



U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

March 12, 1992

Joseph R. Davis, Esq.
Assistant Director - Legal Counsel
Federal Bureau of Investigation
Washington, D.C. 20535

Dear Mr. Davis:

This responds to your letter of February 10, 1992, concerning the Compact for the Interstate Exchange of Criminal History Records for Non-Criminal Justice Purposes. Your letter relates that representatives of the National Crime Information Center (NCIC) Advisory Policy Board (APB) have expressed disagreement with this Office's view that certain aspects of the Compact conflict with the Appointments Clause of the Constitution. The letter further requests that this Office correspond with members of the APB to convey our legal position and reasoning on the applicability of the Appointments Clause to the proposed Compact.

I am pleased to comply with your request through this letter, which you are authorized to transmit to the APB.

As the Supreme Court explained in Buckley v. Valeo, 424 U.S. 1, 126 (1976), any appointee "exercising significant authority pursuant to the laws of the United States" is an Officer of the United States and must, therefore, be appointed in accordance with the requirements of the Appointments Clause, U.S. Const. art. II, §2, cl. 2. The kind of "significant authority" contemplated in Buckley encompasses, inter alia, the power to promulgate rules and the power to adjudicate disputes pursuant to Federal law. Id., 424 U.S. at 140-41; Freytag v. Commissioner of Internal Revenue, 111 S.Ct. 2631, 2640 (1991). In Freytag, the Court stated that the "exercise of significant discretion" and the performance of "more than ministerial tasks" are additional indicia of such "significant authority."

We believe that members of the Compact Council established under Article VI of the proposed Compact would constitute Officers of the United States under the foregoing standards and that they must therefore be appointed in conformity with the

Appointments Clause.¹ As stated in your memorandum to this Office dated August 19, 1991, implementation of the Compact "will directly and immediately affect Federal . . . access, use and exchanges [of criminal history records]." There can therefore be little doubt that the authority exercised by Council members in these areas will be both "significant" and "Federal."²

The Compact would, by its terms, grant the Council significant rulemaking and adjudicatory authority respecting Federal operations and practices. In particular, Article VI of the Compact empowers the Council to establish rules and procedures governing the use of the nationwide "III" criminal records system for noncriminal justice purposes. Article X ("Adjudication of Disputes") vests the Council with "original jurisdiction concerning this compact regarding interpretations of the compact, system policy or standards and disputes or controversies between parties to this compact."³ In addition, Article I(b)(5) provides that the Council will have the power "to monitor system operations and to promulgate system rules and procedures necessary to assure the effective operation of the system for noncriminal justice purposes."

The rules and interpretative decisions adopted by the Council pursuant to these powers will be binding upon the United States in connection with numerous important issues arising under

¹ Under the reasoning of the Ninth Circuit's opinion in Seattle Master Builders v. Pacific N.W. Elec. Power, 786 F.2d 1359 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987), those Council members who are designated Compact Officers of party states would not be subject to the Appointments Clause if they serve pursuant to state law rather than Federal law. The reasoning of Seattle Master Builders would not, of course, apply to the six Council members who would not serve pursuant to any state law.

² Although the decisions and interpretations promulgated by the Council under Article X of the Compact are appealable to the Attorney General, the non-finality of these adjudicatory powers does not negate their significance for Appointments Clause purposes, so long as "significant discretion" is exercised. Freytag, supra, 111 S.Ct. at 2640.

³ In the form originally submitted to this Office, the Compact would have empowered the Compact Officers, "acting as a group," to engage in appellate review of the Attorney General's rulings on initial appeals from the Compact Council's decisions. It is our understanding that all parties have now agreed that the provision in Article X authorizing Compact Officers to review the Attorney General's appellate rulings under the Compact should be deleted.

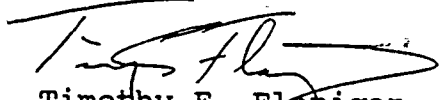
the Compact. For example, rules and interpretations adopted by the Council could affect such matters as the circumstances and conditions under which covered Federal records would be disclosed to state agencies and other requestors; the criteria for determining whether a person or entity constitutes an "authorized record user" under the governing statutes or executive orders; and the adequacy of FBI compliance with system standards governing such matters as computer system security, record request response times, and data quality.

The Council's authority under the Compact is not rendered insignificant for Appointments Clause purposes merely because it includes provisions assuring, for example, that use of the "III" system shall not diminish the level of criminal justice services, and that rules promulgated by the Council may not conflict with FBI administration of the "III" system for criminal justice purposes. Compact, Arts. III(d)(1) and VI(b). Rules and decisions adopted by the Council may implicate numerous significant Federal matters other than the maintenance of criminal justice services, such as records dissemination and privacy policy, computer security standards, and government privileges. In contrast to its specific prohibitions against interference with Federal criminal justice services, nothing in the Compact guarantees that its implementation will not create conflicts or tension with existing Federal policy and practice in other affected areas.

In sum, the powers granted to the Council under the Compact are significant and they will be exercised pursuant to the law of the United States. Those who are to exercise such powers can do so constitutionally only if they are appointed in compliance with the Appointments Clause. The modifications to the Compact proposed by this Office are intended to assure conformity with these constitutional requirements.

I hope that this letter satisfactorily addresses the questions or concerns expressed by the APB representatives.

Sincerely,


Timothy E. Flanigan
Acting Assistant Attorney General
Office of Legal Counsel