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U.S. Department of Justice
Office of Legal Counsel

cc: Luttig R. File
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Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

August 19, 1991

Dennis Daugherty, Esq.
Office of the Solicitor
United States Department of the Interior
Mail Stop 6312
18th & C Streets, N.W.
Washington, D.C. 20240

Dear Mr. Daugherty:

This is in response to your inquiry concerning the constitutionality of delegating Federal law enforcement responsibility to State officials. This Office has consistently taken the position that persons exercising significant governmental authority on behalf of the United States are "officers" of the United States, see Buckley v. Valeo, 424 U.S. 1, 126-141 (1976), and must be appointed pursuant to the requirements of the Appointments Clause. That Clause does not provide for appointment of Federal officers by persons or bodies other than the President, the Federal courts, or the Heads of Executive Departments. See Freytag v. C.I.R., 111 S. Ct. 2631, 2641-42 (1991); id. at 2650-51 (Scalia, J., concurring in part and in judgment). Unless State officials have been appointed pursuant to the requirements of the Appointments Clause, therefore, they may not exercise significant Federal law enforcement powers.

We have, however, also taken the position that certain "cooperative federalism" programs, for example in the environmental protection area, may pass constitutional scrutiny. Under such programs, the participating State is required to enact the necessary statutes and regulations, to designate agencies to administer those statutes and regulations, and to prepare an implementation plan for submission to and approval by the appropriate Federal agency. If the Federal agency finds that the State implementation plan conforms to the relevant Federal guidelines, the Federal agency may relinquish to the State both implementation authority and program funding.

On a related matter, we have suggested that a very high degree of substantively meaningful supervision by responsible Executive Branch officials might in some circumstances permit the delegation of certain Federal law enforcement authority to a private person -- for example, a delegation to a private attorney of the power to bring an enforcement action to collect debts on

behalf of the United States. However, we caution that the degree of Executive Branch supervision and control required to constitutionalize such a delegation may be so pervasive and complete as to be at odds with the intended purpose of the delegation.

We enclose copies of two bill comments by this Office in which we have articulated our position on these issues. We also enclose an excerpt from James Madison's notes on the Philadelphia Convention for August 24, 1787, which records the Convention's decision to reject a proposal that would have allowed Congress to vest Federal appointive power in State executives. Finally, as you requested, we enclose the remarks of Madison on the Judiciary Bill of 1789.

Sincerely,



John O. McGinnis
Deputy Assistant Attorney General
Office of Legal Counsel

(Enclosures)