justice with the best possible agency support while enabling us to better represent the Army."

It is not clear from the Army proposal exactly what duties could be assigned to JAGC attorneys under the first component of the proposal; in particular, it is not clear whether their duties would be such as to require their appointment as

[1] The Army proposal states that "[i]n effect, Special Assistants' duties are those usually performed by agency attorneys right up to the moment Special Assistants step into the courtroom as the primary representative of the United States."

an officer of the Department of Justice.[2] We assume from conversations we have had with Defense Department personnel that the Army proposal contemplates assignment of JAGC attorneys to handle the full range of prosecutorial responsibilities and would thus entail their appointment as Department of Justice attorneys. As discussed above, the second component of the Army proposal expressly provides for the appointment of JAGC lawyers as Special Assistant United States Attorneys to prosecute and defend both civil and criminal cases in the name of the United States.

II. Authority for the Department of Justice to Employ the Services of Outside Attorneys to Carry Out the Department's Exclusive Responsibilities

Section 516 of Title 28 reserves to officers of the Department of Justice the conduct of litigation in which the United States or one of its agencies is a party. A parallel section, 5 U.S.C. § 3106, provides that, except as otherwise authorized by law, an executive agency "may not employ an attorney . . . for the conduct of litigation in which the United States, an agency, or employee thereof is a party . . . but shall refer the matter to the Department of Justice." There is, however, clear statutory authority for the Department of Justice to use non-departmental attorneys to carry out the Department's litigating functions. As the Army proposal points out, 28 U.S.C. § 543 authorizes the Attorney General to appoint attorneys to assist the United States Attorneys "when the public interest so requires." This appointing authority is a general one, and extends both to the appointment of attorneys from other federal agencies, as well as from the private sector, as "Special Assistant United States Attorneys" to perform departmental duties.[3] Although this section would permit the appointment of attorneys from other agencies to carry out Department of Justice functions, it does not indicate which agency should bear the cost of their services.

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[2] Attorneys not employed by the Department of Justice must be appointed by the Attorney General as special attorneys in the Department in order to conduct litigation in the name of the United States. *See* 28 U.S.C. § 516 (reserving to "officers of the Department of Justice, under the direction of the Attorney General," the conduct of all litigation in which the United States is a party). *See also In re Persico*, 522 F.2d 41 (2d Cir. 1975); *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962). The United States Attorney Manual (USAM) recognizes that formal appointment is a prerequisite for "the participation in court proceedings by attorneys not employed by the Department of Justice." *See id.* at 9–2.162. *See also id.* at 1–14.300 ("non- department attorneys" must be appointed before they may conduct grand jury proceedings). In a 1979 opinion, this Office concluded that formal appointment as an attorney of the Department of Justice is necessary before a military lawyer may represent the United States in a judicial proceeding before a United States District Judge or Magistrate. *See* Memorandum from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel to William Tyson, Acting Director, Executive Office for United States Attorneys (Nov. 19, 1979) (1979 Opinion).

[3] Another general source of authority to appoint attorneys from other agencies to assist in carrying out the Department's litigating functions is 28 U.S.C. § 515(b), which authorizes the appointment of "special assistants to the Attorney General" or "special attorneys." Attorneys "specially appointed" under this provision may, when so directed by the Attorney General, "conduct any kind of legal proceeding, civil or criminal . . . which United States Attorneys are authorized by law to conduct." *Id.* § 516(a). Special attorneys appointed under this authority may not be paid an annual salary of more than $12,000. *Id.* § 516(b).

Guidance with respect to this question is provided by the Economy Act, 31 U.S.C. § 1535, and the principles of appropriations law on which it rests. The Economy Act provides in pertinent part:

> The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if —
>
> (1) amounts are available;
>
> (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
>
> (3) the agency or unit to fill the order is able to provide the ordered goods or services; and
>
> (4) the head of the agency decides ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.

31 U.S.C. § 1535(a). The agency ordering the services, including personnel services, must "promptly" provide reimbursement for their full cost to the agency providing them. 31 U.S.C. 1535(c).

In a recent, thorough examination of the application of the Economy Act to the detail or assignment of personnel from one federal agency to another, the Comptroller General clarified the question of reimbursement in connection with formal inter-agency details. 64 Comp. Gen. 370 (1985). After examining the legislative history of the Economy Act, the Comptroller General concluded that, except in limited circumstances, formal inter-agency details may not be made on a non-reimbursable basis. *Id.* at 380. As discussed in the legislative history, this conclusion is dictated by two generally applicable principles of federal appropriations law: (1) appropriations to an agency are limited to the purposes for which appropriated, 31 U.S.C. § 1301(a), which ordinarily do not include the performance of the assigned functions of other federal agencies; and (2) in the absence of express statutory authority, an agency may not augment its appropriation by using another agency's personnel to carry out its own programs. 64 Comp. Gen. at 377. The exceptions to this rule noted by the Comptroller General would generally not be applicable to the detail of personnel from our client agencies to perform duties that can only be performed by officers of the Department of Justice.[4] We believe that the Comptroller General's

[4] The Comptroller General's opinion recognized an exception for "a matter [that is] similar or related to matters ordinarily handled by the loaning agency and that will aid the loaning agency in accomplishing a purpose for which its appropriations are provided." 64 Comp. Gen. at 380. We do not think that this exception applies to the actual conduct of civilian litigation by JAGC lawyers because they do not ordinarily engage in this activity. Obviously, civilian cases that involve the military in some way may be said to "relate[ ] to matters

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interpretation of the Economy Act, although not legally binding on the Executive Branch, is correct.

Although the Economy Act may not be formally applicable to the appointment of attorneys from other agencies under 28 U.S.C. § 543, the same principles of appropriations law discussed above would require reimbursement from this Department's appropriations to the detailing agency.

Beyond the general authority for inter-agency details discussed in the foregoing paragraphs, we are aware of no more specific authority for the employment of personnel or funds from the Department of the Army to carry out litigating responsibilities assigned exclusively to this Department. Nor are we aware of any other generally applicable provision of law that would permit the Department to draw on the appropriation of another agency to carry out litigation functions that are by law assigned to this Department. Accordingly, if this Department is to use the services of assigned JAGC attorneys in place of its own attorneys, it can rely only on the general authority for inter-agency details in the Economy Act or on 28 U.S.C. § 543. In either event, the Department must reimburse the Army for the salaries and other expenses of the detailed personnel from its own appropriation.[5]

III. Authority of the Department of the Army to Use Its Appropriation to Assist with Litigation that Affects Its Mission and Interests

Although Army funds may not be used to do the work of the Justice Department, this is not to say that Army funds and personnel may not be used to assist the Department in performing its litigating functions. Even if Army funds are not available to conduct litigation independently of this Department, they may be used to provide litigation support services.[6] Assuming that Army funds are available to assist in the conduct of particular litigation,[7] we know of

[4] (Continued)
ordinarily handled by the [military]," but if the exception were read this broadly it would swallow up the rule. The Comptroller General's opinion also noted an exception for "details for brief periods when necessary services cannot be obtained, as a practical matter, by other means and the numbers of persons and cost involved are minimal." *Id.* at 381. This exception does not seem to apply here.

[5] When Congress enacts specific authority for one agency to assist another, through the detailing of personnel or otherwise, it generally also gives guidance on the reimbursement question. *See, e.g.*, 10 U.S.C. § 377 (giving the Secretary of Defense discretion to request reimbursement from civilian law enforcement agencies to which the Department of Defense provides assistance under this section); 49 U.S.C. § 324(c) (reimbursement for Defense Department personnel detailed to the Department of Transportation "as may be considered appropriate by the Secretary" of Transportation and the military department involved). This Office has previously analyzed the reimbursement provision of 10 U.S.C. § 377 at length. "Reimbursement for Defense Department Assistance to Civilian Law Enforcement Agencies," 6 Op. O.L.C. 464 (1982).

[6] Despite this Department's exclusive grant of litigating authority, we routinely call upon the attorneys of other agencies, especially those "client" agencies charged with administering the laws at issue in a particular piece of litigation, for assistance in what is commonly known as an "agency counsel" capacity. *See, e.g.*, Memorandum from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel to Acting Deputy Assistant Attorney General, Lands and Natural Resources Division (Dec. 18, 1978).

[7] Whether the Department of the Army has authority to expend its appropriation in connection with a particular piece of civilian litigation depends upon the circumstances. This is a question best addressed in the
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no reason why Army lawyers could not be assigned, on a full- or part-time basis, to provide such support services as may be appropriate and needed under the circumstances. As an opinion of this Office has previously recognized:

> Depending upon the nature of a case, this Department may call upon agency attorneys not only to provide factual material but also to draft pleadings, briefs and other papers. At times, in conjunction with attorneys of this Department, agency attorneys take part in judicial proceedings.

"Department of Justice — Transfer of Funds from Another Agency," 2 Op. O.L.C. 302, 303 (1978).

On the other hand, as discussed above, Army funds may not be used for activities that are reserved by statute to officers of the Department of Justice, such as the responsibility for conducting litigation. We realize that the line between conducting litigation and assisting in the conduct of litigation will be difficult to draw precisely, but the general rule that this Office has previously endorsed is that support services may be provided without reimbursement so long as this Department retains control over the conduct of litigation. 2 Op. O.L.C. at 303. The issue of which litigation expenses must be paid from this Department's appropriation and which may be borne by a client agency was examined in greater detail in a Memorandum of June 26, 1986 to the Director of Litigation Support, Civil Division, from the General Counsel, Justice Management Division. This memorandum notes that "in the absence of specific legislative guidance, substantial weight must be given the good faith judgments and practices of the Civil Division and its client agencies in determining whether specific expenses should be paid by the client agency or the Department of Justice."

IV. Posse Comitatus Act

The Posse Comitatus Act, 18 U.S.C. § 1385, may also restrict the use of JAGC lawyers by this Department. This Reconstruction Era statute makes it a criminal offense to use "any part of the Army or Air Force as a posse comitatus or otherwise to execute the law." The Posse Comitatus Act was intended to prevent persons subject to military law and discipline from directing commands to ordinary citizens.[8]

The Posse Comitatus Act has been interpreted to bar many uses of military personnel to assist in connection with civilian law enforcement activities,

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[7] (Continued)
first instance by the Army's own general counsel. We assume that the Army has authority to expend its funds on litigation support services in connection with cases involving such matters as Army procurement, challenges to Army regulations or practices, or damage claims against Army personnel acting in their official capacity.

[8] See 7 Cong. Rec. 3678–81, 4243–47 (1878). *See generally* Note, *The Posse Comitatus Act: Reconstruction Era Politics Reconsidered*, 13 Am. Crim. L. Rev. 703, 704–10 (1976); Meeks, *Illegal Law Enforcement: Aiding Civilian Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83, 89–93 (1975).

unless Congress has explicitly authorized such assistance. *See, e.g.*, Memorandum from Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel to the General Counsel, Department of Defense (Mar. 24, 1978). Assuming that the litigation of civil and criminal cases constitutes the "execution" of the law within the meaning of the Act, the legality of the use of JAGC lawyers by this Department to assist in carrying out its litigating functions would depend upon several factual questions, including the context in which such lawyers functioned and the specific activities in which they were engaged.

In a 1971 opinion of this Office, then-Assistant Attorney General Rehnquist discussed the applicability of the Posse Comitatus Act in connection with the deputization of military personnel to serve as security guards on civilian aircraft. Memorandum from William Rehnquist, Assistant Attorney General, Office of Legal Counsel to the Assistant General Counsel, Department of Defense (Sept. 30, 1971). That opinion concluded that the arrangement there at issue would not violate the Posse Comitatus Act because "individual members of the Armed Forces assigned to and subject to the exclusive orders of the Secretary of Transportation are not 'any part of the Army or Air Force' within the meaning of the Posse Comitatus Act." Under the reasoning of that opinion, we believe that the Posse Comitatus Act would not be implicated if JAGC lawyers were detailed on a full-time basis to the Department of Justice and functioned on a day-to-day basis in an entirely civilian capacity under the supervision of civilian personnel.

On the other hand, serious questions under the Posse Comitatus Act might be raised if military lawyers functioning under the usual military chain-of-command were assigned on a part-time basis to perform civilian law enforcement functions along with their regularly assigned military duties.[9] In order to minimize the risk of contravening this criminal statute pending further examination of the question presented, military lawyers who are not functioning in an entirely civilian environment should not be used to perform any prosecutorial function that involves direct contact with civilians in a law enforcement context, such as the interrogation of witnesses or a personal appearance in court.

SAMUEL A. ALITO, JR.
Deputy Assistant Attorney General
Office of Legal Counsel

[9] The Army proposal states that military lawyers assigned on a part-time basis to assist in connection with Justice Department litigation would be supervised by the United States Attorney and "work side-by-side" with an Assistant United States Attorney. However, it is our understanding that in at least some cases military lawyers would be based on a military installation some distance away from the United States Attorney's Office and would be working day-to-day under the direction and supervision of the installation's "command counsel." Unless close and continuous civilian supervision is maintained, it is difficult to see how the standards in the 1971 opinion could be met.

Application of the Mansfield Amendment to the Use of United States Military Personnel and Equipment to Assist Foreign Governments in Drug Enforcement Activities

The Mansfield Amendment to the Foreign Assistance Act provides that "no officer or employee of the United States may engage in or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts." 22 U.S.C. § 2291(c). Although the question of what constitutes a "direct police arrest action" within the meaning of the Amendment is not unambiguously answered by the language of the statute, the legislative history demonstrates that Congress was animated by concern that United States officers and employees not participate directly in joint drug raids with foreign authorities. The Amendment should therefore be understood to prohibit participation in narcotics control activity that would under normal circumstances be likely to lead to the arrest of foreign nationals. It does not prohibit involvement of United States officers in activities that would not ordinarily involve arrests.

September 18, 1986

MEMORANDUM FOR THE ATTORNEY GENERAL

This memorandum responds to your request for the views of this Office regarding the applicability of the Mansfield Amendment, 22 U.S.C. § 2291(c), to the use of United States military officers and equipment to assist foreign governments in their drug enforcement activities. You have also asked this Office to consider the possible statutory bases for using United States military personnel and equipment to assist in such operations.

The Mansfield Amendment provides that "no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts." The critical legal question raised by the Amendment is what constitutes a "direct police arrest action." The legislative history of the Amendment makes clear that Congress' central concern was that United States narcotics agents not participate in foreign drug raids and other law enforcement operations in which force was likely to be used. The standard employed by Congress for demarcating the scope of "direct police arrest action" under the Mansfield Amendment was whether the activity would, under normal circumstances, involve the arrest of individuals.

We believe the Amendment prohibits participation by United States officers in foreign anti-drug operations which typically involve arrests, such as drug

raids. Conversely, it does not in our judgment prohibit involvement of United States officers in activities that do not typically involve arrests, such as planning and preparing for a drug raid. Nor does it limit training of foreign agents, the provision of intelligence or equipment for drug operations, or participation in operations aimed solely at destroying drug crops or drug facilities where arrests are not expected.

The application of these general observations may raise difficult questions in the circumstances of any particular case.

The Mansfield Amendment to the Foreign Assistance Act provides as follows:

> (1) Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts. No such officer or employee may interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts without the written consent of such person. The provisions of this paragraph shall not apply to the activities of the United States Armed Forces in carrying out their responsibilities under applicable Status of Forces arrangements.
>
> (2) Paragraph (1) of this subsection shall not prohibit officers and employees of the United States from being present during direct police arrest actions with respect to narcotics control efforts in a foreign country to the extent that the Secretary of State and the government of that country agree to such an exemption. The Secretary of State shall report any such agreement to the Congress before the agreement takes effect.

22 U.S.C. § 2291(c). Before turning specifically to the questions you have raised about the applicability of the Mansfield Amendment, we address the congressional authorization for committing military personnel and equipment to assist in foreign anti-drug operations.

I. Statutory Basis in the Foreign Assistance Act for Providing United States Military Personnel and Equipment to Assist in Foreign Anti-Drug Activities

The Foreign Assistance Act authorizes the President to furnish United States personnel and material resources to assist foreign governments in the enforcement of their drug laws. Section 2291(a) of Title 22 (§ 481 of the Foreign Assistance Act)[1] stresses the necessity of international cooperation "to control the illicit cultivation, production, and smuggling of, trafficking in, and abuse of narcotic and psychotropic drugs," and declares that "international narcotics

[1] This authority and the related appropriations authority are often referred to by the section designation in the Foreign Assistance Act.

control programs" should include elimination of narcotics-producing crops as well as "suppression of the illicit manufacture of and traffic in narcotic and psychotropic drugs." Accordingly, § 2291(a) expressly authorizes the President "to conclude agreements with other countries to facilitate control of the production, processing, transportation, and distribution of narcotics." More importantly, this section provides:

> Notwithstanding any other provision of law, the President is authorized to furnish assistance to any country or international organization, on such terms and conditions as he may determine, for the control of narcotic and psychotropic drugs and other controlled substances.

Although the language of this section does not expressly refer to military assistance, we believe that the section clearly authorizes the President to provide such assistance. Unlike other provisions of the Foreign Assistance Act, which explicitly distinguish among "economic," "military," and "nonmilitary," assistance,[2] the language of § 2291(a) of the Act is not qualified, broadly allowing for all types of assistance "[n]otwithstanding any other provision of law" and "on such terms and conditions as [the President] may determine."[3] Indeed, § 2291(i) of Title 22 defines the term "United States assistance" explicitly to include military assistance.[4]

Finally, the language of the Mansfield Amendment itself makes clear that Congress contemplated the provision of military assistance to foreign narcotics control efforts. The Mansfield Amendment's prohibition on participation in any "direct police arrest action" applies to any "officer or employee" of the United States, which is defined under the Foreign Assistance Act to include "civilian personnel and members of the Armed Forces of the United States Government." *Id.* § 2403(j). Moreover, the Mansfield Amendment expressly

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[2] For example, 22 U.S.C. § 2382(b) instructs the Chief of the United States Diplomatic Mission in each country to make sure that the recommendations of other United States representatives "pertaining to military assistance (including civic action) and military education and training programs are coordinated with political and economic considerations." *See also id* § 2403(k).

[3] Prior to 1983, § 2291(a) of Title 22 allowed the President to "suspend . . . military assistance furnished *under this chapter* or any other Act" to any country if the President "determines that the government of such country has failed to take steps to prevent" drugs "produced or processed" in that country or "transported through such country" from entering the United States. (Emphasis added). Because the term "this chapter" includes a host of provisions authorizing foreign military assistance wholly unrelated to foreign anti-drug activities, the pre-1983 reference in § 2291(a) to "military assistance" cannot be read as a dispositive indication that Congress intended § 2291(a) to authorize the provision of American military assistance to foreign anti-drug efforts. Congress' reference in the pre-1983 version of § 2291(a) to "economic or military assistance," however, provides a strong indication that Congress knew how to distinguish among different types of assistance. It is thus difficult to escape the conclusion that Congress' unqualified use of the term "assistance" was intended to cover all forms of assistance, including military assistance. In 1983, § 2291(a) was amended to separate the provisions dealing with the President's power to suspend assistance to countries that do not take adequate steps to stem the illegal flow of narcotics to the United States. Pub L. No. 98-164, Title X, § 1003, 97 Stat. 1053 (1983); *see* 22 U.S.C. § 2291(h).

[4] Section 2291(i)(4) of Title 22 defines the term "United States assistance" to cover all forms of military assistance provided under the Foreign Assistance Act (with certain exceptions not relevant to this point, including an exception for "international narcotics control assistance").

excludes from its coverage "activities of the United States Armed Forces in carrying out their responsibilities under the applicable Status of Forces arrangements." 22 U.S.C. § 2291(c)(1). By implication, the use of United States armed forces personnel for activities other than Status of Forces arrangements[5] are thus covered by the Mansfield Amendment, and hence also within the positive authority granted to the President under § 2291(a).

Because the language of § 2291(a) contains no limitation on the type of assistance which the President can furnish to foreign governments to assist in their anti-drug activities, and because a broad reading of this authority is supported by the Mansfield Amendment and by other provisions of the Foreign Assistance Act, we conclude that the President has authority under the Act to furnish military assistance to foreign governments for such purposes.[7] The primary limitation on this authority is the Mansfield Amendment, to which we now turn.

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[5] Status of Forces Agreements (SOFAs) are treaties that prescribe the conditions and terms that control the status of forces sent by one State into the territory of another State. In particular, SOFAs avoid jurisdictional clashes whenever the military personnel of one country, assigned to peacetime duty within another country, commit criminal acts. *See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846. Thus, it makes sense that Congress would preclude such agreements from the scope of the Mansfield Amendment to allow the United States military to enforce United States (and perhaps foreign) drug laws, including arrests, against its own personnel serving a tour of duty in a foreign country.

[6] There may be difficult appropriations questions tied to the use of any particular authority. Assistance provided under § 2291(a) appears to be limited to funds authorized by Congress specifically for that foreign narcotics assistance program. Congress authorized appropriations of $57,529,000 for each of 1986 and 1987 "[t]o carry out the purposes of § 481." *See* Pub. L. No. 99-83, Title VI, § 602, 99 Stat. 228 (Aug. 8, 1985) (codified at 22 U.S.C § 2291a). Some limited funds from the Military Assistance Program (MAP) can be used to equip aircraft used for anti-drug operations under § 2291(a), but additional limitations in the form of notification of Congressional committees are attached to the use of these funds. Pub. L No. 99-83, 99 Stat. at 611 (codified at 22 U.S.C § 2311). Congress has placed other limitations on the use of the narcotics assistance funds provided under § 2291(a). Congress provided that appropriations made to carry out the purposes of § 2291(a) "shall not be made available for the procurement of weapons or ammunition." 22 U.S.C. § 2291b. The foreign narcotics assistance program developed under the authority of § 2291(a) is administered by the Secretary of State. Exec. Order. No. 12163, 44 Fed. Reg. 56678 (1979).

[7] Authority to use United States military resources to assist in foreign anti-drug activities may be found in other federal statutes as well. For example, 10 U.S.C. § 374(c) provides in part that "[i]n an emergency circumstance" United States military equipment, and personnel to operate and maintain it, "may be used outside the . . United States . . . as a base of operations by Federal law enforcement officials to facilitate the enforcement of [United States narcotics laws] and to transport such law enforcement officials in connection with such operations." This statute on its face contains a number of limitations on the provision of United States military assistance that do not apply to aid provided under § 2291(a). For example, under § 2291(a) United States military assistance may be provided in the absence of an "emergency circumstance" to facilitate the enforcement of foreign anti-drug laws, and it need not be to limited to use as a base of operations for federal law enforcement officials. In addition, United States military personnel furnished under 10 U.S.C. § 374(c) are prohibited from direct participation "in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation in such activity by such [personnel] is otherwise authorized by law." *Id.* § 375.

Under 21 U.S.C. § 873(b), the Attorney General is authorized to call on other federal agencies to furnish assistance in carrying out his responsibility to enforce United States narcotics laws. This provision allows the Attorney General to request assistance if that assistance is within the otherwise authorized capacity of the assisting agency. This provision, accordingly, does not authorize the Attorney General to request, nor a responding agency to provide, assistance in the enforcement of foreign anti-drug laws. This Office has

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II. The Mansfield Amendment

The Mansfield Amendment forbids United States officers and employees from "engag[ing] or participat[ing] in any direct police arrest action in any foreign country with respect to narcotics control efforts." 22 U.S.C. § 2291(c)(1). This statute was amended in 1985 to make clear that United States officers and employees may be present during such direct police arrest actions, so long as the Secretary of State and the government of the foreign country agree to such presence. *Id.* § 2291(c)(2).[8] Determining the nature and scope of the Mansfield Amendment's limitation on United States assistance to foreign anti-drug activities thus hinges on the meaning of the term "direct police arrest action."[9]

The use of the term "arrest *action*," rather than simply "arrest," suggests that Congress intended to bar more than just participation in an actual arrest by foreign law enforcement officers. Congress' use of the modifier "direct," however, suggests that it intended to prohibit only conduct closely related, in time and place, to an actual arrest. The language of the Mansfield Amendment thus suggests that Congress intended to include within the Amendment's prohibition more than just the arrest of suspects, but did not intend to include conduct, such as the planning and preparation for the law enforcement operation, that is not closely related to arrests. The Amendment's peculiar linguistic formulation — "direct police arrest action" — does not on its face clearly identify the line between prohibited and permissible conduct.

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[7] (. . . continued)
previously suggested that law enforcement operations conducted with assistance provided under § 873(b) must foreseeably lead to prosecutions under United States narcotics laws. *See* Memorandum to James I. Knapp, Deputy Assistant Attorney General, Criminal Division from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 18, 1984).

An additional positive source of authority to provide United States military resources to assist foreign governments in their anti-drug activities is § 22 U.S.C. § 2311 (§ 503 of the Foreign Assistance Act). That section authorizes the President "to furnish military assistance, on such terms and conditions as he may determine, to any friendly country . . . the assisting of which the President finds will strengthen the security of the United States and promote world peace . . . by . . . assigning or detailing members of the Armed Forces of the United States and other personnel of the Department of Defense to perform duties of a non-combatant nature." This provision is administered by the State Department, and it is our understanding that the State Department does not read § 2311 to authorize the provision of military assistance for purposes of foreign drug enforcement activities unless, perhaps, those activities are conducted by foreign military forces.

[8] This Office has been asked whether an "agreement to agree" to specific future operations satisfies the terms of the 1985 amendment to the Mansfield Amendment. This amendment allows United States officers to be *present* during arrest actions when the foreign government agrees, but it remains true that no officer may *engage or participate* in any direct police arrest action. The legislative history does not provide any explanation of the type of agreement required by the 1985 amendment. In the absence of further guidance, we assume from the language of the amendment that Congress meant to vest substantial discretion in the Secretary of State to develop such agreements. Thus it appears that oral agreements, for example, would satisfy the requirements of the amendment. Similarly, we assume that reports to Congress under the amendment may include notifying key committees that such agreements have been reached.

[9] The requirement that the direct arrest action relate to "narcotics control efforts" raises the question whether the Mansfield Amendment would apply to individual arrests since a single arrest might not be seen as part of a "narcotics control effort." It appears however, that an individual arrest, even though it might not necessarily relate to broader drug control efforts, is plainly within the Amendment's prohibition on participation in any "direct police arrest action." The Mansfield Amendment does not apply to arrest actions — or any other law enforcement action — not related to narcotics control efforts.

The legislative history of the Amendment provides useful insights. The Mansfield Amendment was proposed by Senator Mansfield after he had visited Southeast Asia in 1975 and had learned of the direct involvement of Drug Enforcement Administration (DEA) agents in Burmese and Thai anti-drug operations. Senator Mansfield was particularly critical of a "joint raid of an opium refinery" carried out by United States and Thai narcotics agents. *See* Report by Senator Mansfield, "Winds of Change: Evolving Relations and Interests in Southeast Asia," S. Rep. No. 382–38, 94th Cong., 1st Sess. 9 (Oct. 1975).[10] The origin of Senator Mansfield's particular concern in proposing the Mansfield Amendment — joint drug raids — suggests the framework for construing the meaning of "direct police arrest actions."

The Amendment as originally introduced provided that no United States officer or employee "may engage in any police action in any foreign country with respect to narcotics control efforts." 122 Cong. Rec. 2592 (1976). This language is both narrower and broader than the language eventually adopted. It is narrower in that it covers only officers who "engage" in certain actions, rather than those who "engage or participate." It is broader because it covers all "police actions" and not just "direct police arrest actions."[11]

In discussing the proposed Amendment on the Senate floor, Senator Mansfield emphasized his concern with "U.S. involvement in local drug raids." 122 Cong. Rec. 2592 (1976). He observed that United States agents "now participate in raids and other such activities alongside local police officials," and explained that his proposal would "put a limit on the extent to which U.S. personnel can participate" in such actions. *Id.*

Senator Percy, during debate on the initial version of the Amendment, noted that it "is designed solely to prevent American involvement where it is unnecessary to our own domestic drug law enforcement programs and where friction with foreign governments is likely to result." 122 Cong. Rec. 2591 (1976). In particular, according to Senator Percy, the Amendment "would prohibit United States narcotics agents operating abroad, whether by themselves or as members of teams involving the agents . . . of foreign governments, from engaging in actions where it is reasonably foreseeable that force will be used or an arrest of foreign nationals made." *Id.*

The legislative comments on the final version of the Amendment mirrored the concerns expressed by Senators Percy and Mansfield.[12] The Report by the House International Relations Committee on the final version noted that the provision was intended "to insure U.S. narcotics control efforts abroad are conducted in such a manner as to avoid involvement by U.S. personnel in

[10] Senator Mansfield considered local drug enforcement a "function of indigenous government." *See* Report by Senator Mansfield, "Winds of Change· Evolving Relations and Interests in Southeast Asia," S. Rep. No. 382–38, 94th Cong., 1st Sess. (1975).

[11] The Amendment as originally introduced was passed as part of the International Security Assistance and Arms Export Control Act of 1976, but this bill was vetoed by the President for reasons unrelated to the Mansfield Amendment.

[12] There is no indication in the legislative history that the shift in language between the initial and final versions of the Amendment reflected a change in the intentions of the measure's drafters and sponsors.

foreign police operations where violence or the use of force could reasonably be anticipated." H.R. Rep. No. 1144, 94th Cong., 2d Sess. 59 (1976).[13]

Joint drug raids provide the archetypical violation of Congress' desire that United States agents not participate in foreign law enforcement operations in which violence or the use of force is likely to occur.[14] Identifying participation in joint drug raids as the paradigm forbidden behavior, however, does not complete the necessary inquiry. It is still necessary to identify the point at which such raids, or "direct police arrest actions," begin and end. Here, too, the legislative history provides valuable assistance.[15]

The House International Relations Committee and the Senate Foreign Relations Committee both defined "arrest actions" to mean "any police action which, under normal circumstances, would involve the arrest of individuals whether or not arrests, in fact, are actually made." H.R. Rep. No. 1144, *supra*, at 55; S. Rep. No. 876, 94th Cong., 2d Sess. 61 (1976). *See also* 122 Cong. Rec. 2591 (1976) (remarks of Sen. Percy). This definition of "arrest action" makes clear Congress' intent to include more than the actual arrest of foreign nationals, but not to include activities which under normal circumstances would not involve such arrests. In the context of a drug raid, for example, the Mansfield Amendment would preclude the participation (though not presence)[16] of United States officers only in the raid itself, for only the actual raid would, under normal circumstances, involve arrests or the probable use of force. The Mansfield Amendment would not prohibit United States participation in any activity occurring before or after the raid, such as planning and preparing for the raid, or pre-positioning (including transportation) of foreign officers in the general vicinity of the raid target, because arrests do not normally occur during these

[13] Similar lines were drawn by the Senate Foreign Relations Committee on the initial version of the Amendment. *See* S. Rep. No. 605, 94th Cong., 2d Sess 55 (1976), *reprinted in part in* 122 Cong. Rec. 2592 (1976).

[14] Congress evidently believed that operations in which, under normal circumstances, arrests would be likely were also operations where violence or the use of force was likely.

[15] Similar boundaries on the participation of military personnel have been drawn for enforcement of domestic law under the Posse Comitatus Act. The Posse Comitatus Act, 18 U.S.C. § 1385, a Reconstruction era provision that was intended to prevent the participation of United States armed forces in the enforcement of domestic law, has been construed to permit civilian law enforcement agencies to use military equipment or receive training, and to permit military observers, but not to permit the use of military manpower in an active law enforcement role. In *United States* v. *Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1974), the court explained:

> Activities which constitute an active role in direct law enforcement are: arrest; seizure of evidence; search of a person, search of a building; investigation of a crime, interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities. Activities which constitute a passive role which might indirectly aid law enforcement are: mere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military material, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such material or equipment; aerial photographic reconnaissance flights and other like activities.

[16] As noted above, a 1985 amendment to the Mansfield Amendment specifically states that its prohibition should not be construed to forbid United States officers from being "present during direct police arrest action" in a foreign country if the Secretary of State and government of the foreign country reach an agreement to this effect. *See* Pub. L. No. 99–83, § 605, 99 Stat. 190, 229 (codified at 22 U.S.C. § 2291(c)(2)).

activities. Nor would supplying equipment, training, and intelligence for the raid violate the intent of Congress.[17] Similarly, participation of United States officers in foreign operations aimed at eradicating drug producing crops or drug processing facilities would not come within the Mansfield Amendment's prohibition if arrests are not likely to occur.

Conclusion

In enacting the Mansfield Amendment, Congress was animated by concern that United States officers not participate directly in joint drug raids with foreign authorities. Congress addressed this concern by prohibiting United States officers from personally participating, except as observers, in any activity which, under normal circumstances, would be likely to lead to the arrest of foreign nationals.[18] The Amendment was not intended to prohibit participation of United States officers in activities occurring before or after any such "arrest action." The application of these principles to specific cases may raise difficult questions.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[17] Congress made clear that the role of the foreign government in requesting United States assistance does not alter the boundaries on the behavior of United States officers in drug raids. Senator Percy explained the Amendment's "basic meaning" as preventing involvement in actions in which force would result "whether or not the host government in question has requested the participation of American agents." 122 Cong. Rec. 2592 (1976). The Senate Foreign Relations Committee Report on the original version noted that it was intended to prohibit involvement in actions involving the arrest of foreign nationals "whether unilaterally (acting on their own) or as members of teams involving agents or officials of other foreign governments." *Id.*; *see also* S. Rep. No. 605, 94th Cong., 2d Sess. (1976).

[18] The Department has previously considered efforts to repeal or amend the Mansfield Amendment to remove its restriction on United States anti-drug activities abroad. The President's Commission on Organized Crime has recommended that the Mansfield Amendment "be repealed in its entirety." Presidential Commission on Organized Crime, *America's Habits, Drug Abuse, Drug Trafficking, and Organized Crime* 468 (March 1986).

Department of Labor Jurisdiction to Investigate Certain Criminal Matters

The Attorney General may not delegate his authority to investigate labor crimes to the Secretary of Labor unless the Department of Labor has specific overlapping statutory authority to investigate those same offenses.

Section 601(a) of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 521(a), precludes the investigation of violations of § 302 of the Labor Management Relations Act, 29 U.S.C. § 186, by the Department of Labor.

Section 805(b) of the Comprehensive Crime Control Act of 1984, 29 U.S.C. § 1136, did not alter the limitations on Department of Labor investigatory authority set forth in § 601(a) of the LMRDA.

October 28, 1986

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

This memorandum responds to questions posed by the Criminal Division regarding the investigative jurisdiction of the Department of Labor over certain criminal matters. In response to a prior request from the Criminal Division, this Office recently opined that § 805(b) of the Comprehensive Crime Control Act of 1984, 29 U.S.C. § 1136, granted investigative jurisdiction to the Department of Labor over offenses related to pension funds and welfare benefit plans. Memorandum for Stephen S. Trott, Assistant Attorney General, Criminal Division from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (Aug. 29, 1986).

In a follow-up memorandum expanding the original request, the Criminal Division posed three additional questions that we address separately in this memorandum. We understand that these questions have arisen during the process of negotiating a Memorandum of Understanding (MOU) between this Department and the Department of Labor identifying their respective investigative and prosecutorial responsibilities. First, you have asked for our views on the general limits, if any, that apply to the power of the Attorney General to delegate his investigative authority to other agencies through an MOU or other means. The second issue you have asked us to address is whether the Labor Department's investigative authority under § 601(a) of the Labor Management Reporting and Disclosure Act (LMRDA) of 1959, 29 U.S.C. § 521(a), excludes investigations of violations of § 302 of the Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. § 186, and certain other offenses. Third, you

have inquired whether any limitation imposed by § 601(a) of the LMRDA was modified by § 805(b) of the Comprehensive Crime Control Act of 1984.

With respect to your inquiry concerning the general limitations on delegation of investigative power by the Attorney General, this Office has consistently taken the position that the Attorney General may not delegate criminal investigative authority to outside agencies in the absence of specific statutory authority. We are not aware of any specific authority that would alter that conclusion in the present case. Therefore, we believe that the Attorney General may not delegate his authority to investigate labor offenses unless the Department of Labor has specific overlapping statutory authority to investigate those same offenses.

On the second question regarding the construction of § 601(a) of the LMRDA, your Division has taken the position that this provision precludes the investigation of § 302 offenses by the Department of Labor. Although § 302 is somewhat cryptic, we agree with your interpretation.

Finally, we do not believe that the limitation imposed on the Department of Labor by § 601(a) of the LMRDA was altered by § 805(b) of the Comprehensive Crime Control Act of 1984. Section 302 of the Taft-Hartley Act is not related to the operation of pension funds or welfare benefit plans. Therefore, under the analysis in our prior memorandum, § 805(b) did not alter the limitation contained in section 601(a).

I. Background

Because these issues have arisen during MOU negotiations between this Department and the Department of Labor, we believe it is important to explain the role of prior agreements between these two departments governing the division of investigative responsibility over certain labor offenses.

Investigations into criminal matters relating to labor-management relations have been governed by a 1960 memorandum of understanding.[1] The 1960 MOU directed that cases investigated by the Department of Labor would be referred to the Criminal Division, and that all criminal prosecutions (as well as civil actions in the name of the Secretary of Labor) would be conducted by this Department. The MOU, however, made the division of investigative responsibility "subject to specific arrangements agreed upon by the Department of Justice and the Department of Labor on a case-by-case basis." For example, the MOU provided that this Department would investigate offenses under § 505 of the LMRDA, 29 U.S.C. § 186 (amending § 302 of the Taft-Hartley Act), but the MOU suggested that investigation of such matters could be delegated to the Department of Labor on a case-by-case basis.

[1] 25 Fed. Reg. 1708 (1960). A second MOU executed in 1975 divides responsibility for the investigation of certain ERISA offenses between the two departments. Memorandum of Understanding Between the Departments of Justice and Labor Relating to the Investigation and Prosecution of Crimes and Related Matters under Title I of the Employee Retirement Income Security Act of 1974 (Feb. 9, 1975). *See generally* Memorandum to Stephen S. Trott, Assistant Attorney General, Criminal Division from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 23, 1983).

As noted above, the Department of Labor and this Department are currently working on a new memorandum of understanding on this subject.[2] The MOU now being drafted can, of course, change or modify any agreement reached in the prior MOUs, so long as the provisions of the new MOU are consistent with legal constraints.[3] We now turn to the three specific legal issues that you have raised.

II. The Attorney General May Not Delegate Investigative Jurisdiction to Other Agencies Without Statutory Authority

You have asked whether there are limits on the Attorney General's authority to delegate his investigative powers either generally or on a case-by-case basis. This Department's general authority to undertake criminal investigations is conferred by 28 U.S.C. § 533, which provides that the Attorney General "may appoint officials . . . to detect and prosecute crimes against the United States."[4] In interpreting § 533, this Office has repeatedly recognized that this provision authorizes the Department of Justice to investigate all federal criminal violations, unless a particular statute specifically assigns exclusive investigative responsibility to another agency.

This Office has also consistently concluded that "[i]n the absence of any general provision of law permitting an agency to transfer its statutory authority to another agency, such transfers or delegations may normally be accomplished only by legislation or by executive reorganization under the Reorganization Act." "Litigation Authority of the Office of Federal Inspector, Alaska Natural Gas Transportation System," 4B Op. O.L.C. 820, 823 (1980). This principle, in our judgment, compels the conclusion that the Attorney General may not delegate this Department's investigative responsibility to another agency, just as he may not delegate this Department's litigating authority to another agency, unless specific legislation grants him this power.[5] In the present instance, we are not aware of any statute authorizing the delegation of Justice Department investigative authority to the Labor Department.[6]

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[2] We understand that the two departments have recently signed a new MOU that deals with cooperation and the provision of information but does not deal with issues of jurisdiction.

[3] Our analyses of the respective authorities of the Department of Labor and this Department are not meant to confer any rights on defendants. *See In re Application to Quash Grand Jury Subpoena Served Upon Local 806*, 384 F. Supp. 1304, 1306 (E.D.N.Y. 1974) (1960 MOU between Departments of Labor and Justice is not for the benefit of defendants).

[4] Pursuant to this authority, the Attorney General may delegate his statutory authority to persons within the Department of Justice.

[5] *See, e.g.*, 21 U.S.C. § 873(b). *See also* Memorandum for Stephen S. Trott, Assistant Attorney General, Criminal Division from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel (Nov. 8, 1985); Memorandum for Mark Richard, Deputy Assistant Attorney General, Criminal Division from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 12, 1984).

[6] Although the Attorney General may not delegate enforcement authority to other agencies, he may in some instances appoint members of other federal agencies as deputy marshals to aid in the enforcement of federal law. The analytical distinction between delegation of authority and deputation lies in the direct control

Continued

Although we have not found any statute authorizing such a delegation, we see no reason why the Attorney General could not enter into an agreement providing for the Labor Department to exercise primary investigative responsibility in an area of overlapping jurisdiction. Such an agreement, however, would depend upon the existence of a statute granting relevant investigative jurisdiction to the Labor Department.

In this connection, we note that the Criminal Division has directed our attention to three sources of independent criminal investigative authority possessed by the Department of Labor. The first of these, § 805(b) of the Comprehensive Crime Control Act of 1984, was analyzed in our prior memorandum. Congress has also expressly granted the Labor Department investigative jurisdiction in § 504 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1134, and in § 601 of the LMRDA, 29 U.S.C. § 521. You have asked for our views on the nature of the limitation imposed by § 601(a) of the LMRDA on Labor Department investigations of possible violations of § 302 of the Taft-Hartley Act, and on the question whether that limitation was altered by § 805(b) of the Comprehensive Crime Control Act of 1984. We now turn to these issues.

III. Section 601(a) of the LMRDA Does Not Authorize the Labor Department to Investigate Possible Violations of § 302 of the Taft-Hartley Act

As you note in your request, the original Taft-Hartley Act, which was enacted in 1947, did not assign any agency the responsibility for investigating violations of § 302. When Congress creates a crime but does not specifically assign investigative jurisdiction to any particular agency, the Attorney General has investigative jurisdiction under his general powers to "appoint officials . . . to detect and prosecute crimes against the United States." 28 U.S.C. § 533.

In § 601(a) of the LMRDA, enacted in 1959, Congress gave the Secretary of Labor investigative authority with respect to any violation of the LMRDA "except title I [relating to the protection of union members' rights by private civil action] *or amendments made by this Act to other statutes.*" Pub. L. No. 86–257, § 601(a), 73 Stat. 519, 539 (1959) (emphasis added). Among the statutory provisions amended by the LMRDA was 29 U.S.C. § 186, the codifi-

[6] (. . . *continued*)
maintained by the Attorney General (through the marshal) when an individual is deputized. The Attorney General is authorized to direct a marshal to assign a deputy to perform any special national police duty that is within the marshal's jurisdiction, whether by express provision or necessary implication. *In re Neagle*, 135 U.S. 1, 65 (1890). *See also* 28 U.S.C. §§ 562, 569(c), 28 C.F.R. § 0.111–12. Such deputations have been sharply restricted as an administrative matter by the Marshals Service, and numerous other legal considerations weigh against the use of this power to authorize agents of other agencies to enforce federal law. For example, special deputations might in some instances 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. *See, e.g.*, "Special Deputations of Private Citizens Providing Security to a Former Cabinet Member," 7 Op. O.L.C. 67 (1983).

cation of § 302 of the Taft-Hartley Act. *See* Pub. L. No. 86–257, § 505, 73 Stat. 519, 537 (1959). Thus, because Congress amended § 302 of the Taft-Hartley Act as part of the LMRDA, the language of § 601(a) clearly indicates that the Secretary of Labor does not have authority to investigate § 302 offenses.

The legislative history of § 601(a) does not contradict the plain meaning of the statutory language.[7] The bill passed by the House and sent to the conference committee directed the Secretary "to make an investigation" when he has probable cause to believe that any person has violated a provision of the act, other than title I." H.R. Rep. No. 741, 86th Cong., 1st Sess. 47 (1959) (report on H.R. 8342). The Senate bill rejected the probable cause requirement for investigations and made the investigative power permissive rather than mandatory. S. Rep. No. 187, 86th Cong., 1st Sess. 100 (1959) (report on S. 1555). Moreover, the Senate bill, unlike the House bill, excepted violations of the Taft-Hartley provisions from the Secretary of Labor's investigative authority. S. 1555, 86th Cong., 1st Sess. 21 (1959). The report of the Senate Labor Committee explained in clear terms that the bill excepted from the Secretary's investigative authority "amendments made in other statutes, such as the National Labor Relations Act [Taft-Hartley] or the Labor Management Relations Act, 1947." S. Rep. No. 187, *supra*, at 42.

The main dispute in the Conference Committee over the Secretary's investigative authority concerned the requirement of probable cause to investigate violations of the Act and the mandatory nature of the investigations in the House bill. *See* H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 36 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2508. The Conference Committee report did not even mention the restriction on investigations of Taft-Hartley offenses. *Id.* Instead, the Conference Report merely noted that the Conference adopted the Senate version "except that the investigation authority is permissive rather than mandatory, no investigation may be made with respect to violations of rules and regulations, and the investigation authority does not extend to title I." H.R. Conf. Rep. No. 1147, *supra*, at 36. Nevertheless, the Conference Committee included the Senate bill's exception pertaining to statutes amended by the act in the version of the bill reported out of the committee. *See* 105 Cong. Rec. 18115 (1959) (bill as reported out of conference committee).

The Taft-Hartley exclusion was explained briefly by Senator Goldwater on the floor of the Senate prior to final passage. Senator Goldwater noted that § 601(a) authorizes the Secretary to investigate violations of any provision of the act excluding "amendments made to Taft-Hartley." 105 Cong. Rec. 19768

[7] The National Labor Relations Board (NLRB) collected the legislative history of the LMRDA in 1959, and the Department of Labor published a selected legislative history in 1964. National Labor Relations Board, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* (1959); Department of Labor, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* (1964). The Bureau of National Affairs (BNA) also published an annotated legislative history in 1959. Bureau of National Affairs, *The Labor Reform Law* (Labor Management Reporting and Disclosure Act of 1959) (1959). *See also* A. McAdams, *Power and Politics in Labor Legislation* (1964).

(1959). Accordingly, it appears that the only explanation offered in the legislative history supports the plain language of section 601(a).

The change makes sense when the history of the act is considered.[8] The LMRDA resulted in part from over two years of detailed hearings by the McClellan Commission on American labor union practices and labor management relations.[9] The primary aim of the LMRDA was to establish reporting provisions to regulate and democratize the operation of the unions. *See, e.g.*, S. Rep. No. 187, 86th Cong., 1st Sess. 2 (1959). One of the key issues in the drafting process was whether the bill should include amendments to the Taft-Hartley Act which would entail changes in substantive provisions governing labor-management relations or whether such amendments should be left for a subsequent legislative effort. The Senate debated this issue at great length, with a substantial number of Senators arguing that the substance of labor-management relations involved a distinct set of issues that should not be allowed to fracture the broad consensus concerning the need for additional procedural (*i.e.*, reporting) requirements. *See, e.g.*, 105 Cong. Rec. 6131–32, 6239–40, 6281, 6285–92, 6296–6301, 6389–93, 6395–6400, 6409–11 (1959) (debating amendment to delete provisions amending Taft-Hartley). In the end, the Senate decided to include a handful of key amendments to Taft-Hartley in its version of the bill.[10]

This history makes sense of § 601(a) which, in effect, provided the Secretary of Labor with investigative authority over the heart of the 1959 Act — the new reporting and disclosure provisions — but not over the distinct substantive provisions governing labor management relations, which were amendments to provisions of the Taft-Hartley Act. Thus, what may seem on first impression to be awkward phraseology — "amendments made by this Act to other statutes" — in fact clearly identifies the set of provisions that altered the Taft-Hartley Act.

In sum, the legislative history does not suggest that the final language of § 601(a) was intended to mean anything other than the plain language suggests.

One additional issue that must be considered is whether § 607 of the LMRDA, 29 U.S.C. § 1136(a), can be read to provide additional investigative jurisdiction to the Department of Labor or to any other department. Section 607 gives the Secretary of Labor the power to "make . . . arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this Act and the functions of any such agency as he may find to be practicable and

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[8] The BNA legislative history of the LMRDA, published in 1959, explains that the exception for the Taft-Hartley amendments stemmed from the fact that the National Labor Relations Board (NLRB) or the Justice Department administered that act. Bureau of National Affairs, *supra* note 7, at 104.

[9] *See, e.g.*, S. Rep. No. 187, 86th Cong., 1st Sess. (1959) (bill designed "to correct the abuses which have crept into labor and management and which have been the subject of investigation by the Committee on Improper Activities in the Labor and Management field for the past several years"), *reprinted in* 1959 U.S.C.C.A.N. 2318. The McClellan hearings focused on corrupt labor practices in a handful of unions, notably by the Teamsters and their president, Jimmy Hoffa. S. Rep. No. 1417, 85th Cong., 2d Sess., Interim Report of the Senate Select Committee on Improper Activities in the Labor or Management Field (1958); S. Rep. No. 1210, 85th Cong., 2d Sess. (1958).

[10] Much of the eventual substance of the Taft-Hartley amendments was adopted from the House version by the conference committee. *See* H.R. Conf. Rep. No. 1147, *supra*, at 46, 49–75.

consistent with law."[11] The section also provides that "each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request." Finally, the section specifically directs the Attorney General to receive evidence from the Secretary of Labor and to take appropriate action.

In our view, § 607 does not provide a basis for expanding Labor's statutory jurisdiction. That section authorizes the Secretary of Labor to enter into arrangements or agreements to assist "in the performance of his functions *under this Act* and *the functions of any such agency . . . consistent with law.*" (Emphasis added.) We do not believe this language can be read to enlarge the scope of Labor's lawful functions. To be "consistent with law," the Secretary of Labor can exercise only that authority granted to him by statute. The 1960 MOU recognized that § 607 explicitly provided the Secretary of Labor with authority to make interagency agreements. In our view, the agreement reflected in the 1960 MOU did not necessarily eliminate permanently the investigative jurisdiction of the Labor Department in the areas assigned to this Department, but rather transferred that power to this Department based upon § 607 for as long as that agreement remains in effect.[12]

Thus, the 1960 MOU would not bar a different allocation of responsibility in a new MOU so long as the investigative jurisdiction falls within the investigative authority conferred by Congress in 1959 or since that time.

IV. Section 805(b) of the Comprehensive Crime Control Act of 1984 Did Not Alter § 601(a) of the LMRDA

Finally, we address the question whether Labor's lack of authority to investigate violations of § 302 of the Taft-Hartley Act was subsequently altered by § 805(b) of the Comprehensive Crime Control Act of 1984. We have already opined that § 805(b) provided investigative jurisdiction only over offenses related to pension funds and welfare benefit plans, and § 302 of the Taft-

[11] Section 607 of the LMRDA, provides in pertinent part:

> In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this Act and the function of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment to the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this Act. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of this Act or other Federal law.

29 U.S.C. § 1136(A)

[12] The 1960 MOU required "periodic reviews of this agreement to determine any adjustments which seem necessary based on experience under this Act." It is clear that the MOU envisioned the possibility of subsequent alteration in the division of authority recognized in the original agreement.

Hartley Act is not related to pension funds or welfare benefit plans. Therefore, § 805(b) did not, in our view, provide the Department of Labor with investigative jurisdiction over these offenses.

You have not suggested any other post-1959 statutory provision that might have expanded the investigative jurisdiction of the Department of Labor over § 302 offenses, and we have found no such provision in our independent research. In the absence of such a provision, it is our view that the Labor Department cannot investigate offenses under § 302.[13]

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[13] The 1960 MOU between the Labor Department and this Department describes § 302 of the Taft-Hartley Act, as amended by § 505 of the LMRDA of 1959, in the list of matters to be investigated by the FBI. As previously noted, the MOU provides that specific arrangements could be made on a case-by-case basis for investigation of § 302 violations by the Labor Department. You note that the Criminal Division held the view that such an agreement was acceptable based upon the belief that the Attorney General could delegate investigative authority over such offenses under 28 U.S.C. § 533. As explained above, we do not believe that the Attorney General can delegate such authority unless Congress has specifically given him power to make such a delegation or unless the agency to which that investigative authority would be delegated already has clear and express congressional authority to investigate those offenses.

Applicability of Fourth Amendment to use of Electronic Beepers in Tracking Bank Robbery Bait Money

The warrantless monitoring by law enforcement personnel of electronic beepers hidden in bait money robbed from a bank probably does not constitute a "search" implicating the Fourth Amendment, even after the beeper being monitored has been taken into a home.

One who has come into possession of beeper-monitored bank bait money by robbing a bank has no legitimate expectation of privacy in such money that would be violated by the beeper monitoring.

Although this form of beeper monitoring probably does not constitute a search implicating the Fourth Amendment, it was recommended that the FBI should continue its practice of seeking a warrant when that form of monitoring is undertaken. However, because exigent circumstances justify the FBI's practice of commencing beeper monitoring immediately when a baited bank is robbed, the FBI is not constitutionally required to refrain from monitoring the beeper until it has obtained a warrant.

December 5, 1986

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

This memorandum responds to your request for an opinion on the legality of the warrantless monitoring of beepers hidden in bank robbery bait money. This Office has concluded that such monitoring probably does not constitute a "search," even after a beeper has been taken into a home. Nevertheless, we recognize that a court subsequently may disagree with this interpretation of the Fourth Amendment. We therefore recommend that the FBI continue its current practice of seeking a warrant in every case.[1]

Before proceeding further, it is important to emphasize the narrow scope of the constitutional issue presented. The installation of the beeper in the bait money clearly does not implicate the Fourth Amendment rights of the prospective bank robber. Only the bank has a legitimate privacy interest in the bait money, and its consent to the installation would preclude any objection it might make. *United States* v. *Karo*, 468 U.S. 705, 711 (1984).[2] Similarly, the transfer of the beeper to the bank robber does not infringe upon his legitimate expecta-

[1] This Office has been advised that the FBI's general practice, upon being informed of a bank robbery in which a beeper was taken, is to seek a warrant as soon as it is reasonably practicable to do so.

[2] We assume that the installation occurs at the direction or suggestion or with the cooperation of government agents. Otherwise, of course, the Fourth Amendment would not apply because the Fourth Amendment does not govern private searches. *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984).

tion of privacy. *Id.* at 712.[3] Finally, even when government agents do begin monitoring a beeper that has been taken from a bank, there is no "search" if the information revealed could have been obtained through visual surveillance. *See United States* v. *Knotts*, 460 U.S. 276 (1983). Thus, the only time that the Fourth Amendment *might* be implicated by the monitoring of a beeper in bait money is when the beeper is taken into a place that could not be entered physically without a warrant.

In *Karo*, the Supreme Court held that using a beeper to locate a can of ether inside a house constituted a "search" because it "reveal[ed] a critical fact about the interior of the premises that the Government was extremely interested in knowing and that it could not have otherwise obtained without a warrant." 468 U.S. at 715. The Court analogized the electronic surveillance to a physical entry of the home:

> [H]ad a DEA agent thought it useful to enter the Taos residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house.

Id. If the Supreme Court were to carry this analogy to its logical extreme, of course, monitoring any beeper that has been taken into a residence would constitute a "search." Fortunately, there is reason to believe that the Supreme Court might not rely upon this analogy in the present situation. The *Karo* Court acknowledged that monitoring an electronic device in a home is "less intrusive than a full scale search." 468 U.S. at 715. More importantly, the Court suggested that a warrant to monitor a home electronically might be issued on the basis of "reasonable suspicion." *Id.* at 718–19 n.5.[4] This shows the imperfection of the Court's analogy, for if the Court had intended to equate the monitoring of a beeper in a private residence with the physical entry of the home, there would have been no justification for suggesting that a warrant might be issued to authorize the former in the absence of "probable cause."

Karo is best understood as holding simply that the electronic surveillance at issue there infringed upon "an expectation of privacy that society is prepared to

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[3] In *Karo*, 468 U.S. at 712, the Court explained:

> The mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest. It conveyed no information that Karo wished to keep private, for it conveyed no information at all. To be sure, it created a potential for an invasion of privacy, but we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.

[4] In *Karo*, it was unnecessary for the Court to decide what level of suspicion would justify the issuance of a warrant to monitor a beeper in a home. The Court said that there would be "time enough to resolve the probable cause/reasonable suspicion issue in a case that requires it." 468 U.S. at 718–19 n.5.

accept as reasonable." *United States* v. *Jacobsen*, 466 U.S. 109, 122 (1984). The can of ether to which the beeper was attached was not contraband, and it had been lawfully acquired. Thus, the respondent in *Karo* had a legitimate expectation of privacy in the fact that he possessed this item in his home. If the Court had reached a different conclusion, it would be constitutional for a government agent to attach a beeper to any item and to monitor it wherever it was taken.

This reasoning does not apply to a bank robber's possession of bank bait money. Unlike a person who has lawfully acquired a non-contraband item, a bank robber does not have a legitimate expectation that a beeper in a bait pack will not be monitored in his home. A "legitimate" expectation of privacy "must have a source outside of the Fourth Amendment, either by reference to real or personal property law or to understandings that are recognized and permitted by society." *Rakas* v. *Illinois*, 439 U.S. 128, 143–44 n.12 (1978). The beeper, of course, is attached to bait money that has been stolen from a bank. Neither property law nor any other "understanding" recognized by society protects an expectation of privacy relating to the location of such stolen money. Admittedly, it may be reasonable for the bank robber to assume that government authorities are not monitoring the location of a recently stolen bait pack, in much the same way that "a burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy." *United States* v. *Jacobsen*, 466 U.S. at 122–23 n.22. The Supreme Court has long recognized, however, that "the concept of an interest in privacy that society is prepared to recognize as reasonable is . . . critically different from the mere expectation . . . that certain facts will not come to the attention of authorities." *Id.* at 122.[5]

The Supreme Court's decision in *United States* v. *Jacobsen*, *supra*, bolsters the argument that monitoring a beeper attached to bank robbery bait money, even after the beeper is taken into a home, does not implicate the Fourth Amendment. In *Jacobsen*, the Court held that testing a white powder to determine whether it was cocaine did not constitute a search. Critical to the Court's decision was the fact that "[t]he field test at issue could disclose only one fact previously unknown to the agent — whether or not a suspicious white powder was cocaine." 466 U.S. at 122.[6] Because Congress had decided to "treat the interest in 'privately' possessing cocaine as illegitimate," *id.* at 123,

[5] In a number of cases antedating *United States* v. *Karo*, *supra*, courts found that monitoring beepers placed in stolen property and contraband did not constitute a "search" within the meaning of the Fourth Amendment. *See, e.g.*, *United States* v. *Bailey*, 628 F.2d 938, 944 (6th Cir. 1980) ("For Fourth Amendment purposes, there is a clear distinction between contraband and other property."); *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977) ("We and other courts have upheld the placing of beepers, without warrant, in contraband, stolen goods, and the like on the theory that the possessors of such articles have no legitimate expectation of privacy in substances which they have no right to possess at all."); *United States* v. *Perez*, 526 F.2d 859, 863 (5th Cir. 1976) ("a person who accepts an item of personal property in exchange for heroin has no reasonable expectation that it is cleansed of any device designed to uncover the tainted transaction or identify the parties").

[6] The Court pointed out that the field test could not even tell the government agent whether the substance was sugar or talcum powder. 466 U.S. at 109.

governmental conduct revealing only whether a substance was cocaine, and no other arguably "private" fact, compromised no legitimate privacy interest. *Jacobsen* suggests that monitoring a beeper placed in bank robbery bait money does not constitute a "search." Possession of money stolen from a bank, like possession of cocaine, has been made illegal, and therefore a bank robber's expectation of privacy relating solely to the location of this stolen money is illegitimate.

The Supreme Court's decision in *United States* v. *Place*, 462 U.S. 696 (1983), likewise suggests that the Constitution does not prohibit the warrantless monitoring of a beeper in a bait pack, even after it is taken into a home. In *Place*, the Court held that having a specially trained dog sniff personal luggage in order to determine whether it contains contraband does not constitute a "search." *Id.* at 707. There were twin rationales for the Court's decision. First, the canine sniff reveals only one thing about the contents of the suitcase, the presence or absence of contraband. Second, the limited nature of the search insures that the owner of the suitcase is not "subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods," such as having an officer "rummage through the contents of the luggage." *Id.* These two rationales imply that monitoring a beeper that has been taken into a home does not constitute a "search." Such monitoring reveals only one thing, the presence or absence of an item that is possessed illegally. Furthermore, like the owner of the suitcase in *Place*, the person from whose home the radio signals are emanating is not subjected to the embarrassment of more intrusive investigative methods, such as the physical entry of his residence.

Although this Office believes that monitoring a beeper that has been placed in bait money probably does not constitute a "search," we recommend that the FBI continue its current practice of seeking a warrant in every case. See *supra* note 1. This does not mean that the FBI should refrain from monitoring a beeper until it has obtained a warrant. When a bank is robbed, exigent circumstances justify the FBI's current practice of beginning immediately to monitor a beeper, even before a warrant is secured.[7] But while one or more agents are monitoring the beeper, another agent should be seeking a warrant as soon as it is reasonably practicable to do so.[8] This course of action will avoid the

[7] If the FBI were to locate a bait pack in a specific residence before it had been able to obtain a warrant, we feel certain that a court would hold that this "search," if it is indeed a "search," was justified by exigent circumstances. The warrantless entry of a home is justified if there is reason to believe that evidence will be destroyed or removed before a warrant can be secured. *See, e.g.*, *United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979); *United States* v *Rubin*, 474 F.2d 262 (3d Cir. 1973). Although the resolution of this issue depends upon varying factual circumstances, in most cases it will be reasonable for FBI agents to assume that if they do not locate the beeper immediately, it will be removed or destroyed. Moreover, it is important to remember that the "exigent circumstances" exception to the warrant requirement justifies the physical entry of a home. This Office believes that a court would be even more willing to find that exigent circumstances justify the "electronic entry" of a home without a warrant.

[8] The warrant issued need not describe the "place" to be searched. As the Supreme Court recognized in *United States* v. *Karo*, 468 U.S. at 719, "the location of the place is precisely what is sought to be discovered"

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unnecessary suppression of important evidence if a court subsequently disagrees with our constitutional analysis. We are confident that in the foreseeable future the issue will be resolved in litigation.

SAMUEL A. ALITO, JR.
Deputy Assistant Attorney General
Office of Legal Counsel

[8] (. . . continued)
through the monitoring of the beeper. Therefore, an agent applying for a warrant in such a case simply should describe the circumstances under which the bait pack was taken and the length of time for which beeper surveillance is requested. *See id.*

Constitutionality of Government Commission's Use of Logo Including an Historical Cross in its Design

The Christopher Columbus Quincentenary Commission's use of a logo consisting of the number 500 with a cross in one of the zeros, and a star in the other, does not violate the Establishment Clause of the First Amendment. The use of a cross with clear historical associations in the design of a government commission's logo is compatible with the Supreme Court's holding in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). Furthermore, the Establishment Clause does not require a *per se* rule against the inclusion of religious symbolism in government emblems.

December 9, 1986

MEMORAMDUN OPINION FOR THE ASSISTANT TO THE CHAIRMAN, CHRISTOPHER COLUMBUS QUINCENTENARY JUBILEE COMMISSION

This responds to your request for our opinion whether use by your Commission of either of two logos would violate the Establishment Clause. Each logo consists of the number 500 with a cross in one zero and a star in the other. The only relevant difference between the two logos is the design of the cross. In Design B, the cross is an exact replica of the one that appeared on "the flag of the green cross," which was presented to Columbus by Isabella of Castille and which Columbus carried at the masthead of his ships and hoisted over the island on which he landed on October 12, 1492.[1] Design A depicts a somewhat stylized version of the same cross, in red. For the reasons set forth below, we believe that either of the two designs would be acceptable.

In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the Supreme Court upheld municipal display of a creche as part of a city's Christmas observance. The Court held that celebrating Christmas and depicting its origins were legitimate secular purposes, *see id.* at 681, and that inclusion of the creche neither had the primary effect of advancing religion nor resulted in excessive entanglement between religion and government.[2] In *dicta*, the Court also noted the wide variety of "references to our religious heritage," including the Pledge of Allegiance and the National Motto "In God we Trust." *Id.* at 676. It concluded that "[a]ny notion that these symbols pose a real danger of establishment of a state church is farfetched indeed."[3]

[1] You indicate that the original cross of the green flag also displayed an F and a Y, for Fernando and Ysabel, but that these are omitted from the design of the logo.

[2] *Id.* at 685. Justice O'Connor concurred, and analyzed the question somewhat differently. For her, the creche was permissible because it was not intended to endorse religion and could not "fairly be understood to convey a message of government endorsement." *Id.* at 693 (O'Connor, J., concurring).

[3] *Id.* at 686. Justice O'Connor also referred to the National Motto, as well as to government proclamation of Thanksgiving, and the phrase "God save the United States and this honorable court." She said:

> Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Id. at 693 (O'Connor, J., concurring).

In our view, use of an obviously historical cross in an historically commemorative seal fits within both the holding and *dicta* of *Lynch*. The U.S. Court of Appeals for the Tenth Circuit's holding in *Board of County Commissioners of Bernalillo County* v. *Friedman*, 781 F.2d 777 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986), is not to the contrary. There, the court struck down a county seal containing a relatively large latin cross and the phrase "with this we conquer." In so doing, however, the court did not purport to establish a *per se* rule against religious symbolism in public emblems.[4] Quite the contrary, the court struck down the Bernalillo County seal on the facts of that case.

The court observed that there was no record of when or why the seal was adopted, or of what it was supposed to symbolize. However, the court found "highly persuasive" evidence "that the seal leads the average observer to the conclusion that the county government was 'advertising' the Catholic faith." 781 F.2d at 781. Even so, the court stated that some uses of the seal, such as "[u]se similar to a notary seal," might still be constitutional. *Id.* However, the county's practice of using the seal "on all county paperwork, on all county vehicles, even on county sheriff's uniforms" "pervaded the daily lives of county residents," and was thus unconstitutional. *Id.* at 782. The court distinguished *Lynch* on that basis, and also on the ground that the cross, unlike the creche, lacked a secular context.

Bernalillo County is therefore distinguishable on its facts. In the instant case, there will be a clear record of why the Commission chose to include a cross in its logo and its historical relationship to Columbus' voyage. Indeed, historical commemoration is the very *raison d'etre* of not only the logo, but of the Commission itself. The cross will play only a small role in the commemoration and could hardly be said to pervade the daily lives of citizens.

We therefore believe that inclusion of an obviously historical cross in the Commission's logo would not violate the Establishment Clause. The cross in Design B is historical and, in our view, constitutional. The more stylized cross in Design A is somewhat less obviously historical. A *red* cross is, of course, a less direct reference to the flag of the *green* cross. Nevertheless, its basic design is very nearly the same. Thus, we believe that either design would be permissible.

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

[4] Indeed, such a *per se* rule would be quite at odds with American history. As the Court noted in *Lynch*, *supra*, there is a long tradition of public use of religious symbols. In fact, the Great Seal of the United States is itself a religious symbol.

Enforcement by Federal Magistrates of Summonses Issued by the Federal Bureau of Investigation in Aid of Criminal Investigations and Foreign Intelligence Activities

Certain proposed legislation would have granted the Federal Bureau of Investigation power to issue summonses ordering the production of physical and documentary evidence in aid of federal criminal investigations and foreign intelligence activities. A provision of that legislation allowing United States magistrates to enter orders enforcing such summonses would raise problems under Article III of the Constitution, because it could entail the exercise of the judicial power by officials lacking life tenure and guaranteed non-diminution of compensation.

The Article III problems presented by the foregoing provision could be eliminated by providing that the magistrate's order would be treated as a report of findings and recommendations, subject to *de novo* review by a United States district judge with respect to findings and recommendations of the magistrate as to which objection is made by any party, whereby the judge could accept, reject, or modify the findings or recommendations of the magistrate.

A provision in the proposed legislation would permit the ex parte issuance of an order prohibiting disclosure of such FBI summonses upon a showing that such disclosure might endanger life or property; cause the flight of a suspect; result in the destruction of or tampering with evidence, or the intimidation of potential witnesses; or defeat federal remedies or penalties. Under the standard articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the absence of a predeprivation hearing in this provision would not appear to violate the requirements of the Due Process Clause.

December 11, 1986

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

You have requested the comments of this Office on a proposed bill to grant the Federal Bureau of Investigation the power to issue a summons to acquire physical and documentary evidence in aid of criminal investigations and foreign intelligence activities.

The authority will reside in the Director of the FBI, who may delegate it to supervisory level Special Agents. The summons must be issued in writing, must describe the materials sought with reasonable specificity, and must provide sufficient time to assemble and make available the materials requested. The Attorney General, in consultation with the Director of the FBI, is to promulgate regulations governing the issuance of a summons. Service of the summons on a natural person must be by personal service. For a corporation, partnership, or other association, service may be by personal service or by

registered or certified mail. Service may be national. United States District Courts have jurisdiction to enforce or to modify or vacate a summons on petition of the government or of the person served, respectively.[1] A magistrate or district judge may enter an order enforcing a summons or granting relief from a summons; disobedience of such an order is punishable by contempt. All petitions relating to foreign intelligence are to be heard in the Foreign Intelligence Surveillance Court.

The proposed bill contains certain limitations on summons authority, including a provision proscribing the required production of materials that could not be obtained under the standards governing a subpoena *duces tecum* issued in aid of a grand jury investigation. Finally, the bill allows a court, per a district judge or magistrate, to issue an *ex parte* order prohibiting disclosure of the existence of a summons where such disclosure would jeopardize life or physical safety or would interfere with various law enforcement objectives. Such an order may be challenged in district court, and a district judge or magistrate may set it aside or modify it. Where the Director of the FBI, a Special Agent, or a designated Assistant Special Agent certifies that the summons is being issued for foreign intelligence purposes, the statute prohibits disclosure of its existence. This prohibition against disclosure may be challenged in the Foreign Intelligence Surveillance Court.

This Office has comments with respect to three aspects of the bill. First, we believe that the provision allowing magistrates to enter final district court orders enforcing the summons poses a constitutional problem, because Article III requires that the judicial power of the United States be exercised by an official with life tenure and guaranteed non-diminution of compensation. Second, the non-disclosure provisions impinge on the summoned party's liberty interests and, therefore, raise questions about due process of law. Third, the provision limiting the request for materials to those obtainable under a subpoena *duces tecum* issued in aid of a grand jury investigation seems to be at odds with part of the rationale for proposing the legislation. We address each issue in turn.

I. The Use of Magistrates to Enforce the Summons

The proposed bill poses a potential constitutional problem with respect to the enforcement authority that it appears to confer upon United States magistrates. Insofar as § 1(d)(3) gives the district court "jurisdiction to hear and determine" a petition for enforcement of the administrative summons or for relief from the summons, no issue of constitutionality arises. Section 1(d)(3) continues, however, by stating: "The petition may be heard and an order entered by a district judge or United States Magistrate for the district in which the petition was filed. Any failure to obey the order of the court may be punished as a contempt

[1] Venue lies in the judicial district in which the summons is served, in which the investigation is pending, or in which the summoned person resides or carries on business or may be found.

thereof."[2] This provision appears on its face to empower United States magistrates to enter final orders of the district court, punishable by contempt of court. If so, any such attempt to delegate this inherently judicial function to a United States Magistrate, an office not endowed with the attributes of guaranteed nondiminution of salary or life tenure,[3] may run afoul of Article III's requirement that "the judicial Power of the United States" be exercised by judges with undiminishable compensation and tenure "during good Behaviour." U.S. Const. art. III, § 1.

The starting point for analysis is *ICC* v. *Brimson*, 154 U.S. 447 (1894), in which the parties against whom the agency had issued a summons resisted enforcement in federal court on the ground that permitting or requiring courts of the United States to "use their process in aid of inquiries before" a federal agency failed to meet the case or controversy requirement of Article III. *Id.* at 468. In rejecting this argument, the Court noted that Congress has the power to regulate interstate commerce and that it would "go far towards defeating the object" of giving Congress the commerce power if the Court held that Congress could not "establish an administrative body with authority . . . to call witnesses before it, and to require the production of books, documents, and papers . . . relating to the subject." *Id.* at 474. The *Brimson* Court found that Congress' use of the courts of the United States was an appropriate means to effectuate this power because

> [t]he inquiry whether a witness before [an agency] 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.

Id. at 485. Analogizing the enforcement proceedings to the prosecution of a person indicted under a statute requiring that person to appear or to produce certain materials, the Court further stated that "[t]he performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process." *Id.* at 487. In this vein, the Court added that summons enforcement involved "questions judicial

[2] This provision seems to apply equally to petitions for enforcement by the government and petitions for relief by the parties. The analysis with respect to both kinds of petition is the same, for the result of either petition will be an order enforcing the summons if valid and enforceable or an order denying enforcement if not.

[3] Under 28 U.S.C. § 631(e), a full-time magistrate has a term of eight years and a part-time magistrate serves for four years. A magistrate may be removed before the end of his term for "incompetency, misconduct, neglect of duty, or physical or mental disability" and a "magistrate's office may be terminated if the judicial conference determines that the services performed by his office are no longer needed." *Id.* § 631(i). Although 28 U.S.C. § 634(b) provides that "the salary of a full-time magistrate shall not be reduced, during the term in which he is serving, below the salary fixed for him at the beginning of that term," this guarantee is not of constitutional dimension, and Congress can revoke this provision simply by amending Title 28.

in their nature, and presented in the customary forms of judicial proceedings." *Id.* at 487.

Brimson's statement that the power to enforce an administrative summons cannot be committed to an administrative or executive "tribunal," created pursuant to Congress' Article I powers, necessarily suggests that such enforcement constitutes a part of the "judicial Power of the United States" and that only an official endowed with Article III's guarantees of undiminished compensation and tenure during "good Behavior" could constitutionally compel compliance with a summons. Given Congress' power to create Article I tribunals with significant judicial attributes short of these Article III characteristics, no other rationale for the Court's conclusion suggests itself. Indeed, the *Brimson* Court's explicit reliance on "our system of government" shows that the Court was employing a separation of powers analysis, which, insofar as it addressed the proper forum for "questions judicial in their nature," necessarily implicated Article III.[4] Thus, the *Brimson* Court's conclusion that the duty to obey a summons "cannot be enforced except by judicial process" must be taken as a constitutional pronouncement that commits such enforcement to Article III courts.[5]

Some lower courts have questioned the continuing vitality of this aspect of *Brimson*. For example, in *Federal Maritime Comm'n* v. *New York Terminal Conference*, 373 F.2d 424, 426 n.2 (2d Cir. 1967), Judge Friendly suggested that "Congress might well consider whether the long record of frustration 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." Presumably, Judge Friendly's conception of "less restrictive modern notions of the separation of powers" is a reference to the rise of the modern administrative state and the fact that it has now become a commonplace for Article I agencies to adjudicate so-called "public rights." *Cf. Atlantic Richfield Co.* v. *Dep't of Energy*, 769 F.2d 771, 793–94 (D.C. Cir. 1984) (relying on the advent of the modern administrative state and on the public rights doctrine to uphold the application of discovery sanctions by an agency in response to a party's disobeying a subpoena).

The concept of "public rights" is, at best, elusive and, at worst, unfathomable. The essence of the "public rights" doctrine is that Congress itself has the power to decide, or may delegate to an executive agency the authority to decide, "cases . . . which arise between the Government and private persons in connection with the performance of the constitutional functions of the execu-

[4] *Cf. In Re Groban*, 352 U.S. 330 (1957), in which the Supreme Court implied by way of *dictum* that a state executive officer could issue a subpoena and punish non-compliance by contempt. There is nothing to suggest that this dictum has any application to the federal level or otherwise limits *Brimson*.

[5] Some judges have suggested doubt as to whether *Brimson*'s pronouncements on summons enforcement were of constitutional magnitude. *See, e.g., Penfield Company of California* v. *Securities & Exchange Commission*, 330 U.S. 585, 603–04 (1947) (Frankfurter, J., joined by Jackson, J., dissenting); *United States* v. *Zuskar*, 237 F.2d 528, 533 (7th Cir. 1956) ("Since *Brimson* Congress has *customarily* provided for [the] resort to the courts by [administrative] agencies for orders compelling obedience to subpoenas.") (emphasis added). In light of *Brimson*'s reference to "our system of government" and to "due process of law" in announcing the principle that summons enforcement cannot be committed to an Article I tribunal, it is difficult to understand the basis for any such conclusion.

tive and legislative departments." *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932). Because Congress has plenary power to determine these "public rights" issues or to delegate their determination to executive officers, it may, therefore, also take the expedient of committing such determinations to Article I tribunals not meeting the dictates of Article III.[6] *Id.*

The theory that this doctrine undercuts *Brimson* presumably depends on the notion that, insofar as an agency summons relates to "public rights," Congress can commit its enforcement to a non-Article III tribunal. But because the "public rights" doctrine antedates *Brimson*, *see, e.g.*, *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856), and because the Court in *Brimson* recognized that the Interstate Commerce Commission's summons power related to matters of public rights, *see* 154 U.S. at 475–77, and nonetheless proclaimed that the enforcement of the Commission's summons could not be committed to a subordinate executive or legislative tribunal, *id.* at 485, any such theory must be dismissed. The *Brimson* Court, in fact, explicitly remarked that the legislative purpose for which the summons was sought did not affect the conclusion that summons enforcement was an inherently judicial function. *See id.* at 487 ("[The enforcement of a summons] is none the less the judgment of a judicial tribunal dealing with questions judicial in . . . nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid . . . the performance of duties legally imposed . . . by Congress in execution of . . . power granted by the Constitution.").

Thus, we conclude now, as we have concluded previously, *see, e.g.*, "Proposed Legislation to Grant Additional Power to the President's Commission on Organized Crime," 7 Op. O.L.C. 128 (1983), that *Brimson* remains good law, *see* 1 K. Davis, *Administrative Law Treatise* § 4:6, at 240 (2d ed. 1978), at least as to the enforcement of a summons through criminal penalties. There are apparent exceptions related to Congress,[7] the application of civil penalties,[8]

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[6] Although the concept of what constitutes a "public right" has undergone some recent expansion, *see Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 588–89 (1985) (holding that a dispute between private individuals may constitute a "public rights" case insofar as "Congress has the power, under Article I, to authorize an agency administering a complex statutory scheme to allocate costs and benefits among voluntary participants in the program"), the mere fact of its broader application cannot supply a principled basis for concluding that *Brimson* is no longer good law.

[7] Either House of Congress may compel documentary or oral testimony under pain of criminal contempt. *See Jurney* v. *MacCracken*, 294 U.S. 125, 148 (1935). The basis for this exception to the *Brimson* rule is rooted in the historical powers of the House of Commons, the colonial assemblies, the Continental Congress, and the state legislatures to mete out criminal punishment for contempt, *see id.* at 148–49, a practice that the Supreme Court upheld as constitutional as early as 1821. *See Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821). This power is narrow and limited to punishing acts that "obstruct the performance of the duties of the legislature." *Jurney*, 294 U.S. at 148. In effect, therefore, *Brimson* must be read as establishing a general rule that the use of criminal contempt to compel testimony for the implementation and enforcement of laws is inherently judicial and must be committed to an Article III court, but that Congress may, according to historical practice, itself use the powers of criminal contempt to safeguard the integrity of the legislative process as such. This limited exception, however, does not suggest that Congress may delegate to an Article I tribunal the power to enforce compelled production of testimony by citing persons for criminal contempt.

[8] With respect to civil penalties, the Supreme Court has sustained schemes in which "Congress has . . . created new statutory obligations, provided for civil penalties for their violation, and committed exclusively

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and various monetary claims enforceable in certain Article I courts of limited jurisdiction where the party presumably consents to a waiver of his right to an Article III forum.[9]

The ability of a magistrate under the proposed legislation to enter a final judgment enforcing a summons poses a potential constitutional objection precisely because it exposes the summoned party to possible criminal contempt before any Article III determination of his or her right not to have the summons enforced.[10] Under the proposed legislation, a non-Article III magistrate may initially determine the validity of the summons in light of whatever constitutional or other objections the party may assert.[11] At that point, if the magistrate enters a final order of the district court directing the party to comply with the summons and to produce the "books, records, papers, documents, or other tangible things" that may be reached by § 1(a) of the proposed bill, two choices exist. The party can seek appellate review of this final order of the court, perhaps asking for a stay of the order, or the party can disobey the order and risk a citation for contempt in district court. Neither option preserves the party's right to resist enforcement of a summons in an Article III court without incurring criminal liability.

If the party seeks appellate review, the Article III appellate court does not conduct a *de novo* review of the magistrate's order, but applies a less searching standard of review. *See, e.g., FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 (D.C. Cir. 1985) (upholding a district court's findings in a civil action because they were not "clearly erroneous"). In these circumstances, there will be no determination by an Article III tribunal of the enforceability of the summons, but merely a determination of the adequacy of the non-Article III magistrate's conclusions in that regard.

By the same token, if the party chooses to disobey the magistrate's order, the magistrate can secure a contempt citation against the recalcitrant party by

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[8] (. . . continued)
to an administrative agency the function of deciding whether a violation has . . . occurred." *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977). Thus, in asserting the continuing vitality of the "well-established principle" that Article I tribunals do not have the power to enforce a summons "'by a judgment of fine or imprisonment,'" *see Atlantic Richfield Co.* v. *Dep't of Energy*, 769 F.2d 771, 793 (D.C. Cir. 1984), it appears necessary to append the caveat that this principle is limited to matters involving enforcement through criminal contempt. *But see NLRB* v. *International Medication Systems Ltd.*, 640 F.2d 1110, 1115–16 (9th Cir. 1981) (holding that, because *Brimson* requires that "challenges to agency subpoenas . . . be resolved by the judiciary before compliance can be compelled," an agency cannot apply discovery sanctions in response to a party's refusal to comply with a subpoena).

[9] *See, e.g.*, 26 U.S.C. § 7456(e) (Tax Court).

[10] The following analysis assumes that § 1(d)(3) of the bill does not actually permit the magistrate to cite the party for contempt. Because the language provides that "[a]ny failure to obey [an] order of the court may be punished as a contempt thereof," and does not specify which authority or authorities may apply such a measure, we assume that, with respect to contempt of magistrate's orders, the substantive grant of contempt power may be exercised only pursuant to 28 U.S.C. § 636(e), which governs "acts or conduct" before a magistrate that "shall constitute a contempt of the district court."

[11] A party may oppose the enforcement of a summons on a number of distinct bases, including First, Fourth, and Fifth Amendment objections, attorney-client privilege, reasonableness, and a variety of other substantive and procedural grounds. *See* 3 B. Mezines, J. Stein, & J. Gruff, *Administrative Law* § 21.01[2], at 21–5 to 21–16 (1985).

certifying facts to the district court that show "disobedience or resistance to any lawful order" of the magistrate or "failure to produce, after having been ordered to do so, any pertinent document." 28 U.S.C. § 636(e)(1), (3). Even if the district judge at this point undertook a *de novo* review of the validity of the underlying order, the party would nonetheless have been deprived of his or her right to an Article III tribunal. Because the magistrate's decision about the validity of the summons would be entered as a judgment of the court, any *de novo* determination by an Article III judge would be available only after the point at which the party had already disobeyed an order of the court. In other words, under the proposed legislation, criminal liability for contempt could become fixed before an Article III tribunal became available, even though the citation for contempt could be entered only by the district judge. The party would, therefore, have to risk criminal penalties in order to obtain a *de novo* determination of his or her rights by the Article III judge. Subjecting a party to the Hobson's choice of incurring potential criminal contempt penalties or foregoing the right to an Article III tribunal arguably places an impermissible burden on the *Brimson* right to be free of liability for criminal contempt short of an Article III court's determination that the summons sought to be enforced is valid and enforceable.

By contrast, treating the order of the magistrate as a mere recommendation that could not become final until the district court judge undertook a *de novo* review of the magistrate's conclusions would pose no constitutional problem. *See* 28 U.S.C. § 636(b). Under these circumstances, with no final order of the court to disobey at the point of the magistrate's decision, criminal liability for contempt could not become fixed until after the district judge undertook *de novo* review of the magistrate's determinations. Because such criminal liability could attach, therefore, only for resistance to an order as to which the district judge had been the "ultimate decisionmaker," such a scheme would not offend the *Brimson* rule. *See United States* v. *Raddatz*, 447 U.S. 667, 682 (1980) (approving the use of magistrates as adjuncts to Article III judges, provided that the judges exercise supervisory control over the magistrates and remain the "ultimate decisionmaker[s]").

In this respect, the Internal Revenue Service's statutory summons power is instructive. Under the Internal Revenue Code, the district courts have "jurisdiction" to compel compliance with a summons, *see* 26 U.S.C. § 7602(a), yet magistrates,[12] as well as district judges, have the authority to enter "such order[s] as [the judges or magistrates] shall deem proper, not inconsistent with the law . . . of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience." 26 U.S.C. § 7604(b). The courts have construed this power narrowly, holding that the Code does not empower a magistrate to enter an enforcement order as a final judgment of the court, *see, e.g.*, *United States* v. *Cline*, 566 F.2d 1220, 1221

[12] The Internal Revenue Code refers to United States commissioners, instead of magistrates. 26 U.S.C. § 7604(b). United States commissioners were the predecessors to United States magistrates, and the Federal Magistrate's Act transferred the totality of powers and duties of the former to the latter. 28 U.S.C. § 636(a)(1).

(5th Cir. 1978); *United States* v. *Haley*, 541 F. 2d 678 (8th Cir. 1974), and treating any magistrate's order as a mere recommendation subject to review by the district court according to the strictures of the Federal Magistrate's Act, *see, e.g., United States* v. *First Nat'l Bank of Atlanta*, 628 F.2d 871, 873 (5th Cir. 1980); *United States* v. *Wisnowski*, 580 F.2d 149, 150 (5th Cir. 1978); *United States* v. *First Nat'l Bank of Rush Springs*, 576 F.2d 852, 853 (10th Cir. 1978); *United States* v. *Zuskar*, 237 F.2d 528, 533 (7th Cir. 1956).

As a Departmental proposal, however, it is prudent to avoid the constitutional defect posed if the bill were to be construed as permitting the entry of a final order by a magistrate. Accordingly, this Office strongly recommends that the following language be added to § (1)(d)(3) of the proposed bill:

> Any order entered by a United States magistrate pursuant to authority conferred by this Act shall be treated as a report containing proposed findings of fact and a recommendation for the district judge. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of the court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

This language would, under the test set out in *United States* v. *Raddatz*, 447 U.S. 667, 681–84 (1980), ensure the constitutionality of the magistrate's role in the enforcement of the FBI summons by retaining the district judge as the "ultimate decision-maker."[13]

It bears noting that the language proposed forecloses magistrates' authority to enter final orders only insofar as that authority derives from the proposed bill. Thus, a magistrate could still enter a final order enforcing an FBI summons pursuant to the independent authority granted in the Federal Magistrates Act. Specifically, 28 U.S.C. § 636(c) provides that

> [u]pon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as

[13] The proposed language would also apply to any petition under § 1(d)(3) for "an order modifying or setting aside . . . a prohibition of disclosure" of the summons. Although *Brimson* does not address the issue of prohibiting disclosure of the existence of a summons, it seems as if the rule set out in *Brimson* should apply with equal force to this matter. First, the prohibition of disclosure of a summons is itself an integral part of summons enforcement, for non-disclosure of a third-party summons may be essential to prevent the thwarting of the investigatory purposes of the summons or may be necessary to preclude otherwise unacceptable costs related to the issuance of a summons (*i.e.*, endangering life or physical safety). Second, many similar issues, such as First Amendment and reasonableness objections, govern the validity of a non-disclosure order. Thus, we believe that the decision whether to order non-disclosure of a summons is an inherently judicial function that must be committed to an Article III tribunal.

> a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in § 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with [the] guidelines established by the judicial council of the circuit.

Although the Supreme Court has never spoken to the constitutionality of this provision, the Courts of Appeals have overwhelmingly endorsed it as constitutional insofar as it is dependent on the consent of the parties. *See, e.g.*, *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890 (D.C. Cir. 1984); *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984); *Goldstein* v. *Kelleher*, 728 F.2d 32 (1st Cir.), *cert. denied*, 469 U.S. 852 (1984); *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). The Department, therefore, would appear to have little cause to consider including language that would explicitly negate § 636(c)'s power of consensual reference to magistrates as applied to petitions for enforcement of or relief from an FBI summons.

A word of caution on this point is in order, however. All of the circuit court cases upholding 28 U.S.C. § 636(c) antedate the Supreme Court's recent opinion in *CFTC* v. *Schor*, 478 U.S. 833 (1986). Although *Schor* upheld a scheme in which, with the consent of the parties, the Commodity Futures Trading Commission (CFTC) could exercise pendent or ancillary jurisdiction over common law counterclaims arising out of the transaction or occurrence that formed the basis for the underlying statutory claim, portions of *Schor*'s rationale raises doubts as to the continuing validity of § 636(c). To the extent that *Schor* held that the parties could waive the "personal right" to an Article III tribunal, the decision is highly favorable to the consensual reference provisions contained in the Federal Magistrate's Act. But as to structural concerns involving the separation of powers, the Court found it significant that (1) the scheme involved the exercise of non-Article III power only in the "'particularized area'" of commodities exchange law; (2) CFTC orders were not self-executing and could only be enforced by district courts; (3) orders were reviewed under the "weight of the evidence" standard rather than the "clearly erroneous" standard; (4) the district court had *de novo* review of questions of law; and (5) the CFTC could not exercise all the "ordinary" functions of a district court, such as presiding over a jury trial or issuing writs of habeas corpus. *Id.* at 854–56.

The consensual reference scheme under 28 U.S.C. § 636(c) does not share many of the characteristics that the *Schor* Court found comforting from a

separation of powers standpoint. First, the exercise of a magistrate's authority under the consensual reference provision extends to any "civil matter." 28 U.S.C. § 636(c)(1). Second, although only the district judge can issue a contempt citation to enforce the magistrate's order, *see* 28 U.S.C. § 636(e), that order is nonetheless a final judgment of the district court and, as such, is self-executing. Third, because the judgment entered by the magistrate is appealable "in the same manner as an appeal from any other judgment of [the] district court," 28 U.S.C. § 636(c)(3),(4), the standard of review of factual findings is the "clearly erroneous" standard. *See* Fed. R. Civ. P. 52(a).

Indeed, the consensual reference scheme enjoys only two of the characteristics found significant by the *Schor* Court. First, the Article III court that reviews the magistrate's decision has *de novo* review of all questions of law. Second, while the magistrate can exercise many of the "ordinary functions" of the district court, including the conduct of a jury trial and, presumably, the power to issue a writ of habeas corpus, there remain significant functions, such as the ability to cite a party for contempt, that the magistrate does not possess even under the consensual reference scheme.

Yet, despite the dissimilarities between the CFTC's counterclaim mechanism in *Schor* and the consensual reference provision of the Federal Magistrate's Act, there is reason to believe that the latter still passes constitutional muster. The *Schor* Court found the five factors listed above to be relevant in determining whether the "congressional scheme. . . impermissibly intruded on the province of the judiciary," 478 U.S. at 851–52, but in no way purported to make such factors an exhaustive and exclusive list of the safeguards that could justify the consensual resort to a non-Article III tribunal for matters that would otherwise require adjudication in an Article III court. Indeed, *Schor* may actually buttress the conclusion reached by the Courts of Appeals insofar as it endorses the mode of analysis widely employed in the lower court cases regarding consensual reference.

Under this analytical framework, the parties' consent serves as a waiver of any personal right to an Article III tribunal, and the acceptability of the consensual reference depends on the extent to which the statutory scheme protects the judiciary from "impermissibl[e] intru[sion]" by the executive and legislative branches.

The question of what constitutes an "impermissibl[e] intru[sion] on the province of the judiciary" involves matters of degree, making it difficult to predict with any confidence how the Supreme Court will react to the consensual reference scheme found in 28 U.S.C. § 636(c). The Courts of Appeals, however, have identified several features of the Federal Magistrate's Act as significant protections against the encroachment of the executive and legislative branches on the independence of the judiciary,[14] and, given the widespread

[14] First, the magistrates are appointed by district judges and are subject to removal only by the district judges or, in some circumstances, by the circuit judicial council. *See, e.g., Geras* v. *Lafayette Display Fixtures Inc.*, 742 F.2d 1037, 1043 (7th Cir. 1984); *Pacemaker Diagnostic Clinic of America, Inc* v.

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concurrence of the Courts of Appeals,[15] it may reasonably be predicted that these features may suffice to sustain the scheme in the Supreme Court under the kind of analysis set out *Schor*.

II. *Ex Parte* Prohibition Against Disclosure

Section 1(f)(1) of the proposed legislation permits the *ex parte* issuance of an order prohibiting disclosure of an FBI summons upon a showing that "the materials being sought may be relevant to a legitimate law enforcement inquiry and that there is reason to believe that such disclosure may result in: (A) endangering the life or physical property of any person; (B) flight from prosecution; (C) destruction or tampering with evidence; (D) intimidation of potential witnesses; or (E) defeating any remedy or penalty provided for violation of the laws of the United States." The order may be issued by a magistrate or district judge, and the person against whom the prohibition is directed may obtain relief by filing a petition in the district court pursuant to § 1(d)(2) of the proposed bill.[16] Because the prohibition against disclosure of the summons constitutes a clear deprivation of liberty, the issuance of the *ex parte* order must comport with the requirements of the due process clause of the Fifth Amendment. With respect to § 1(f)(2), the issue is thus whether a prompt postdeprivation hearing is sufficient to meet the dictates of due process.

Under *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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[14] (Continued)
Instromedix, Inc., 725 F.2d 537, 545 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). Second, the district judge must specially designate the magistrate to exercise jurisdiction. *See, e.g., Collins* v. *Foreman*, 729 F.2d 108, 115 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984). Third, the district court retains the power to withdraw the reference of the case from the magistrate. *See, e.g., Collins*, 729 F.2d at 115; *Pacemaker*, 725 F.2d at 545. Fourth, the magistrate lacks any power to cite the parties for contempt. *See, e.g., Geras*, 742 F.2d at 1043.

[15] *See* Note, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. Chi. L. Rev. 1032, 1034 n.16 (1985).

[16] Section 1(f)(1) empowers a magistrate to enter an *ex parte* order imposing the prohibition. Because this order is presumably punishable by criminal contempt pursuant to 28 U.S.C. § 636(e), this Office believes that the same principles that govern summons enforcement under *Brimson* should apply to the entry of a prohibition order, and that language should be added to indicate that an order entered by a magistrate under § 1(f)(1) has no binding effect of its own. Because the proceedings must proceed *ex parte* to serve the interests of prohibiting disclosure, and because review by the district judge prior to entry of judgment cannot proceed, therefore, upon the objections of the party to be bound, language should be added treating every magistrate's order under § 1(f)(1) as a mere recommendation to be given *de novo* review *ex parte* by the district judge before it can become an order of the court.

Under this test, it appears that the absence of a pre-deprivation hearing under § 1(f)(1) would pass constitutional muster.

In this case, the first factor appears to favor the constitutionality of § 1(f)(1), for a "claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Id.* at 331. Because the party against whom the summons and prohibition order are directed can immediately go into court and seek relief from the order, that party's liberty interest in speech is only minimally impaired. No irreparable harm will occur if a party must simply wait to disclose the existence of a summons until after a court has heard the party's petition for relief; if the party has a protectible First Amendment or statutory right to disclose the existence of the summons, the use of the *ex parte* procedures set out in the proposed legislation will only delay, and not defeat, that right. This temporary interference with a protected interest will not threaten the very subsistence or well-being of the party, as in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), a case involving eligibility for welfare benefits, or in *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978), a case involving the termination of utility services. Although a permanent or extended deprivation without any hearing might pose serious constitutional problems, the availability of prompt postdeprivation review reduces the harm to the protected interest of the party. *See Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974).

The possibility of wrongful deprivation also seems slight. Section 1(f)(1) of the proposed bill has set out very narrow and specific bases upon which a non-disclosure order may be issued, and the government must presumably supply concrete evidence showing why it has reason to believe that disclosure would lead to endangerment of life, flight from prosecution, and the like. And the fact that a judge or judicial adjunct makes the initial determination and the judge is the ultimate decisionmaker minimizes the possibility that the deprivation will be in error.[17] *See Mitchell*, 416 U.S. at 616–17 ("The . . . law [at issue] provides for judicial control of the [property sequestration] process from beginning to end. This control is one of the measures adopted . . . to minimize the risk that the *ex parte* procedure will lead to a wrongful taking.").

Finally, the government has a strong interest in the procedure being employed. Disclosure of a summons is an all or nothing proposition. Once it occurs, it cannot be undone. Thus, it is imperative that the government be able to present the summoned party with a prohibition against disclosure under pain of contempt at the time the party becomes aware of the summons. If no legal compulsion existed to preclude disclosure *ab initio*, and the government could not secure the non-disclosure order until notice and hearing were provided, no such prohibition could ever occur, for the party could make any desired disclosures pending the hearing on the prohibition.

Thus, given the important governmental interest in preventing endangerment of health, *see, e.g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594

[17] This presumes that the bill will be changed to reflect our recommendation to make the magistrate's non-disclosure order merely advisory.

(1950) (allowing seizure without a predeprivation hearing where necessary to protect the public from misbranded drugs), in apprehending and convicting criminals, *see, e.g., Fuentes* v. *Shevin*, 407 U.S. 67, 93–94 n.30 (1972), and in preserving and discovering the evidence of crimes, *see, e.g., id.*, the government's ability to prohibit disclosure of a summons *ex parte* under the circumstances provided for in the proposed bill seems well grounded.

The bill contains another non-disclosure provision that merits brief attention as well. Section 1(f)(2) prohibits disclosure of a summons whenever the FBI Director, a Special Agent, or designated Assistant Special Agents-In-Charge certify that the summons was issued for the purpose of collecting positive foreign intelligence or counterintelligence. This Office believes that this section also satisfies the due process requirements of the Constitution. The liberty interest of the summoned party is the same as in § 1(f)(1). And although the application of the prohibition against disclosure is not subject to judicial supervision under this subsection, the factual predicate for prohibition is very narrow and specific and the possibility of wrongful deprivation seems very slim. Moreover, the government's interest in excluding judicial participation at the point of the initial determination of prohibition in this case seems very strong, insofar as the foreign intelligence interests of the United States require that as few people as possible be aware of ongoing intelligence operations. Finally, it is clear that national security is an important governmental interest that can justify the delay of an available hearing until after the deprivation of a protectible interest. *See, e.g., Stoehr* v. *Wallace*, 255 U.S. 239, 245 (1921); *Central Union Trust* v. *Garvan*, 254 U.S. 554, 566 (1921).

Section 1(f)(2), moreover, presents no *Brimson* problem, for none of the executive officers designated to act has the power to enter any kind of enforceable order, and, therefore, no non-Article III official is empowered to perform any such inherently judicial function.[18] The officials certify a summons as being for the purpose of collecting foreign intelligence and then a self-operative statutory prohibition takes effect. Violation of this prohibition presumably can be punished only by virtue of judicial process.

One problem with the proposed bill, however, is that it specifies no penalties for violating the statutory prohibition contained in § 1(f)(2). This deficiency should be rectified before submitting the bill to Congress.

III. Subpoena *Duces Tecum*

Section 1(e)(2) states that "[n]o summons shall require the production of any materials, if such materials would be protected from production under the standards applicable to a subpoena duces tecum entered in aid of a grand jury investigation." The inclusion of this provision is somewhat curious insofar as

[18] There is a distinction between certifying a fact that triggers a statutory prohibition that is enforceable by judicial process and entering a judicial order enforceable by criminal contempt after determining a case or controversy The latter is inherently a judicial function and must, according to *Brimson*, be undertaken only by an Article III tribunal.

one of the avowed purposes of proposing the legislation is to allow the FBI greater scope in locating fugitives for the purposes of turning them over to state and local authorities and in gathering data for foreign intelligence purposes, rather than for purposes of federal investigation and indictment. Since it would normally be considered improper to use a grand jury subpoena for such purposes, § 1(e)(2) may be subject to judicial interpretation that could thwart part of the legislative purpose. Accordingly, § 1(e)(2) should be made clearer to ensure that it will not be used to preclude the gathering of information for locating fugitive felons and conducting foreign intelligence functions.

Conclusion

For the above reasons, we conclude that the provisions of §§ 1(d)(3) and 1(f)(1) require modification to ensure the statute's constitutionality. The insertion we propose which treats a magistrate's order as a recommendation for the district judge for the purposes of the Act should, we believe, satisfy this objection. In addition, § 1(f)(2), providing for nondisclosure in the context of a summons for positive foreign intelligence or counterintelligence information, should specify a legal method of enforcement. Finally, the reference to the grand jury standard in § 1(c)(2) seems contrary to the avowed purpose of the bill without further explanation.

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

The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act

Under the Constitution, the President has plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits contained in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers.

The conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. Statutory requirements that the President report to Congress about his activities in the realm of foreign policy must be construed consistently with his constitutional authority. A statute requiring the President to give Congress notice of covert operations "in a timely fashion" if he withholds prior notification should be construed to permit the President sufficient discretion to choose a reasonable moment for notifying Congress, including withholding notification at least until the secret diplomatic or covert undertaking has progressed to a point when disclosure will not threaten its success.

December 17, 1986

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to your request that this Office review the legality of the President's decision to postpone notifying Congress of a recent series of actions that he took with respect to Iran. As we understand the facts, the President has, for the past several months, been pursuing a multifaceted secret diplomatic effort aimed at bringing about better relations between the United States and Iran (partly because of the general strategic importance of that country and partly to help end the Iran-Iraq war on terms favorable to our interests in the region); at obtaining intelligence about political conditions within Iran; and at encouraging Iranian steps that might facilitate the release of American hostages being held in Lebanon. It is our understanding that the President, in an effort to achieve these goals, instructed his staff to make secret contacts with elements of the Iranian government who favored closer relations with the United States; that limited quantities of defensive arms were provided to Iran; that these arms shipments were intended to increase the political influence of the Iranian elements who shared our interest in closer relations between the two countries and to demonstrate our good faith; and that there was hope that the limited arms shipments would encourage the Iranians to provide our government with useful intelligence about Iran and to assist our efforts to free the Americans being held captive in Lebanon.

On these facts, we conclude that the President was within his authority in maintaining the secrecy of this sensitive diplomatic initiative from Congress until such time as he believed that disclosure to Congress would not interfere with the success of the operation.

Section 501 of the National Security Act permits the President to withhold prior notification of covert operations from Congress, subject to the requirements that he inform congressional committees of the operations "in a timely fashion," and that he give a statement of reasons for not having provided prior notice. We now conclude that the vague phrase "in a timely fashion" should be construed to leave the President wide discretion to choose a reasonable moment for notifying Congress. This discretion, which is rooted at least as firmly in the President's constitutional authority and duties as in the terms of any statute, must be especially broad in the case of a delicate and ongoing operation whose chances for success could be diminished as much by disclosure while it was being conducted as by disclosure prior to its being undertaken. Thus, the statutory allowance for withholding prior notification supports an interpretation of the "timely fashion" language, consistent with the President's constitutional independence and authority in the field of foreign relations, to withhold information about a secret diplomatic undertaking until such a project has progressed to a point where its disclosure will not threaten its success.[1]

I. The President's Inherent Constitutional Powers Authorize a Wide Range of Unilateral Covert Actions in the Field of Foreign Affairs

A. The President Possesses Inherent and Plenary Constitutional Authority in the Field of International Relations

"The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. This is the principal textual source for the President's wide and inherent discretion to act for the nation in foreign affairs.[2] The clause has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself

[1] The vagueness of the phrase "in a timely fashion," together with the relatively amorphous nature of the President's inherent authority in the field of foreign relations, necessarily leaves room for some dispute about the strength of the President's legal position in withholding information about the Iranian project from Congress over a period of several months. The remainder of this memorandum outlines the legal support for the President's position, and does not attempt to provide a comprehensive analysis of all the arguments and authorities on both sides of the question. This caveat, which does not alter the conclusion stated in the accompanying text, reflects the urgent time pressures under which this memorandum was prepared.

[2] The Constitution also makes the President Commander in Chief of the armed forces (Article II, § 2) and gives him power to make treaties and appoint ambassadors, subject to the advice and consent of the Senate (Article II, § 2), and to receive ambassadors and other public ministers (Article II, § 3). The Constitution also requires that the President "take Care that the Laws be faithfully executed" (Article II, § 3). These specific grants of authority supplement, and to some extent clarify, the discretion given to the President by the Executive Power Clause.

and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. The President's executive power includes, at a minimum, all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.

Before the Constitution was ratified, Alexander Hamilton explained in *The Federalist* why the President's executive power would include the conduct of foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate."[3] This fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" explains why the Constitution gave to Congress *only* those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens.[4]

As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of the "executive Power."[5]

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[3] *The Federalist* No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961). This number of *The Federalist* was devoted primarily to explaining why the power of making treaties is partly legislative and partly executive in nature, so that it made sense to require the cooperation of the President and the Senate in that special case.

[4] Congress' power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," U.S. Const. art. I, § 8, cl 11, like the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* art. I, § 8, cl. 10, and the power "[t]o regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, reflects the fact that the United States is, because of its geographical position, necessarily a nation in which a significant number of citizens will engage in international commerce. A declaration of war immediately alters the legal climate for Americans engaged in foreign trade and is therefore properly treated as a legislative act necessarily binding on an important section of the private citizenry. Similarly, Congress' broad power over the establishment and maintenance of the armed forces, U.S. Const. art. I, § 8, cls 12–16, reflects their obviously important domestic effects. In accord with Hamilton's distinction, however, the actual command of the armed forces is given to the President in his role as Commander in Chief. Treaties (in whose making the Senate participates under Article II, § 2) have binding legal effect within our borders, and are most notable for the significantly *small* role that Congress plays.

[5] As one would expect in a situation dealing with implied constitutional powers, argument and authority can be mustered for the proposition that Congress was intended to have a significant share of the foreign policy powers not specifically delegated by the Constitution. Perhaps the most oft-cited authority for this position is James Madison's "Helvidius Letters" (*reprinted in part in* E. Corwin, *The President's Control of Foreign Relations* 16–27 (1917)), where he cautioned against construing the President's executive power so broadly as to reduce Congress' power to declare war to a mere formality. Madison's argument was directed principally at countering some overstatements made by Alexander Hamilton in his "Pacificus Letters" (*reprinted in part in* E. Corwin, *supra*, at 8–15). Madison's argument is *not* properly interpreted, however, to imply that Congress has as great a role to play in setting policy in foreign affairs as in domestic matters. Even Jefferson, who was generally disinclined to acknowledge implied powers in the federal government or in the President, wrote: "The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate Exceptions are strictly to be construed. . ." 5 *Writings of Thomas Jefferson* 161 (Ford ed. 1895). While we agree that Congress has some powers to curb a President who persistently pursued a foreign policy that Congress felt was seriously undermining the national interest, especially in cases where Congress' constitutional authority to declare war was implicated, well-settled historical practice and legal precedents have confirmed the President's dominant role in formulating, as well as in carrying out, the nation's foreign policy.

The presumptively exclusive authority of the President in foreign affairs was asserted at the outset by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain impartial in the war between France and Great Britain.[6] Similarly, the First Congress itself acknowledged the breadth of the executive power in foreign affairs when it established what is now the Department of State. In creating this executive department, Congress directed the department's head (*i.e.*, the person now called the Secretary of State) to carry out certain specific tasks when entrusted to him by the President, as well as "such other matters respecting foreign affairs, as the President of the United States shall assign to the said department."[7] Just as the first President and the first Congress recognized that the executive function contained all the residual power to conduct foreign policy that was not otherwise delegated by the Constitution, subsequent historical practice has generally confirmed the President's primacy in formulating and carrying out American foreign policy.[8]

The Supreme Court, too, has recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the

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[6] Proclamation of the President, Apr. 22, 1793, *reprinted in* 1 *Messages and Papers of the Presidents* 156–157 (J. Richardson ed. 1896). President Washington also warned that his Administration would pursue criminal prosecutions for violations of his neutrality proclamation. Although such prosecutions were upheld at the time, a rule that would prohibit such prosecutions was recognized by the Supreme Court relatively soon thereafter. *Compare Henfield's Case*, 11 F. Cas. 1099, 1102 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.), *with United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). It is worth emphasizing that Presidents have sometimes encountered constitutional obstacles when attempting to pursue foreign policy goals through actions in the domestic arena, but have rarely been interfered with in taking diplomatic steps, or even military actions short of war, outside our borders. The present significance of President Washington's proclamation has less to do with the particular actions he might have taken in the domestic sphere than with his claim that *foreign* affairs are generally within the constitutional domain assigned to the Executive. This claim is consistent with the Constitution and has now been reinforced by long historical practice.

[7] Act of July 27, 1789, 1 Stat. 28–29. *See also* Act of Jan. 30, 1799, 1 Stat. 613 (similar provision currently codified at 18 U.S.C. § 953), which made it a crime for any person to attempt to influence the conduct of foreign nations with respect to a controversy with the United States.

[8] The fact that Presidents have often asked Congress to give them specific statutory authority to take action in foreign affairs may reflect a practical spirit of courtesy and compromise rather than any concession of an absence of inherent constitutional authority to proceed. For example, President Franklin Roosevelt requested that Congress repeal a provision of the Emergency Price Control Act that he felt was interfering with the war effort; he warned, however, that if Congress failed to act, he would proceed on the authority of his own office to take whatever measures were necessary to ensure the winning of the war. 88 Cong. Rec. 7044 (1942).

As one would expect, of course, Congress has not always accepted the most far-reaching assertions of Presidential authority. *See also Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (Constitution did not authorize President to take possession of and operate privately owned steel mills that had ceased producing strategically important materials during labor dispute); *id* at 635 (Jackson, J., concurring) ("[The Constitution] enjoins upon [the government's] branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

Constitution itself and that congressional efforts to act in this area must be evaluated in the light of the President's constitutional ascendancy:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority *plus* the very delicate, plenary and exclusive power of the President as the *sole* organ of the federal government in the field of international relations — *a power which does not require as a basis for its exercise an act of Congress*, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has *his* agents in the form of diplomatic, consular and other officials. *Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.*[9]

Based on this analysis, the Supreme Court rejected the argument that Congress had improperly delegated a legislative function to the President when it authorized him to impose an embargo on arms going to an area of South America in

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[9] 299 U.S. at 319–20 (emphasis added). *See also Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (President "possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); *id.* at 109–12 (refusing to read literally a statute that seemed to require judicial review of a presidential decision taken pursuant to his discretion to make foreign policy); *id.* at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.") (*quoted with approval in United States* v. *Nixon*, 418 U.S. 683, 710 (1974)).

In *Perez* v. *Brownell*, 356 U.S. 44, 57 (1958) (citations omitted), the Court stated, "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation." The *Perez* Court, however, was reviewing the constitutionality of a statute in whose drafting the Executive Branch had played a role equivalent to one of Congress' own committees. 356 U.S. at 56. Furthermore, the statute at issue in *Perez* provided that an American national who voted in a political election of a foreign state would thereby lose his American nationality. If the President lacks the inherent constitutional authority to deprive an American of his nationality, then the *Perez* Court's language about congressional "regulation of foreign affairs" may refer only to "regulation of domestic affairs that affect foreign affairs." In any case, *Perez* should not be read to imply that Congress has broad legislative powers that can be used to diminish the President's inherent Article II discretion.

which a war was taking place. The Court's holding hinged on the essential insight that the embargo statute's principal effect was merely to remove any question about the President's power to pursue his foreign policy objectives by enforcing the embargo *within* the borders of this country.[10] As the Court emphatically stated, the President's authority to act in the field of international relations is plenary, exclusive, and subject to no legal limitations save those derived from applicable provisions of the Constitution itself.[11] As the Court noted with obvious approval, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history:

> *"The President is the constitutional representative of the United States with regard to foreign nations.* He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. *For his conduct he is responsible to the Constitution.* The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch."

299 U.S. at 319 (emphasis added) (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). It follows inexorably from the *Curtiss-Wright* analysis that congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and that statutes infringing the President's inherent Article II authority would be unconstitutional.[12]

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[10] *See* 299 U.S. at 327 (effect of various embargo acts was to confide to the President "an authority which was cognate to the conduct by him of the foreign relations of the government") (quoting *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 422 (1935)). This implies that while the President may in some cases need enabling legislation in order to advance his foreign policy by controlling the activities of American citizens on American soil, he needs no such legislation for operations and negotiations outside our borders.

[11] Because the Presidential action at issue in *Curtiss-Wright* was authorized by statute, the Court's statements as to the President's inherent powers could be, and have been, characterized as *dicta*. *See, e.g., Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring). We believe, however, that the *Curtiss-Wright* Court's broad view of the President's inherent powers was essential to its conclusion that Congress had not unconstitutionally delegated legislative authority to the President. Furthermore, the Supreme Court has since reaffirmed its strong commitment to the principle requiring the "utmost deference" to Presidential responsibilities in the military and diplomatic areas. *United States* v. *Nixon*, 418 U.S. 683, 710 (1974).

[12] *See e.g., United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950) (citations omitted):

> The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

Id. at 542. *See also Worthy* v. *Herter*, 270 F.2d 905, 910–12 (D.C. Cir. 1959) (statute giving President authority to refuse to allow Americans to travel to foreign "trouble spots" simply reinforces the President's inherent constitutional authority to impose the same travel restrictions).

B. Secret Diplomatic and Intelligence Missions Are at the Core of the President's Inherent Foreign Affairs Authority

The President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court has repeatedly so held in modern times. For example:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis in original). The Court has also, and more recently, emphasized that this core Presidential function is by no means limited to matters directly involving treaties. In *United States* v. *Nixon*, 418 U.S. 683 (1974), the Court invoked the basic *Curtiss-Wright* distinction between the domestic and international contexts to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the *utmost deference* to Presidential responsibilities." 418 U.S. at 710 (emphasis added).[13]

Such statements by the Supreme Court reflect an understanding of the President's function that is firmly rooted in the nature of his office as it was understood at the time the Constitution was adopted. John Jay, for example, offered a concise statement in *The Federalist*:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are

[13] *See also id.* at 706 ("a claim of need to protect military, diplomatic, or sensitive national security secrets" would present a strong case for denying judicial power to make *in camera* inspections of confidential material); *id.* at 712 n.19 (recognizing "the President's interest in preserving state secrets").

Note also that the *Curtiss-Wright* Court expressly endorsed President Washington's refusal to provide the House of Representatives with information about treaty negotiations *after the negotiations had been concluded*. 299 U.S at 320–21. *A fortiori*, such information could be withheld *during* the negotiations.

> sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.
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> So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.[14]

Jay's reference to treaties "of whatever nature" and his explicit discussion of intelligence operations make it clear that he was speaking, not of treaty negotiation in the narrow sense, but of the whole process of diplomacy and intelligence-gathering. The President's recent Iran project fits comfortably *within the terms of* Jay's discussion.

C. The President Has Inherent Authority to Take Steps to Protect the Lives of Americans Abroad

Perhaps the most important reason for giving the federal government the attributes of sovereignty in the international arena was to protect the interests and welfare of American citizens from the various threats that may be posed by foreign powers. This obvious and common sense proposition was confirmed and relied on by the Supreme Court when it held that every citizen of the United States has a constitutional right, based on the Privileges or Immunities Clause of the Fourteenth Amendment, "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."[15] Accordingly, the Supreme

[14] *The Federalist* No. 64, at 392-93 (J. Jay) (C. Rossiter ed. 1961) (emphasis in original). Jay went on to note that "should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them." *Id.* at 393. Jay did not, however, suggest that the President would be obliged to seek such advice and consent for actions other than those specifically enumerated in the Constitution.

[15] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

Court has repeatedly intimated that the President has inherent authority to protect Americans and their property abroad by whatever means, short of war, he may find necessary.

An early judicial recognition of the President's authority to take decisive action to protect Americans abroad came during a mid-nineteenth century revolution in Nicaragua. On the orders of the President, the commander of a naval gunship bombarded a town where a revolutionary government had engaged in violence against American citizens and their property. In a later civil action against the naval commander for damages resulting from the bombardment, Justice Nelson of the Supreme Court held that the action could not be maintained:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. *It is to him, also, the citizens abroad must look for protection of person and of property*, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof. . . .
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> Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, *the duty must, of necessity, rest in the discretion of the president.* Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not infrequently, require the most prompt and decided action. Under our system of government, *the citizen abroad is as much entitled to protection as the citizen at home.* The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.

Durand v. *Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186) (emphasis added).

Later, the full Court confirmed this analysis in an opinion holding that the President has inherent authority to provide bodyguards, clothed with federal immunity from state law, to protect judicial officers, even when they are travelling *within* the United States in the performance of their duties. *In re Neagle*, 135 U.S. 1 (1890). Rather than base its decision on a narrow analysis of the status of federal judges, the Court held that the Presidential duty to "take

Care that the Laws be faithfully executed"[16] includes "any obligation fairly and properly inferrible [sic] from" the Constitution.[17] The Court specifically stated that these were not limited to the express terms of statutes and treaties, but included "the rights, duties, and obligations growing out of *the Constitution itself*, our *international relations*, and *all* the protection implied by the nature of the government under the Constitution."[18] As the Court pointed out, Congress itself had approved this position when it ratified the conduct of the government in using military threats and diplomatic pressure to secure the release of an American who had been taken prisoner in Europe. Noting that Congress had voted a medal for the naval officer who had threatened to use force to obtain the American's release, the Court asked, "Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?"[19] If military force may be used on the President's own discretion to protect American lives and property abroad, surely the less drastic means employed by President Reagan during the Iran project were within his constitutional authority.

II. Any Statute Infringing Upon the President's Inherent Authority to Conduct Foreign Policy Would be Unconstitutional and Void

Congress has traditionally exercised broad implied powers in overseeing the activities of Executive Branch agencies, including "probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957); *see also McGrain* v. *Daugherty*, 273 U.S. 135, 161–164 (1927). This power of oversight is grounded on Congress' need for information to carry out its legislative function. Because the executive departments are subject to statutory regulation and to practical restrictions imposed through appropriations levels, Congress can usually demonstrate that it has a legitimate and proper need for the information necessary to make future regulatory and appropriations decisions in an informed manner. *McGrain*, 273 U.S. at 178.

As the Supreme Court has observed, however, the congressional power of oversight "is not unlimited." *Watkins*, 354 U.S. at 187.[20] It can be exercised only in aid of a legitimate legislative function traceable to one of Congress' enumerated powers. *See McGrain*, 273 U.S. at 173–74. The power of oversight

[16] U.S. Const. art. II, § 3.

[17] *In re Neagle*, 135 U.S. at 59.

[18] *Id.* at 64 (emphasis added).

[19] *Id.* That such a statute may have existed, *see* Expatriation Act of July 27, 1868, ch. 249, § 3, 15 Stat. 223, 224 (current version at 22 U.S.C. § 1732) (authorizing the President to use such means, short of war, as may be necessary to obtain the release of Americans unjustly held prisoner by foreign governments), does not diminish the force of the Supreme Court's statement that no such statute would be *needed* to support such an exercise of executive power.

[20] It is worth observing that Congress' oversight powers are no more explicit in the Constitution than are the President's powers in foreign affairs *See McGrain*, 273 U.S. at 161.

cannot constitutionally be exercised in a manner that would usurp the functions of either the Judicial or Executive Branches. Thus, the Supreme Court has held that by investigating the affairs of a business arrangement in which one of the government's debtors was interested, "the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial." *Kilbourn* v. *Thompson*, 103 U.S. 168, 192 (1881). The same principle applies to congressional inquiries that would trench on the President's exclusive functions. "Lacking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. *Neither can it supplant the Executive in what exclusively belongs to the Executive.*" *Barenblatt* v. *United States*, 360 U.S. 109, 112 (1959) (emphasis added).[21]

It is undoubtedly true that the Constitution does not contemplate "a complete division of authority between the three branches." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). Nevertheless, there are certain quintessential executive functions that Congress may not exercise in the guise of its "oversight power." Congress, for example, may not give its own agents the power to make binding rules "necessary to or advisable for the administration and enforcement of a major statute." *Buckley* v. *Valeo*, 424 U.S. 1, 281 (1976) (White, J., concurring in part). Nor may Congress unilaterally alter the rights and duties created by a prior statutory authorization. *INS* v. *Chadha*, 462 U.S. 919, 951 (1983). In general, the management and control of affairs committed to the Executive Branch, even those given to the Executive by Congress itself, must remain firmly in the control of the President. *Myers* v. *United States*, 272 U.S. 52, 135 (1926). *A fortiori*, the conduct of affairs committed exclusively to the President by the Constitution must be carefully insulated from improper congressional interference in the guise of "oversight" activities.

This principle has three immediately relevant corollaries. First, decisions and actions by the President and his immediate staff in the conduct of foreign policy are not subject to direct review by Congress. "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 164 (1803).[22]

Second, while Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that require the President to relinquish any of

[21] On its facts, *Barenblatt* did not involve an inter-branch dispute. The Court upheld a contempt citation issued by a House Committee against a witness who refused to answer questions about his ties with the Communist Party.

[22] Obviously, Congress may investigate and consider the President's past actions when performing one of its own assigned functions (for example, while giving advice and consent to treaties or appointments, deciding whether to issue a declaration of war, or during the impeachment process).

his constitutional discretion in foreign affairs. Just as an individual cannot be required to waive his constitutional rights as a condition of accepting public employment or benefits, so the President cannot be compelled to give up the authority of his office as a condition of receiving the funds necessary to carry out the duties of his office.[23] To leave the President thus at the mercy of the Congress would violate the principle of the separation of powers in the most fundamental manner. *The Federalist* indicates that one great "inconveniency" of republican government is the tendency of the legislature to invade the prerogatives of the other branches, and that one of the main concerns of the Framers was to give the other branches the "necessary constitutional means and personal motives to resist [such] encroachments."[24] In an effort to address this problem, the Constitution provides that the President's personal compensation cannot be altered during his term of office,[25] and it must be acknowledged that the President's *constitutional* independence is even more precious and vulnerable than his personal independence.[26]

Third, any statute that touches on the President's inherent authority in foreign policy must be interpreted to leave the President as much discretion as the language of the statute will allow. This accords with well-established judicial presumption in favor of construing statutes so as to avoid constitutional questions whenever possible.[27] Because the President's constitutional authority in international relations is by its very nature virtually as broad as the national interest and as indefinable as the exigencies of unpredictable events, almost *any* congressional attempt to curtail his discretion raises questions of constitutional dimension. Those questions can, and must, be kept to a minimum in the only way possible: by resolving all statutory ambiguities in accord with the presumption that recognizes the President's constitutional independence in international affairs.

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[23] The doctrine of unconstitutional conditions has pervasive application throughout the law. For a good general statement of the doctrine, *see Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583 (1926):

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Id. at 594.

[24] *The Federalist* No. 51, at 321–22 (J. Madison) (C. Rossiter ed. 1961).

[25] U.S. Const. art. II, § 1, cl. 7; *The Federalist* No. 51, at 321 (J. Madison) (C. Rossiter ed. 1961); *id.* No. 73, at 441–42 (A. Hamilton).

[26] *See* 41 Op. Att'y Gen. 230, 233 (1955):

> It is recognized that the Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy.

[27] "[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' a court should adopt that construction." *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

III. Statutory Requirements that the President Report to Congress about his Activities Must Be Construed Consistently with the President's Constitutional Authority to Conduct Foreign Policy

In 1980, § 501(a) of the National Security Act of 1947 was amended to provide for congressional oversight of "significant anticipated intelligence activities." This section now provides:

> To the extent consistent with all applicable authorities and duties, *including those conferred by the Constitution upon the executive and legislative branches of the Government*, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall —
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> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

50 U.S.C. § 413(a) (emphasis added). For situations in which the President fails to give prior notice under § 501(a), § 501(b) provides:

> The President shall fully inform the intelligence committees *in a timely fashion* of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.

50 U.S.C. § 413(b) (emphasis added).[28]

The delicate connection between the "timely notice" requirement of § 501(b) and the President's inherent constitutional authority, acknowledged in § 501(a), is dramatically confirmed by a colloquy between Senators Javits and Huddleston, both of whom were on the committee that drafted this provision. Senator Javits asked: "If information has been withheld from both the select committee and the leadership group (as § 501(b) envisages), can it be withheld on any grounds other than 'independent constitutional authority' and, if so, on what grounds?" Senator Huddleston answered: "Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operation [sic], but would *not* be able to claim the identical authority to withhold timely notice under § 501(b). A claim of constitutional authority is the *sole* grounds that may be asserted for withholding prior notice of a covert operation." 126 Cong. Rec. 17693 (1980) (emphasis added).[29] If, as Senator Huddleston contended, § 501(b) is to be interpreted to require the President to act on his inherent authority in withholding notice of covert operations until after the

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[28] Section 501 of the National Security Act does *not* contemplate that prior notice of "intelligence activities" will be given in all instances. Subsection (b) of § 501 makes specific provision for situations in which "prior notice was not given under subsection (a)." Because subsection (a) includes situations in which the President provides notice to the full intelligence committees under subsection (a)(1)(A) and situations in which he provides prior notice restricted to designated members of Congress, including the chairmen and ranking members of the House and Senate intelligence committees under subsection (a)(1)(B), it seems clear that subsection (b) contemplates situations in which no prior notice has been given under either of these provisions.

[29] A similar colloquy took place on the floor of the House between Representative Boland, Chairman of the House Select Committee on Intelligence, and Representative Hamilton:

> Rep. Hamilton: As I understand that subsection, it allows the President to withhold prior notice entirely: that is, he does not inform anyone in that circumstance. He only has to report in a timely fashion.
>
> Is that a correct view of subsection (b)?
>
> Rep. Boland: In response to the gentleman, let me say that the President must always give at least timely notice.

126 Cong. Rec. 28392 (1980). Thus, Representative Boland clearly, if reluctantly, confirmed Rep. Hamilton's interpretation. During the floor debates, several Senators also acknowledged that the proposed legislation did not require that Congress be notified of all intelligence activities prior to their inception. According to Senator Nunn, the bill contemplated that "in certain instances the requirements of secrecy preclude any prior consultation with Congress." 126 Cong. Rec. 13127 (1980) (statement of Sen. Nunn). *See also id.* at 13125 (statement of Sen. Huddleston) ("Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operations . . . ."); *id.* at 13103 (statement of Sen. Bayh).

In the course of the floor debates, some Senators stated that the situations in which prior notice was not required would be very rare. *See, e.g.*, 126 Cong. Rec. 26276 (1980) (remarks of Sen. Inouye). Such statements are of little relevance to determining the scope of the prior notice requirement. First, the executive branch has always agreed that instances of deferred reporting will be rare and has consistently given prior notice. Second, § 501 at the very least permits the President to defer notice when he is acting pursuant to his independent constitutional authority; the scope of this authority is determined, not by legislators' view of the Constitution, but by the Constitution itself. Third, the draftsmen of § 501 decided that because the scope of the President's constitutional "authorities and duties" was in serious dispute, the legislation would not attempt to resolve the issues separating the parties to the dispute. *See* 126 Cong. Rec. 13123 (1980) (statement of Sen. Javits). The ambiguities of subsection (b) reflect Congress' *inability* to override the executive branch's view of the President's constitutional authority. That dispute cannot now be settled, contrary to the Executive's position, by reference to the statements of individual Congressmen who had a narrow view of the President's constitutional role.

fact,[30] then any further statutory limitations on the President's discretion should be narrowly construed in order to respect the President's constitutional independence. The requirement that such after-the-fact notification be made "in a timely fashion" appears to be such an additional limitation.

The entire analysis in this memorandum supports the proposition that the phrase "in a timely fashion" must be construed to mean "as soon as the President judges that disclosure to congressional committees will not interfere with the success of the operation." To interpret it in any other way — for example, by requiring notification within some arbitrary period of time unrelated to the exigencies of a particular operation — would seriously infringe upon the President's ability to conduct operations that cannot be completed within whatever period of time was read into the statutory provision.[31] Furthermore, several putatively discrete intelligence "operations" may be so interrelated that they should realistically be treated as a single undertaking whose success might be jeopardized by disclosure prior to its completion.[32]

Thus, a number of factors combine to support the conclusion that the "timely fashion" language should be read to leave the President with virtually unfet-

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[30] Senator Huddleston's interpretation is not necessarily correct, because the President may be able to withhold prior notice even without invoking his independent constitutional authority.

[31] On the floor of the Senate, the bill's sponsor indicated that his personal view of the President's constitutional powers was very narrow, and that he wanted the relevant congressional committees notified "as soon as possible." He acknowledged, however, that the executive branch took a different view, and that he expected "that these matters will be worked out in a practical way." 126 Cong. Rec. 13096 (1980) (remarks of Sen. Huddleston). These statements show that the legislation was not thought to preclude the President from acting on his own view of his own constitutional powers. In guarding against such improper interference, the President's own interpretation of his constitutional powers "is due great respect" from the other branches. *See United States* v. *Nixon*, 418 U.S. 683, 703 (1974).

[32] In his prepared testimony on S. 2284, President Carter's CIA Director, Stansfield Turner, stated:

> Prior reporting would reduce the President's flexibility to deal with situations involving grave danger to personal safety, or which dictate special requirements for speed and secrecy. On the other hand, activities which would have long term consequences, or which would be carried out over an extended period of time should *generally* be shared with the Congress at their inception, and I would have no objection to making this point in the legislative history.

National Intelligence Act of 1980: Hearings before the Senate Select Comm. on Intelligence, 96th Cong., 2d Sess. 17 (1980) (emphasis added). Turner's testimony cannot properly be interpreted to imply that all "long term," as opposed to "short term," projects require prior notice. First, Turner drew a distinction between projects involving great personal danger *or* requiring speed and secrecy and projects of long duration or with long term consequences. He did not address projects that are *both* long term *and* that involve danger to personal safety, such as the recent Iranian initiative. The inadvisability of prior reporting applies as forcefully to such a project as to "short term" projects that involve personal safety. Second, Turner was careful not to say that long term projects must always be reported at their inception: he said only that they will *generally* be so reported. In a colloquy with Senator Bayh concerning the word "generally," Turner stressed that "one has to be a little cautious" in making such a statement because "it will be quoted back from these hearings for years to come." *Hearings*, *supra*, at 32. Turner never stated that the Executive would or should give prior notice of all long-term projects. Third, a distinction between long and short-term projects would virtually force the President to prefer military to diplomatic initiatives in situations like the one at issue in this memorandum, which could not have been Congress' intent.

In any event, S. 2284 was not enacted, and the full Congress never had its attention directed to Turner's statements. Those statements are therefore not a significant aid in interpreting § 501(b). As we have shown, both the text of the statute and the colloquies on the floor of the House and Senate indicate that Congress did not require prior notice when the President was acting pursuant to his independent constitutional authority. In permitting "timely notice" in § 501(b), Congress made no distinction between long and short term projects, and no such distinction should be read into the statute.

tered discretion to choose the right moment for making the required notification. The word "timely" is inherently vague;[33] in *any* statute, it would ordinarily be read to give the party charged with abiding by a timeliness requirement the latitude to interpret it in a reasonable manner. Congress apparently thought that the notification requirement was meant to limit the President's exercise of his inherent authority, while at the same time Congress acknowledged the existence and validity of that authority. Because the President is in the best position to determine what the most reasonable moment for notification is, and because any statutory effort to curtail the President's judgment would raise the most serious constitutional questions, the "timely fashion" language should be read, in its natural sense, as a concession to the President's superior knowledge *and constitutional right* to make any decision that is not manifestly and indisputably unreasonable.[34] This conclusion is reinforced by the nature of intelligence operations, which are often exceptionally delicate undertakings that may have to extend over considerable periods of time. The statute's recognition of the President's authority to withhold prior notification would be meaningless if he could not withhold notification at least until after the undertaking as a whole was completed or terminated.[35]

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[33] The statute uses a more precise phrase in § 501(a), where it requires that certain committees be kept "fully and currently informed" of activities not covered by § 501(b). This phrase was interpreted by the Senate Committee to mean that "arrangements for notice are to be made forthwith, without delay." S. Rep. No. 730, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4192, 4199. No such interpretation was placed on the "timely fashion" language of § 501(b). *See id.* at 12, *reprinted in* 1980 U.S.C.C.A.N., at 4202–03.

[34] The legislative history of § 501(a) specifically indicated that "[n]othing in this subsection is intended to expand or to contract or to define whatever may be the applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative branches." S. Rep. No. 730, 96th Cong., 2d Sess. 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4192, 4196. Furthermore, the Senate Committee acknowledged that it was "uncertain" about the distribution of powers between the President and Congress in the national security and foreign policy area. *See id.* at 9, *reprinted in* 1980 U.S.C.C.A.N., at 4199.

[35] Section 502 of the National Security Act, 50 U.S.C. § 414, generally limits the use of funds appropriated for intelligence activities to cases in which Congress has been given prior notice of the nature of the activities. Section 502(a)(2) allows expenditures when "in the case of funds from the Reserve for Contingencies of the Central Intelligence Agency and consistent with the provisions of section [501] concerning any significant anticipated intelligence activity, the Director of Central Intelligence has notified the appropriate congressional committees of the intent to make such funds available for such activity." This provision should be interpreted to allow the President to use funds from the Reserve for Contingencies in order to carry out operations for which he withholds notice in accord with § 501(b). Section 502(a)(2)'s specific reference to § 501 should be taken to give the President implicit authorization to withhold notification of the expenditure of funds just as he withholds notification of the operation itself: to read it otherwise would mean that § 502 had effectively, though impliedly, repealed § 501's acknowledgement of the President's independent constitutional authority.

It should be noted, however, that § 502(a)(2) is clumsily drafted; if read literally, it could be taken to suggest that Congress must always be notified in advance when funds appropriated for intelligence activities are to be used for covert operations. The Conference Committee commented on the language in question by noting that it did not expect situations to arise in which there would have to be prior notice under § 502 as to the funding of an activity that did not itself have to be reported under § 501; the Committee also indicated that if such a situation were to arise, it should be resolved in a spirit of "comity and mutual understanding." H.R. Conf. Rep. No. 373, 99th Cong., 1st Sess. 19 (1985), *reprinted in* 1985 U.S.C.C.A.N. 952, 961–62. *Accord* S. Rep. 79, 99th Cong., 1st Sess. 5 (1985). Similarly, the House Committee Report indicated that "the same event . . . can be treated in the same way under new Section 502(a) and Section 501." H.R. Rep. No. 106 (Part 1) 8 (1985), *reprinted in* 1985 U.S.C.C.A.N. 952, 954. This supports the reasoning outlined above.

Conclusion

Section 501(b) of the National Security Act of 1947 must be interpreted in the light of § 501 as a whole and in light of the President's broad and independent constitutional authority to conduct foreign policy. The requirement that the President inform certain congressional committees "in a timely fashion" of a foreign intelligence operation as to which those committees were not given prior notice should be read to leave the President with discretion to postpone informing the committees until he determines that the success of the operation will not be jeopardized thereby. Because the recent contacts with elements of the Iranian government could reasonably have been thought to require the utmost secrecy, the President was justified in withholding § 501(b) notification during the ongoing effort to cultivate those individuals and seek their aid in promoting the interests of the United States.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Applicability of Executive Privilege to the Recommendations of Independent Agencies Regarding Presidential Approval or Veto of Legislation

In making recommendations to the President to approve or disapprove legislation, an independent agency functions as part of the President's core of executive advisers.

When independent agencies render advice to the President concerning his approval or disapproval of legislation, they are acting in an executive capacity, and such advice can be protected under the doctrine of executive privilege.

December 22, 1986

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

As part of the internal executive branch process for presenting to the President recommendations for approval or disapproval of legislation, the Office of Management and Budget often solicits the views of the "independent agencies" with respect to legislation of particular concern to them. Their recommendations and comments are consolidated by OMB and communicated to the President along with those of the other concerned agencies and departments.

Because existing precedent separates the "independent agencies" somewhat from the President's direct supervision and control, *see, e.g., Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the question has arisen as to whether recommendations and comments made by an independent agency in this context, *i.e.*, as advice to the President on his approval or disapproval of legislation, may be protected from disclosure to Congress by the doctrine of executive privilege.

A preliminary question, which does not depend on the status of an agency as "independent," is whether Congress has authority to inquire into approval or veto recommendations made to the President. The Supreme Court has acknowledged that the investigative power of Congress, while broad, is not unlimited. There must be a subject matter for the inquiry, the investigation must be authorized by Congress, there must be a valid legislative purpose, the witness must be accorded certain constitutional protections, and the information demanded must be pertinent to the inquiry. *See Gojack* v. *United States*, 384 U.S. 702, 704–05, 714 (1966); *Wilkinson* v. *United States*, 365 U.S. 399, 408–09 (1961); *Barenblatt* v. *United States*, 360 U.S. 109, 111, 117 (1959);

Watkins v. *United States*, 354 U.S. 178, 187 (1957); *United States* v. *Rumely*, 345 U.S. 41, 44–46 (1953); *McGrain* v. *Daugherty*, 273 U.S. 135, 173, 176 (1927); *Kilbourn* v. *Thompson*, 103 U.S. 168, 190 (1881). The information sought by Congress must be "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Congress may of course appropriately request the views of the Executive Branch on pending legislation, as part of its inquiry into the wisdom of and need for the legislation. However, once that legislation has been passed by Congress, the President alone must determine whether it should be approved. The President's authority to approve or disapprove legislation is absolute, unqualified (except insofar as Congress may override a veto through the legislative process), and unreviewable. Because the veto power is one vested exclusively in the President by the Constitution, it is therefore difficult to see how Congress has any legitimate legislative interest in reviewing the exercise of that power.[1]

Even if Congress can claim a legitimate legislative interest in recommendations made to the President with respect to the approval or disapproval of legislation, it is clear, at least with respect to "nonindependent" Executive Branch agencies, that the doctrine of executive privilege may be invoked to prevent disclosure of those recommendations. In *United States* v. *Nixon*, 418 U.S. 683 (1974), the Supreme Court established in unequivocal terms that the privilege is of constitutional stature. The Court rested this ruling, first, on the need for protection of communications between high government officials and those who assist and advise them, and, second, on the constitutional separation of powers between the three branches:

> Human experience teaches that those who expect public dissemination of their remarks may well temper candor with concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area

[1] In a similar context — that of removal of executive branch officers — the Executive Branch has consistently refused to comply with congressional requests to explore the reasons for dismissal, because under Article II the power to remove Executive Branch officers is exclusively the President's. For example, President Andrew Jackson declined to give the Senate the reasons for dismissal of an executive officer, explaining that "the President in cases of this nature possesses the exclusive power of removal from office, and, under the sanction of his official oath and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require." 3 J. Richardson, *Messages and Papers of the President* 133 (Gov't Printing Office ed. 1896). President Cleveland similarly rejected "the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function." 8 J. Richardson, *Messages and Papers of the President* at 381. In the more recent past, General Omar Bradley refused in 1951 to testify before Senate committees concerning his discussions with President Truman regarding the firing of General MacArthur. General Bradley's refusal was upheld by the Senate Committees on Armed Services and Foreign Relations *Military Situation in the Far East: Hearings before the Sen. Comm. on Armed Services and Sen. Comm. on Foreign Relations*, 82d Cong., 1st Sess., Part 2, 832–72 (1951).

> of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Id. at 705–06. In determining whether to approve or disapprove legislation, the President needs the benefit of full and frank discussions within the Executive Branch of the merits of the legislation. Recommendations made to the President are therefore quintessentially deliberative type materials that can be protected under the doctrine of executive privilege.[2]

The rationale that justifies withholding this type of material under the doctrine of executive privilege is equally applicable to the "independent agencies." In making recommendations to the President to approve or disapprove legislation, an independent agency is functioning as part of the President's core of executive advisers, just as the other departments and agencies. The role played by the various agencies in the process is virtually indistinguishable, regardless of whether the agency is termed "independent" or not. It would be inconsistent with the underlying principle of executive privilege — the need to preserve the integrity of the President's decisionmaking process — to conclude that recommendations made by a Cabinet agency may be protected, whereas recommendations on the same bill, made as part of the same inter-agency process, cannot be protected.

This functional analysis is consistent with the Supreme Court's view in *Humphrey's Executor* of the relationship between the President and the independent agencies. Even assuming, *arguendo*, the continuing validity of *Humphrey's Executor*,[3] it clearly does not divorce entirely the "independent agencies" from the executive branch. Under *Humphrey's Executor*, the President may be limited, in certain questions of removal, from asserting direct supervision and control over the "quasi- legislative" or "quasi-judicial" functions of the agencies. Nothing in the decision suggests, however, that when an agency functions in a clearly executive capacity — such as rendering advice to the President — it is likewise insulated from direct Presidential supervision. A more detailed discussion of this question can be found in a 1957 opinion of this Office. Memorandum for the Attorney General from W. Wilson White, Assistant Attorney General, Office of Legal Counsel (Nov. 5, 1957). That opinion concludes, based on an analysis of *Humphrey's Executor*, that, "[i]n many respects [the] functions and operations [of the independent agencies] are subject to executive control," and "[i]n such cases the doctrine of executive privilege should apply to the independent regulatory commissions to the same extent that it applies to the executive departments and officers of the federal government." A current example of application of this functional analysis is the

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[2] In order to protect the confidentiality of those recommendations, the privilege would extend as well to drafts and inter- or intra-agency deliberative communications preparatory to making the final recommendation. *See generally NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Coastal States Gas Corp.* v. *Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

[3] *See generally Bowsher* v. *Synar*, 478 U.S. 714, 761 n.3 (1986).

Executive Order on classification and declassification of sensitive national security information. Executive Order No. 12356, 47 Fed. Reg. 14874 (1982). This order, which is based on the President's supervisory authority over the disclosure of information that may harm the national security — a long-recognized branch of executive privilege — applies equally to "independent agencies" and the other executive agencies.

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