OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

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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 seven volumes of opinions published covered the years 1977 through 1983; the present volume covers 1984. The opinions included in Volume 8 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 1984 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 8

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Proposed Constitutional Amendment to Limit the Tenure of Judges

A proposed constitutional amendment to limit the tenure of judges to a term, subject to reconfirmation, is antagonistic to the overall structural design of the Constitution.

The present guarantee of judicial tenure "during good Behaviour," U.S. Const. art. III, § 1, is necessary to secure independence and impartiality. Judges limited by term and subject to reappointment will be unacceptably dependent upon the political branch exercising the power of appointment.

Under the specific proposal the appointing authority would be the Senate, thereby frustrating the present delicate balance between the legislative and executive branches that exists with respect to judicial appointments.

January 18, 1984

LETTER TO THE CHAIRMAN, SENATE COMMITTEE ON THE JUDICIARY

This responds to your request for the views of the Department of Justice on S.J. Res. 39, 98th Cong., 1st Sess., which would propose a constitutional amendment pursuant to which federal judges would be appointed for a term of office of ten years and hold office for that term during good behavior. The bill would provide that:

> During the tenth year of each term of office of any such judge, his nomination for an additional term of office for that judgeship shall be placed before the Senate for its advice and consent to such additional term, unless that judge requests that his nomination not be so placed. Any judge whose nomination for an additional term of office is so placed may remain in office until the Senate gives its advice and consent to, or rejects, such nomination.

Although the proposal is not explicit as to the manner in which a judge's nomination is to be placed before the Senate, the implication to be drawn from the language of the resolution is that, unless the judge requests that his name not be considered, the nomination is submitted to the Senate automatically by a procedure not involving the President.[1]

[1] Under the Constitution, the President's functions are, with a few exceptions, discretionary rather than ministerial. We therefore do not interpret the proposal as intending to impose on the President a ministerial duty to renominate a judge whose term is about to expire.

In commenting on the proposed amendment, the Department of Justice acknowledges that Article V of the Constitution assigns to Congress the responsibility for proposing constitutional amendments to the States and that the Executive branch has no direct role in this process, in particular that joint resolutions of this variety are not subject to the veto power of the President, *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798). Nonetheless, you have asked for the views of the Department of Justice, and we set them forth in this letter.

The Department of Justice strongly opposes the proposed amendment. The constitutional requirement "that the judges, both of the supreme and inferior Courts shall hold their Offices during good Behaviour," U.S. Const. art. III, § 1, is one of the cornerstones of the constitutional plan for the independence of the Judicial Branch and therefore of the separation of powers, the basic structural doctrine of the Constitution. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

In *The Federalist* No. 78, Alexander Hamilton stated:

> The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).[2]

During the last decade Congress, including your Committee, conducted extensive and searching inquiries into the crucial interrelationship between the independence of the judiciary and the provision in Article III for judicial tenure during good behavior terminable only by impeachment proceedings. The issue arose in connection with legislative proposals to provide in judicial proceedings for the removal or the involuntary retirement of judges who had allegedly violated the good behavior requirement or who had become incapacitated. Senators and Representatives of both political parties considered this proposal so serious a threat to the independence of the judiciary that it was ultimately abandoned and replaced by the disciplinary provisions of § 3 of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Stat. 2036 (codified at 28 U.S.C. § 372(c)).[3]

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[2] In *Toth* v. *Quarles*, 355 U.S. 11, 16 (1955), the Supreme Court stated: "The provisions of Article III [of the Constitution, which include the Good Behavior Clause] were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government." *See generally United States* v. *Will*, 449 U.S. 200, 217–19 (1980); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

[3] S. Rep. No. 362, 96th Cong., 1st Sess. 4–7, 23, 29–30 (1979); H.R. Rep. No. 1313, 96th Cong. 2d Sess. 1–5, 16–19 (1980); *Hearings on the Independence of Federal Judges before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong. 2d Sess. 329–51 (1970); *Hearings on Judicial Tenure and Discipline 1979–1980, before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. (1980).

For example, Senator Laxalt stated his view that even 28 U.S.C. § 372(c) as ultimately enacted went too far in impinging on judicial independence. He stated:

> Lifetime appointment and a slow and cumbersome system of impeachment have insured us of a Federal judiciary which remains free and independent, and has helped to assure us that cases are decided on their merits and on the law. Where unpopular decisions are warranted by the law, as they often are, a judge may render such a decision knowing that he will be free of pressure from the public, from the press, and from the rest of the judiciary. We are assured, in short, that the case will be decided as it should be, and according to law.
>
> The Federal Courts are the final link in our system of checks and balances. They are the last to act, and the last to change. After the legislature and the executive branches have acted, after the press has analyzed, reported and commented, and even after the public has experienced changes and additions to our system and to our laws, the courts finally rule on the legality, the constitutionality, the application, and the scope of those changes and laws. That review follows the debate on the need for and the advisability of such changes with good cause. Making that process more susceptible to political pressure will not, in my opinion, improve our system of Government.

S. Rep. No. 362, 96th Cong., 1st Sess. 29 (1979).

Proposals to appoint judges for terms of years "to make their decisions conform to the will of the people" are not new.[4] A century-and-a-half ago Justice Story felt it necessary to demonstrate that the appointment of judges for terms of years would not have the effect of subjecting their decisions to the "will of the people" but rather would make judges subservient to the political branches of the Government, and make the meaning of the Constitution dependent on every biennial or quadrennial election rather than on the judges' deliberate judgment. 2 J. Story, *Commentaries on the Constitution of the United States,* §§ 1613–1621 (5th ed. 1891).

The following passages are representative of Justice Story's discussion:

> If the judges are appointed at short intervals, either by the legislative or the executive department, they will naturally, and, indeed, almost necessarily, become mere dependents upon the appointing power. If they have any desire to obtain, or to hold office, they will at all times evince a desire to follow and obey the will of the predominant power in the state. Public justice will be administered with a faltering and feeble hand. . . . It will decree what best suits the opinions of the day, and it will forget that the precepts of the law rest on eternal foundations.

[4] *See* 2 J. Story, *Commentaries on the Constitution of the United States,* § 1615 (5th ed. 1891). The first edition of the *Commentaries* was published in 1833.

* * *

> If the will of the people is to govern in the construction of the powers of the constitution, and that will is to be gathered at every successive election at the polls, and not from their deliberate judgment, and solemn acts in ratifying the Constitution, or in amending it, what certainty can there be in those powers? If the Constitution is to be expounded, not by its written text, but by the opinions of the rulers for the time being, whose opinions are to prevail, the first, or the last? When, therefore, it is said that the judges ought to be subjected to the will of the people, and to conform to their interpretation of the Constitution, the practical meaning must be, that they should be subjected to the control of the representatives of the people in the executive and legislative departments, and should interpret the Constitution as the latter may, from time to time, deem correct.

Id. §§ 1613, 1616. The logic of Justice Story's analysis is still valid. If judges are appointed for a definite term subject to reappointment, it is inevitable that at least some of them will seek to avoid offending those who have the power to block their reappointment. It would, of course, be possible to guard against that danger by providing that judges would be ineligible for reappointment. In that event, however, many lawyers, although highly qualified to become judges, might be reluctant to give up their practice for a temporary judicial appointment, and even among those who do, some may be suspected toward the end of their term of seeking to curry favor with those who may be of assistance to them in reentering private practice. *See The Federalist* No. 78, supra, at 471.

For the foregoing reasons, and without intending to foreclose further congressional consideration of the good behavior issue or the entirely separate issue of "judicial restraint," the Department of Justice is in principle opposed to the abolition of tenure during good behavior for the federal judiciary as contemplated by S.J. Res. 39. Two significant aspects of S.J. Res. 39 which aggravate the harm connected with the abolition of such tenure require additional comment.

First, as we understand the proposal, the renomination of a judge whose term has expired would come automatically before the Senate, and if the Senate were to give its advice and consent to the additional term, the term would be automatically extended. The President would take no part in the processes of nomination and appointment; he would not have the power to refuse to renominate a judge or to deny reappointment to a judge to whose reappointment the Senate has given its advice and consent. The reappointment process thus would be under the exclusive control of the Senate. The Department of Justice strenuously objects to this aspect of the joint resolution, because it is in conflict with the constitutional plan embodied in Article II, § 2 of the Constitution, pursuant to which the nomination and appointment of federal officers are the *discretionary* acts of the President, even if as regards certain officers the latter can be performed only with the advice and consent of the Senate. *Marbury* v.

Madison, 5 U.S. (1 Cranch) 137, 155 (1803). We are not aware why this rule should not apply to the reappointment of judges. Indeed, this aspect of the joint resolution accentuates the objections to the provisions giving judges terms of years, because it makes judges dependent exclusively on the Senate for their reappointment. This alters the constitutional plan of checks and balances and tilts the scale toward one branch, the Legislative, and away from the Judiciary and the President.

Second, the joint resolution would provide that when a nomination for an additional term is placed before the Senate, the judge "may remain in office until the Senate gives its advice and consent to, or rejects, such nomination." By refusing to take any action on the renomination, the Senate, or indeed a Committee of the Senate or, under Senate practice relating to confirmations, initially one Senator,[5] can place the judge in a position for an indefinite period in which he or she can be ousted at any time for any decision which may displease the Senate. To have such a sword of Damocles hang over a judge is totally inconsistent with our constitutional system of three separate branches "entirely free from the control or coercive influence direct or indirect of either of the others." *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). As the Court held in that case: "[I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.* at 629.

We should not forget that one of the charges against King George III in the Declaration of Independence was:

> He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.

The Department of Justice therefore opposes the proposed constitutional amendment.

The Office of Management and Budget has advised that it has no objection to the submission of this report from the standpoint of the Administration's program.

ROBERT A. MCCONNELL
Assistant Attorney General
*Office of Legislative Affairs**

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[5] In *The Changing Role of the Senate Judiciary Committee on Judicial Selection*, 62 Judicature 502, 504–05 (1979), Professor Slotnick documents the fact that, under the "Blue Slip" procedure, a single Senator of the nominee's home state may prevent the scheduling of the hearing and consequently the advice and consent of the Senate on a Presidential nominee. *See also Slotnick, Reforms in Judicial Selection: Will They Affect the Senate's Role?*, 64 Judicature 60, 62–63 (1980). This process is also described in Adams and Kavanagh-Baran, *Promise and Performance: Carter Builds a New Administration* 111–13 (1979). Thus, a single Senator could utilize current practices to keep a judge's reconfirmation in suspense for an indefinite period of time.

* NOTE: This letter was drafted by the Office of Legal Counsel for the signature of the Assistant Attorney General for the Office of Legislative Affairs.

Application of the Resource Conservation and Recovery Act to the Department of Energy's Atomic Energy Act Facilities

The nuclear production and weapons facilities that are operated by the Department of Energy (DOE) pursuant to the Atomic Energy Act (AEA) are generally subject to the requirements of the Resource Conservation and Recovery Act (RCRA) governing the disposal of solid wastes, including applicable standards, regulations, permit requirements, and enforcement mechanisms. 42 U.S.C. § 6961.

Particular RCRA regulations or requirements may not apply to DOE facilities when the application of such regulation or requirement would be inconsistent with specific requirements of the AEA that flow directly from DOE's statutory mandate to develop and use atomic energy. 42 U.S.C. § 6905(a).

Whether a particular RCRA regulation or requirement is inconsistent with the requirements of the AEA must be analyzed by DOE and the Environmental Protection Agency on a case-by-case basis. However, § 1006(a) of RCRA, 42 U.S.C. § 6905(a), should relieve DOE from compliance with RCRA regulations or requirements (1) if they conflict with prescriptive directives contained in the AEA itself, such as the AEA restrictions on public disclosure of restricted data; (2) if compliance would prevent DOE from carrying out authorized AEA activities; or (3) if compliance would be inconsistent with specific operational needs of a facility that are unique to the production of nuclear material or components. In addition, a state may not exercise veto power over the establishment or operation of a DOE facility, either by denying necessary permits, or by seeking injunctive relief, because of noncompliance with a RCRA regulation that is inconsistent with the AEA.

February 9, 1984

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

This responds to your request for our analysis regarding whether, or to what extent, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (RCRA) applies to chemical wastes generated by nuclear production and weapons facilities owned by the Department of Energy (DOE) and operated under authority provided by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.* (AEA). The context for your request is a difference of opinion between DOE and the Environmental Protection Agency (EPA) over whether waste treatment and disposal facilities and methods used at DOE's Atomic Energy Act plants are subject to RCRA standards, permit requirements, and enforcement mechanisms. DOE has taken the position that § 1006(a) of RCRA, 42 U.S.C. § 6905(a), which provides that RCRA does not apply to "activit[ies] . . . subject to . . . the Atomic Energy Act of 1954 . . . except to the

extent such application (or regulation) is not inconsistent with the requirements of such Act[]," exempts its AEA facilities from all RCRA regulation. EPA contends that DOE's AEA facilities are subject to RCRA, as are all other federal facilities, but that specific RCRA regulations may not apply to some aspects of DOE's operations, if application of those regulations would be inconsistent with particular requirements flowing directly from the language or purpose of the AEA.[1]

We have received submissions from DOE and EPA on the applicability of RCRA, including copies of previous correspondence between those agencies on the issue. Based on our review of those materials, discussions with your Division and personnel at DOE and EPA, and our own research, we have concluded that EPA's interpretation of § 1006(a) represents the sounder view of the law. For the reasons set forth below, we conclude that DOE's Atomic Energy Act facilities are generally subject to the requirements of RCRA, including compliance with applicable standards, regulations, and permitting requirements, and are generally subject to the enforcement mechanisms established by RCRA. Section 1006(a) leaves open the possibility, however, that particular RCRA regulations or requirements are not applicable to DOE's facilities, or to a particular facility, because such regulations or requirements would be "inconsistent with the requirements of [the AEA]." We do not interpret "requirements of [the AEA]," as used in § 1006(a), as broadly as DOE urges, *i.e.*, to encompass all DOE regulations, orders, and directives that apply to, or may affect, health and safety aspects of its Atomic Energy Act facilities. Rather, in order to give reasonable content to § 1006(a), we must interpret the term "requirements" more narrowly, as EPA urges, in light of the somewhat different purposes of the AEA and RCRA.

Thus, we believe that § 1006(a) would relieve DOE from compliance with RCRA only in particular circumstances where DOE can demonstrate that application of a regulation or requirement would be inconsistent with specific requirements of the AEA that flow directly from DOE's statutory mandate to develop and use atomic energy. Although it is difficult in the absence of particular facts to give precise content to the term "requirements," we believe DOE could demonstrate that particular aspects of RCRA should not apply to operation of its facilities (or particular facilities), for example: if the RCRA regulation would conflict with prescriptive directives contained in the AEA itself, including principally the restrictions on public disclosure of "restricted data;"[2] if compliance would prevent DOE from carrying out authorized Atomic Energy Act activities; or if compliance with a particular regulation or require-

[1] DOE's position has been challenged in recently filed litigation involving DOE's Y-12 Plant in Oak Ridge, Tennessee, at which nuclear weapons components are fabricated and assembled. *Legal Envt'l Assistance Found.* v. *Hodel*, C.A. No. 3–83–52 (E.D. Tenn filed Sept. 20, 1983). In addition, we understand that DOE is currently negotiating with officials in South Carolina with respect to regulation of waste handling at Atomic Energy Act facilities in that state, and that those officials have taken the position that operation of those facilities should be conditioned on receipt of state waste handling permits under the RCRA scheme.

[2] *See* 42 U.S.C. §§ 2161–2168.

ment would be inconsistent with specific operational needs of a facility that are unique to the production of nuclear material or components.

Obviously, this interpretation does not provide an exact or necessarily comprehensive standard. We attempt below to provide as much guidance as possible to you and to EPA for implementation of our conclusions. In the abstract, however, we cannot determine which particular aspects of RCRA, or particular regulations, would be "inconsistent with the requirements of [the AEA]." That determination must be made by your agency and EPA based on an analysis, from both a general and a facility specific perspective, of how implementation of RCRA will affect the operation of DOE's Atomic Energy Act facilities.

II. Background

RCRA, passed in 1976, established a broad regulatory scheme governing the generation, transportation, storage, and disposal of solid wastes. Under that Act, the practice of "open dumping" is prohibited, *see* 42 U.S.C. § 6945, and the states are encouraged by federal financial and technical assistance to prepare and submit to EPA for approval overall plans for regulation of solid waste. *See id.* §§ 6931, 6948. The treatment, storage, and disposal of solid wastes considered by EPA to be "hazardous wastes"[3] are subject to a permit requirement, *see id.* § 6925, and generators, transporters, and owners or operators of facilities for the treatment, storage, and disposal of solid wastes must meet such minimum standards promulgated by EPA "as may be necessary to protect human health and environment." *See id.* §§ 6922, 6923, 6924. As under the regulatory schemes established by the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (FWPCA), RCRA authorizes the states to administer the regulatory scheme, including issuance of permits and enforcement of sanctions for violations, if the Administrator of EPA finds that a state's regulatory scheme is "equivalent" to the federal scheme.[4] No state may impose any requirements for the management of hazardous wastes that are less stringent than the standards promulgated by EPA, but states are expressly authorized to impose requirements that are more stringent than federal standards. *See* 42 U.S.C. § 6929. RCRA also provides for private "citizens suits" against persons, including the United States, for violation of any permit, standard, regulation, condition, requirement, or order that has become effective pursuant to RCRA. *See id.* § 6972.

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[3] "Hazardous waste" is defined by RCRA to mean "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may —

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

42 U.S.C. § 6903(5). EPA is responsible for identifying the characteristics of hazardous wastes and listing particular hazardous wastes that are subject to the hazardous waste management provisions of RCRA. *Id.* § 6921.

[4] *Compare* 42 U.S.C. § 6926 (RCRA) *with* 42 U.S.C. § 7410 (Clean Air Act) and 33 U.S.C. § 1342 (FWPCA)

The question before us is whether the regulatory scheme imposed by RCRA, including both federal and state regulation of hazardous wastes, applies to chemical wastes produced by DOE's production and weapons facilities operated pursuant to authority provided in the AEA.[5] These facilities, which are generally owned by DOE and operated by private contractors, produce special nuclear material and components used in research, development, testing, and production of nuclear weapons.[6] Operation of the facilities generates various waste streams, including chemical wastes that are considered to be "hazardous wastes" under EPA criteria and regulations. These wastes are generated by a variety of industrial processes, including metal working, electroplating, chemical extraction, machining, fabrication, and assembly and cleaning of solvent parts.

Our analysis here turns on the two sections of RCRA that deal with regulation of federal facilities and activities: § 6001, 42 U.S.C. § 6961, which explicitly subjects all federal facilities and activities to state and federal regulation under RCRA; and § 1006(a), 42 U.S.C § 6905(a), which precludes regulation under RCRA of any "activity or substance" subject, *inter alia,* to the AEA "except to the extent such application [of RCRA] (or regulation) is not inconsistent with the requirements of such Acts." Section 6001 provides in pertinent part:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management

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[5] The question we address here is applicability of RCRA to *nonnuclear* wastes generated by DOE's facilities. The only materials that can be regulated under RCRA are "solid wastes" and "hazardous wastes" (which are a subset of "solid wastes"). Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), expressly exempts from the definition of "solid waste": "source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended." Thus, RCRA leaves undisturbed DOE's authority to regulate the disposal of source, special nuclear, and byproduct wastes, which we understand are for the most part handled separately from nonnuclear wastes. DOE has not indicated that its waste streams include other nuclear material that does not fall within the categories of source, special nuclear, and byproduct wastes.

[6] DOE, as successor to the Atomic Energy Commission's research and development responsibilities, *see* 42 U.S.C. §§ 5814(c), 5817 (1976) (transfer of functions to Energy Research and Development Administration); 42 U.S.C. § 7151 (Supp. V 1981) (transfer of functions from Energy Research and Development Administration to DOE), is authorized by § 31(a) of the AEA, 42 U.S.C. § 2051(a), to make arrangements for the conduct of research and development activities relating to

> (1) nuclear processes;
>
> (2) the theory and production of atomic energy, including processes, materials, and devices related to such production;
>
> (3) utilization of special nuclear material and radioactive material for medical, biological, agricultural, health, or military purposes;
>
> (4) utilization of special nuclear material, atomic energy, and radioactive material and processes entailed in the utilization or production of atomic energy or such material for all other purposes, including industrial or commercial uses, the generation of usable energy, and the demonstration of advances in the commercial or industrial application of atomic energy;
>
> (5) the protection of health and the promotion of safety during research and production activities; and
>
> (6) the preservation and enhancement of a viable environment by developing more efficient methods to meet the Nation's energy needs.

Id. DOE is further authorized to "produce or to provide for production of special nuclear material in its own production facilities," *id.* § 2061(b), to perform research and development work in the military application of atomic energy, *id.* § 2121(a), and to engage in the production of atomic weapons, *id.*

> facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

This section further provides that the President may exempt any "solid waste management facility"[7] of any Executive Branch department, agency, or instrumentality from compliance with RCRA requirements "if he determines it to be in the paramount interest of the United States to do so." *Id.* Section 6001 was modeled on parallel provisions in the Clean Air Act and the FWPCA, both of which subject federal facilities to the regulatory schemes imposed by those Acts and provide for Presidential exemptions.[8]

If § 6001 were the only provision dealing with the applicability of RCRA to federal facilities or activities, our analysis would end here. The operation of DOE's Atomic Energy Act facilities is plainly an "activity resulting . . . in the disposal of hazardous wastes," and therefore within the explicit waiver of sovereign immunity for federal facilities provided by § 6001.[9] Indeed, we understand that DOE does not contest the applicability to those facilities of the FWPCA.[10] Specific problems that have arisen because of the application of the FWPCA to DOE's Atomic Energy Act facilities have been dealt with through negotiations between EPA and DOE, resulting in most cases in agreements that govern DOE's compliance with the FWPCA.

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[7] RCRA's definition of this term includes systems for collection, separation, recycling, and recovery of solid wastes, systems for resource conservation, and facilities for the treatment of solid wastes. *See* 42 U.S.C. § 6903(29).

[8] *See* 42 U.S.C. § 7418 (Clean Air Act); 33 U.S.C. § 1323 (FWPCA), *discussed in* S. Rep. No. 988, 94th Cong., 2d Sess. 24 (1976).

[9] Given the broad definition of "solid waste management facility," DOE's Atomic Energy Act facilities would in most cases also be considered "solid waste management facilities;" if wastes were disposed on site, DOE would be considered to have jurisdiction over "disposal sites." Therefore those facilities would probably also fall within the first category of federal facilities described in § 6001.

[10] The FWPCA does not include a provision comparable to § 1006(a) of RCRA making the FWPCA subordinate, at least in some circumstances, to the AEA or other statutes. Rather, the effect of § 511(a) of the FWPCA, 33 U.S.C. § 1371(a), is to make the FWPCA prevail in the event of inconsistencies between that Act and other laws or regulations. Section 511(a) provides, in pertinent part, that "[t]his chapter [FWPCA] shall not be construed as . . . limiting the authority or functions of any officer or agency of the United States under any law or regulation not inconsistent with this chapter."

Because the Clean Air Act is not generally enforced through a permit system, DOE has not had relevant experience with potential inconsistencies between the AEA and that Act.

However, unlike the FWPCA, RCRA explicitly addresses, in § 1006(a), its relationship to certain other statutes, including the AEA. Section 1006(a) provides in full text that:

> *Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to* the Federal Water Pollution Control Act [33 U.S.C. §§ 1251 *et seq.*], the Safe Drinking Water Act [42 U.S.C. §§ 300f *et seq.*], the Marine Protection, Research and Sanctuaries Act of 1972 [33 U.S.C. §§ 1401 *et seq.*], or *the Atomic Energy Act of 1954 [42 U.S.C. §§ 2011 et seq.] except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.*

42 U.S.C. § 6905(a) (emphasis added).

If operation of DOE's Atomic Energy Act facilities is an "activity . . . subject to . . . the Atomic Energy Act" within the meaning of this section, which we believe it is,[11] § 1006(a) by its terms would preclude application of RCRA regulations or requirements "except to the extent . . . not inconsistent with the requirements of [the AEA]." The crux of the question before us is the meaning of that proviso in § 1006(a).

DOE contends that this proviso proscribes any application of RCRA regulations and requirements to its Atomic Energy Act facilities, and therefore also proscribes any regulatory authority by EPA or the states over those facilities. The comparison required by the language of the proviso and its context within § 1006(a), according to DOE, is between overlapping regulatory *schemes*, not between individual regulations or requirements imposed by those schemes. DOE argues that § 1006(a) is intended to make it clear that RCRA's regulatory scheme would be subordinate to those of other enumerated statutes so as to avoid subjecting the same activity or substance to varying sources of regulation having the potential for conflict. DOE asserts that comparison of the regulatory schemes established by the AEA and RCRA reveals three major inconsistencies in the treatment of federal facilities under those Acts:

> (1) the AEA does not provide for any state role in permitting of federal facilities, while RCRA provides for state permitting programs and enforcement, and allows state requirements to be more stringent than those imposed by federal regulation;

[11] It could be argued that the term "activity" as used in § 1006(a) is intended only to include the activity of handling or treating solid wastes, which arguably is not "subject to" the AEA. However, we construe "activity" in § 1006(a) consistently with the use of the same term in § 6001, which provides that any federal "*activity resulting* . . . in the disposal of solid waste or hazardous waste" is subject to RCRA. (Emphasis added.) As we note above, we believe that term clearly includes the operation of DOE's Atomic Energy Act facilities.

(2) the AEA places authority in DOE to determine appropriate standards for waste handling for public health and safety, while RCRA places that authority in EPA and the states;[12]

(3) the AEA restricts access to and dissemination of restricted data pertinent to the design or construction of nuclear weapons and production and use of special nuclear material, while RCRA requires that EPA and state officials have access to information on the generation and handling of hazardous wastes and to waste sites, and generally provides for public availability of information.

DOE contends that the cumulative effect of these inconsistencies is to exempt from RCRA's scheme of regulation the operation of DOE's Atomic Energy Act facilities.

EPA accepts the premise that national security and other considerations may require some adjustments in the application of hazardous waste regulations to DOE's Atomic Energy Act facilities and agrees with DOE's assertion that continued operation of certain facilities cannot be dependent on permission granted by state officials. EPA disagrees, however, with DOE's argument that the effect of the "except to the extent . . . not inconsistent" proviso in § 1006(a) is to exempt *entirely* DOE's Atomic Energy Act facilities from RCRA. Rather, EPA interprets that proviso to require a case-by-case comparison of RCRA regulations with specific requirements of the AEA. In that regard, EPA argues that regulations or directives governing hazardous waste treatment and disposal that DOE issues under the authority of § 161(i)(3) would not generally be "requirements of" the AEA, but rather should, for the most part, be considered as incidental to DOE's statutory mandate to promote the development, use, and control of atomic energy.[13] EPA interprets "requirements," as used in § 1006(a), to mean prescriptive directives contained in the statute itself, such as the AEA's provisions governing restricted data, or particular regulations and orders shown to be necessary to implement DOE's particular statutory mandate.

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[12] DOE cites § 161(i)(3) of the AEA, 42 U.S.C. § 2201(i)(3), as the basis for its authority to prescribe regulations and directives governing the treatment and disposal of solid wastes at its facilities. That section, enacted as part of several general powers granted to the Atomic Energy Commission under the AEA, grants DOE authority to:

> prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property.

Pursuant to this authority DOE has issued an internal order governing chemical waste disposal practices at its Atomic Energy Act facilities. DOE Order 5480.2 (Dec. 13, 1982). The hazardous waste management procedures established by that order follow, "to the extent practicable," regulations issued by EPA under RCRA, but the order states that facilities administered under the authority of the AEA are not bound by RCRA requirements.

[13] EPA points out that the primary concern of Congress when it passed the AEA in 1954 was to develop a scheme for the promotion of atomic energy and protection of the public from radioactive hazards. The general grant of authority to regulate health and safety aspects of atomic energy facilities should be interpreted in light of the legislative history of the AEA, which EPA asserts does not suggest that DOE is authorized, much less required, to establish a regime for the control of non-radioactive wastes.

EPA recognizes that some specific applications of hazardous waste regulations would probably have to yield to regulation by DOE, but believes this conclusion cannot be made on a general, abstract basis, but only with reference to specific AEA activities, and specific aspects of hazardous waste regulation. That review, EPA asserts, should be sufficient to protect DOE's particular concerns about protection of restricted data and the effect of state regulation and permit requirements.

II. Analysis

Neither the language nor the legislative history of § 1006(a) necessarily provides a dispositive answer to the question before us. However, reading the language of that provision in light of the structure and purpose of both RCRA and the AEA, we conclude that Congress did not intend that section to provide a categorical exemption from RCRA for DOE's Atomic Energy Act facilities. Rather, that section is most reasonably read to establish a priority among those statutes in cases in which a *particular* conflict exists between RCRA and accomplishment by DOE of the congressionally mandated purposes of the AEA.

We start with the language of § 1006(a). Although that language might be said to be somewhat ambiguous, the inclusion of the "except to the extent . . . not inconsistent" proviso suggests that Congress contemplated that some aspects of RCRA would apply to activities and substances subject to the enumerated statutes.[14] DOE interprets that proviso, however, to apply only to privately owned nuclear power facilities licensed by the Nuclear Regulatory Commission (NRC) under the AEA. DOE argues that, absent that proviso, the exemption from RCRA for all "activit[ies] . . . subject to [the AEA]" would encompass the operation of such private nuclear power facilities, and thereby exempt those facilities from state or federal regulation under RCRA — a result DOE argues was clearly not intended by Congress. Thus, DOE contends that inclusion of the proviso was necessary to preserve EPA's jurisdiction under RCRA over the disposal of nonnuclear chemical wastes by *privately owned* nuclear power facilities, but Congress did not also intend to provide for implementation and enforcement of RCRA with respect to federal activities "subject to the [AEA]."

[14] This reading is logically intended with respect to the three statutes listed in that section in addition to the AEA: the FWPCA, the Safe Drinking Water Act, and the Marine Protection, Research and Sanctuaries Act of 1972. Those statutes each regulate some aspect of the dumping of materials, including waste products, into bodies of water — an area also subject to regulation under RCRA and therefore potentially involving overlapping and inconsistent regulations. It is most logical to read the "except to the extent . . . not inconsistent" proviso to mean, with respect to those statutes, that in the event of an actual inconsistency between the regulations and obligations required by those statutes and by RCRA, the requirements of the enumerated statutes prevail. This reading is also suggested by § 1006(b), 42 U.S.C. § 6905(b), which directs the Administrator of EPA to "integrate all provisions of RCRA for purposes of administration and enforcement and to avoid duplication, to the maximum extent practicable, with the appropriate provisions of" several statutes administered by the EPA, including the FWPCA, the Safe Drinking Water Act, and the Marine Protection, Research and Sanctuaries Act of 1972. This section indicates clearly that Congress contemplated that RCRA would apply in some respects to activities and substances subject to those three acts.

DOE's argument would require us to draw a distinction, for the purpose of § 1006(a), between activities of *federal agencies* "subject to" the AEA and activities of *private individuals* "subject to" the AEA. However, the language of § 1006(a) does not make any such distinction, and no such distinction is suggested in the legislative history of that section. Indeed, DOE's argument could render the proviso completely superfluous, because nothing in the language or legislative history of RCRA would prevent the NRC from making virtually the same argument that DOE makes for categorical exemption from RCRA.[15] Thus, although DOE's interpretation is not entirely implausible, we are not persuaded that it is the correct one, at least in the absence of relevant and clear supporting legislative history.

Unfortunately, the legislative history of RCRA is silent with respect to exactly what Congress did intend § 1006(a) to mean. The language that became § 1006(a) was originally included in the House bill, without explanation. *See* H.R. Rep. No. 1491, 94th Cong., 2d Sess. 53 (1976) (House Report). The House bill did not include a waiver of sovereign immunity for federal facilities comparable to § 6001, but rather included a provision that would have subjected federal agencies to a separate scheme of regulation administered by EPA. *See* House Report at 24–25, 45. The Senate bill, by contrast, adopted the approach used in the FWPCA and the Clean Air Act with respect to federal facilities. Section 4 of the Senate bill added to the existing Solid Waste Disposal Act a new section that would require "[a]ll federal agencies . . . to comply with State and local controls on solid waste and hazardous waste disposal as if they were private citizens. This includes compliance with all substantive and procedural requirements, and specifically any requirements to obtain permits." S. Rep. No. 988, 94th Cong., 2d Sess. 24 (1976) (Senate Report). The Senate bill also included a definition of hazardous waste, not in the House bill, that specifically exempted "source, special nuclear, and byproduct materials," and materials subject to permits under § 402 of FWPCA. *See* Senate Report at 25, 26. The Senate Report notes, with respect to that definition, that "[r]adioactive material is included in the definition of hazardous waste, except to the extent actually regulated under the [AEA]." *Id.* at 26.

Differences between the House and Senate bills were reconciled without a formal conference, and therefore no conference report or statement of managers exists to explain the compromise reached. This compromise substituted the Senate provision that subjected federal facilities to regulation under RCRA, including state regulation, and a definition of solid waste that included the Senate's language excluding source, special nuclear, and byproduct materials.

[15] The NRC, as successor to the licensing functions of the Atomic Energy Commission, *see* 42 U.S.C. § 5841(f), is generally subject to the same restrictions, and has many of the same general powers, as DOE, under the terms of the AEA. For example, the NRC and its licensees are fully subject to the "restricted data" provisions of the AEA. Moreover, the NRC could conceivably argue that § 161(i)(3) gives it authority to impose license conditions on private nuclear plants to address hazardous waste disposal problems, and that those conditions are "requirements of" the AEA that would be inconsistent with RCRA, much as DOE has argued. Although we think it highly unlikely that the NRC would make that argument, it would considerably undercut the interpretation of § 1006(a) urged by DOE.

The compromise also included the House's language, which became § 1006(a), with respect to the effect of the AEA and other enumerated statutes. The debates on the conference bill do not discuss the for inclusion of that provision, or its intended effect. *See, e.g.,* 122 Cong. Rec. 33817 (Sept. 30, 1976) (remarks of Sen. Randolph); *id.* at 32599 (Sept. 27, 1976) (remarks of Rep. Skubitz).

Although he legislative history does not provide specific guidance on the intended effect of § 1006(a), it contains no indication Congress contemplated that some activities of federal agencies would be wholly exempt from federal and state regulation under RCRA. To the contrary, the language used by both the House and Senate consistently is that "all federal agencies" would be subject to regulation of their solid waste disposal practices, either under the separate regulatory scheme set up by the House bill, or under the waiver of sovereign immunity in the Senate bill. *See, e.g.,* House Report at 5, 48–49; Senate Report at 23.

Moreover, the legislative history of RCRA contains some indication that Congress intended that the solid waste disposal practices of federal agencies be treated comparably to disposal of pollutants under the FWPCA and the Clean Air Act. *See, e.g.,* Senate Report at 24 (noting that § 223 "parallels section 118 of the Clean Air Act and section 313 of the Federal Water Pollution Control Act"); House Report at 45–47 (discussion of Administrative Conference's recommendations). We must assume that Congress was fully aware of the scope of those Acts. We note that the Supreme Court's decision in *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1 (1976), was issued on June 1, 1976, shortly before completion of the Committee reports on the House and Senate bills, and well before adoption of the conference bill in September 1976. That case presented the issue of EPA's jurisdiction under the FWPCA to regulate the discharge of source, byproduct, and special nuclear material into the environment. Respondents included a private nuclear power generating station licensed by the Atomic Energy Commission, and federal facility operated for the Energy Research and Development Administration (the immediate predecessor to DOE's authority) to fabricate plutonium into nuclear weapons parts. *See* 426 U.S. at 4, 5 & n.5. In concluding that the FWPCA did not authorize EPA to regulate discharges of source, byproduct, and special nuclear materials, the Court placed great weight on the legislative history of the FWPCA indicating that Congress understood the AEA's exclusive jurisdiction to extend only to regulation of those radioactive materials. *See* 426 U.S. at 17 & n.14, 21–23. If Congress believed that the Court had misinterpreted the scope of the AEA, or that a different result should obtain with respect to solid waste disposal practices of federal agencies, it could have addressed the issue in the legislative history of RCRA.[16]

[16] In RCRA, Congress did set up a scheme slightly different from that of the FWPCA in one respect. As noted above, in the event of an inconsistency the FWPCA by its terms prevails over other federal statutes and regulations. By contrast, § 1006(a) of RCRA provides that RCRA will yield to the AEA in the event of an

Continued

In addition, Congress provided in § 6001 for categorical exemptions from federal and state regulation, if the President determines that such exemption would be "in the paramount interest of the United States." 42 U.S.C. § 6961. The inclusion of such authority suggests that Congress intended categorical exemptions from RCRA, such as that urged by DOE, to be obtained through a Presidential waiver, rather than through application of § 1006(a).[17]

Nonetheless, while we cannot construe the language of § 1006(a) to exempt all of DOE's activities under the AEA from RCRA regulation, that section must be interpreted to exempt some aspects of "activit[ies] . . . subject to" the AEA from regulation under RCRA, *i.e.,* if application of RCRA would be inconsistent with particular "requirements" of the AEA. The scope of the term "requirements," as used in § 1006(a), is not illuminated by the language or legislative history of RCRA. The commonly understood meaning of the term implies some prescriptive content, *i.e.,* specific directives that require an agency or a person to take or refrain from taking certain actions, to follow certain procedures, or to meet certain standards and regulations. *See generally Mississippi River Fuel Corp.* v. *Slayton,* 359 F.2d 106, 119 (8th Cir. 1966). For the most part, the AEA does not impose specific prescriptive requirements in that sense, at least with respect to aspects of activities that might overlap with, or be inconsistent with, regulations, standards, and procedures established pursuant to RCRA. Rather, insofar as we consider it here, the AEA generally provides underlying authority for certain types of activities intended to carry out the purposes of the Act.[18] Those purposes focus specifically on the development and use of atomic power for military and civilian applications:

> It is . . . declared to be the policy of the United States that —
>
> (a) the development, use and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and
>
> (b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general

[16] (. . . continued)
inconsistency. We do not believe that distinction is material to our analysis here. Those provisions do reflect somewhat different congressional priorities for the two statutes when an *inconsistency exists;* the difference, however, does not lend any particular support to DOE's central legal argument that the relevant comparison under § 1006(a), for the purpose of determining when an inconsistency exists, is between entire regulatory schemes, rather than between particular applications of those schemes.

[17] We note that § 1006(c) of RCRA, 42 U.S.C. § 6905(c), which was added in 1980 by Pub. L. No. 96–482, 94 Stat. 2334, specifically vests in the Secretary of the Interior the exclusive responsibility for implementing hazardous waste regulations with respect to coal mining wastes. Although this section was added to RCRA by a later-enacted statute, and therefore is of limited value in determining the legislative intent of the drafters of § 1006(a), it demonstrates that when Congress intends to carve out a categorical exemption from RCRA for certain types of activities, it can do so in clear and explicit terms.

[18] *See* S. Rep. No. 1699, 83rd Cong., 2d Sess. 14–15, 19, 26 (1954).

welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. § 2011.

One exception to this general lack of prescriptive "requirements" in the AEA is afforded by those provisions of the AEA that establish standards and procedures for identification and handling of "restricted data," which is defined to include "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy." 42 U.S.C. § 2014(y). Subchapter II of the AEA requires that such data be handled pursuant to detailed provisions governing its protection and disclosure. 42 U.S.C. §§ 2161–2168.[19] We believe that these provisions fall within the commonly understood meaning of the term "requirements," and therefore that particular RCRA provisions or regulations governing access to information concerning the disposal of hazardous wastes or access to wastes sites must yield if they are inconsistent with particular requirements imposed by the AEA with respect to the handling of restricted data.[20]

We also believe that § 1006(a) would preclude a state from exercising veto power over the establishment or operation of a DOE facility, either by denying the necessary permits or by seeking an injunction in court against continued operation of the facility because of noncompliance with RCRA. Clearly, a state could not refuse to issue a RCRA permit, or request injunctive relief, based on DOE's noncompliance with an aspect of state or federal RCRA regulation that

[19] Pursuant to these provisions, access to restricted data is limited to individuals who have undergone background investigations, and is contingent on a determination that permitting such persons to have access will not endanger the common defense and safety. 42 U.S.C. §§ 2163, 2165. We note that sensitive information that does not fall within the category of "restricted data" may nonetheless be classified as "national security information" under Executive Order 12356, and therefore required to be handled pursuant to the provisions of that Executive Order. In addition, the Secretary of Energy has authority under the AEA to prescribe regulations or issue orders to prohibit the unauthorized dissemination of certain unclassified information if such dissemination "could reasonably be expected to have a significant adverse effect on the health or safety of the public or the common defense and security by significantly increasing the likelihood of (A) illegal production of nuclear weapons, or (B) theft, diversion, or sabotage of nuclear materials, equipment, or facilities." 42 U.S.C. § 2168. It is possible that particular access and disclosure provisions of RCRA may conflict with such restrictions in some instances, in which case we believe the restrictions authorized by the AEA would prevail.

[20] As EPA points out, however, the possibility of conflict between the restricted data provisions of the AEA and the access and disclosure provisions of RCRA does not necessarily mean that DOE can refuse categorically to grant access to its facilities or to deny information to EPA and state officials responsible for enforcing RCRA. It may well be that not all information about hazardous waste disposal at DOE's facilities would require special protection, or would fall within the definition of restricted data, or within the scope of "national security information" required to be classified by Executive Order 12356. In addition, it would probably be feasible in many cases to require those officials to obtain appropriate security clearances in order to gain access to data necessary to determine compliance with RCRA regulations.

We also do not rule out entirely the possibility that some information about the production of nuclear weapons and materials at DOE's facilities is so sensitive that access must be restricted to DOE personnel, or to DOE and EPA personnel. This level of detail should be identified and worked out by DOE in cooperation with EPA. We note that EPA is working with other federal agencies, including the Department of Defense, to ensure that implementation of the RCRA program does not compromise sensitive information or the national security, and has worked with DOE to accommodate national security concerns under the FWPCA.

is inconsistent with the requirements of the AEA, within the meaning of § 1006(a). For example, we do not believe a state could refuse to issue a permit based on DOE's proper refusal under the "restricted data" provisions of the AEA to grant the state access to particular restricted data or to make such data publicly available.

In addition, even if a state could establish that DOE had not fully complied with RCRA regulations and standards not superseded by virtue of § 1006(a), *i.e.*, those that are consistent with the AEA, we have serious reservations whether a state could effectively shut down DOE's operation by denying a permit or by obtaining an injunction to enforce compliance, particularly where alternative, less drastic means of enforcement exist. While the AEA does not in so many words require DOE to operate its Atomic Energy Act facilities, the clear purpose of the statute is to authorize and encourage operation of such facilities, and the authority provided represents a congressional judgment that such activities should be carried out at a federal level. We believe therefore that it may well be "inconsistent with" the AEA itself to permit a state to veto operation of a federal facility authorized under the Act.[21] *See generally Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 315 n.9 (1982); *California* v. *United States*, 438 U.S. 645, 668 n.21, 679 (1978); *First Iowa Hydro Electric Cooperative* v. *Federal Power Comm'n,* 328 U.S. 152, 181–82 (1946); *Oklahoma* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 534–35 (1941). A state could, nonetheless, include in a permit certain compliance schedules or other conditions intended to bring DOE's facilities into compliance with RCRA standards or requirements that lie within the scope of § 1006(a), and could seek judicial enforcement of those conditions through means short of an injunction against continued operation. *See, e.g., Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 315 n.9 (1982).[22] DOE would of course have the opportunity to seek review of

[21] We do not believe, however, that any state regulation under RCRA of DOE's Atomic Energy Act facilities would necessarily be precluded as "inconsistent." RCRA clearly provides for a significant state role in the promulgation and enforcement of standards for the treatment and disposal of solid waste, even with respect to federal facilities. *See* 42 U.S.C. § 6961. Although we believe that serious questions would be raised if a state attempted to close a DOE facility for failure to comply with state permitting or substantive requirements, much state regulation could probably be accommodated consistent with DOE's statutory mandate. We understand that DOE and EPA have worked together and with the states to implement the standards and permitting requirements set forth in the FWPCA, and we know of no persuasive reason why cooperation with state authorities with respect to hazardous waste disposal under RCRA would not also be possible.

[22] Even though the state might not be able to enforce the permit (or denial of a permit) by an injunction against continued operation of a facility, the permit itself, and the permitting process, would not be meaningless. A state (or private citizen) could, for example, seek declaratory relief that DOE should comply with particular RCRA requirements or standards embodied in a state permit or required as a prerequisite for obtaining the permit. In addition, under Executive Order 12088, there would be an opportunity for internal Executive Branch resolution of particular disputes. Executive Order 12088 requires the head of each Executive agency to insure that the agency complies with the "same substantive, procedural, and other requirements that would apply to a private person" under a number of environmental statutes, including RCRA, and to cooperate with EPA and state, interstate, and local agencies in the prevention, control, and abatement of environmental pollution. The order directs that conflicts between the EPA and an Executive Branch agency, or between an Executive Branch agency and a state, interstate, or local agency, regarding violations of those environmental statutes be resolved by the Office of Management and Budget, if such conflicts cannot be resolved through efforts of the EPA.

such conditions to determine that they are reasonably related to bona fide health and safety objectives and not designed to force closure of the facility.

DOE argues that the AEA does not provide for any state role in regulation of federal facilities, citing in particular the 1965 amendments to § 271 of the Act, 42 U.S.C. § 2018, that clarified Congress' intent that the states could not regulate "any activities of the [Atomic Energy] Commission." We agree with DOE that, prior to enactment of RCRA, federal facilities operated pursuant to the AEA were immune from state regulation of waste disposal practices, because of the lack of any clear waiver of sovereign immunity in the AEA or any other statute that would allow such regulation. The effect of the 1965 amendments to § 271 of the AEA, however, is largely irrelevant to our analysis here. Those amendments were intended explicitly to clarify an ambiguity in the extent to which the AEA waived sovereign immunity over regulation of the transmission and generation of electricity by federal facilities. The legislative history recited by DOE in support of its argument reflects that this was Congress' particular concern; that history reflects further that Congress intended to make clear that the federal facilities at issue stood on the same footing as all other federal agencies. *See, e.g.,* 111 Cong. Rec. 18702 (1965) (remarks of Rep. Hosmer); *id.* at 19821 (remarks of Sen. Pastore).

At that time, however, no federal facilities were subject to state regulation of hazardous waste disposal practices. Therefore, our analysis here must focus on the effect of the subsequent waiver of sovereign immunity in § 6001 of RCRA and the exception to that waiver carved out by § 1006(a) of that statute. In that regard, we believe that the waiver of sovereign immunity in § 6001 is sufficiently "clear and unambiguous," *see Hancock* v. *Train*, 426 U.S. 167, 179 (1976), to overcome the general principle that federal facilities and activities are immune from regulation by the states. Although § 1006(a) creates some ambiguity with respect to application of that waiver to "activit[ies] . . . subject to . . . the [AEA]," we do not believe that ambiguity undercuts the clarity or effectiveness of the waiver contained in § 6001.[23]

Thus, we concur with EPA's conclusion that the thrust of § 1006(a) of RCRA is not to exempt completely DOE's Atomic Energy Act facilities from

[23] We note that the issue whether states could regulate waste disposal practices of *federal* facilities under the AEA prior to RCRA is different from the issue whether states could then regulate waste disposal by *privately owned* facilities licensed under the AEA. The first issue is one of sovereign immunity — whether Congress has clearly and explicitly authorized the states to regulate the federal government in a particular aspect of its activities. The second issue is one of preemption — whether Congress has, in the exercise of its constitutional authority, preempted state regulation of private activities. Thus, even prior to RCRA, the states could regulate disposal of nonnuclear wastes by private licensees, because the AEA did not preempt such regulation. *See, e.g., Pacific Gas and Electric Co.* v. *State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190 (1983); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 16–17 & n.14 (1976); *Illinois* v. *Kerr-McGee Corp.*, 677 F.2d 571, 580 (7th Cir. 1982); *Northern States Power Co.* v. *State of Minnesota,* 447 F.2d 1143, 1149–50 (8th Cir. 1971), *aff'd,* 405 U.S. 1035 (1972); 42 U.S.C. § 2021(k) ("[n]othing in this section authorizing limited state agreements for regulation of nuclear material shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards"). Because neither the AEA nor any other statute prior to RCRA clearly waived sovereign immunity, however, states could not then similarly regulate hazardous waste disposal practices of federal facilities.

state and federal regulation of hazardous waste disposal, but rather to avoid inconsistencies between RCRA and the unique national security and health problems created by operation of nuclear facilities under the AEA. To the extent that operation of those facilities is comparable to operation of other manufacturing and industrial facilities, Congress intended that they be subject to the standards and requirements imposed by RCRA on all other federal government facilities, and enforced by EPA and the states. To the extent there are actual inconsistencies, however, the AEA would control; this feature of the statutory scheme should be responsive to DOE's particular and clearly legitimate concerns about the protection of sensitive information and the possibility of state vetoes over operation of its facilities, while also meeting EPA's concern that RCRA regulations apply, to the extent possible, uniformly throughout the federal government.[24]

DOE argues in addition, however, that its regulations and directives under § 161(i)(3) of the AEA governing the disposal of nonnuclear wastes also constitute "requirements" of the AEA, considered in the context of the purpose and scope of DOE's authority under the AEA. DOE contends that this authority "necessarily and essentially pertains" to accomplishment by DOE of the purposes of the AEA, and is "an essential ingredient of the scheme of the [AEA]." Under this analysis, DOE's regulations or directives governing disposal of nonnuclear wastes would control, at least to the extent they are inconsistent with state or federal regulations and requirements under RCRA. The logical result of this argument is that DOE could totally exempt its Atomic Energy Act facilities from RCRA regulation by prescribing regulations or directives that differ somewhat from otherwise applicable RCRA regulations and standards.

We believe that this argument stretches the language and purpose of § 161(i)(3) beyond that intended by Congress when it enacted the AEA.[25] It is highly

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[24] If DOE's specific concern cannot be met adequately under this scheme, it may obtain a Presidential waiver for particular facilities, or for all its Atomic Energy Act facilities, pursuant to § 6001, 42 U.S.C. § 6961.

[25] We do not suggest that, in the absence of RCRA, DOE could not use the authority provided by § 161(i)(3) to regulate the disposal of nonnuclear wastes at its Atomic Energy Act facilities. Certainly the language of that provision, giving DOE the authority "to prescribe . . standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property," 42 U.S.C. § 2201(i)(3), is broad enough to encompass such regulation. The grant of discretionary authority under that section to prescribe such regulations, however, does not compel the conclusion that such regulations would be requirements of the AEA.

Section 161(i)(3) was given a very narrow interpretation in *Reynolds* v. *United States*, 286 F.2d 433, 438 (9th Cir. 1960), a case involving criminal prosecution of an individual for trespass in a 390,000 square mile area surrounding the Eniwetok Proving Grounds (used for nuclear bomb testing), which had been designated as a closed area by the Atomic Energy Commission on the basis of authority provided in § 161(i)(3). Based on its reading of the legislative history of § 161(i)(3), the court concluded that the authority provided by that section applies only to activities of *private industry* licensed by the AEC, and not "to the Commission's own activities." 286 F.2d at 438–39. We believe the court's reading of that legislative history was strained in reaching the result that an individual could not be subject to serious criminal penalties for violating a regulation that arguably exceeded the Commission's authority. The logic of the court's reading of § 161(i)(3) is that the Atomic Energy Commission — and now DOE — would have no authority whatsoever to take actions to protect the health and safety of its workers or of the public from nonnuclear hazards created by its own activities. We do not believe Congress intended that result.

unlikely that Congress even considered possible problems caused by the disposal of nonnuclear wastes when it enacted the AEA in 1954. Indeed, the dimensions of the nation's hazardous waste problem were not generally acknowledged until more than a decade after enactment of the AEA. *See generally* Senate Report, *supra*, at 6; H.R. Rep. No. 899, 89th Cong., 1st Sess. 7–9 (1965) (discussing Solid Waste Disposal Act of 1965, Pub. L. No. 89–272, 79 Stat. 992). Rather, the focus of the AEA, inasmuch as it deals with disposal problems, is with regulation of nuclear wastes generated by atomic facilities. *See Pacific Gas and Electric Co.* v. *State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190 (1983); *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 16–17 & n.14 (1976); *Northern States Power Co.* v. *Minnesota,* 447 F.2d 1143, 1149–50 (8th Cir. 1971), *aff'd,* 405 U.S. 1035 (1972). There is no suggestion in the AEA or its legislative history that § 161(i)(3) was intended to require DOE to establish a comprehensive regime for the control of nonnuclear wastes, or that Congress considered such authority to be necessary to accomplishment of the purposes of the AEA. That section is, rather, most reasonably interpreted as a general grant of discretionary authority to DOE to make whatever incidental regulations it deems necessary to insure that its facilities are operated safely and with minimal risk to health, life, and property. *See generally Bramer* v. *United States,* 412 F. Supp. 569, 575, 577 (C.D. Cal.), *aff'd,* 595 F.2d 1141 (9th Cir. 1976) (interpreting 42 U.S.C. § 2051); *Blaber* v. *United States,* 332 F.2d 629, 631 (2d Cir. 1964) (interpreting 42 U.S.C. § 2051).

By contrast, RCRA is clearly and explicitly intended to provide a comprehensive scheme for regulation of the disposal of nonnuclear wastes by private entities and by the federal government. *See* Senate Report, *supra*, at 2–7; House Report, *supra*, at 2–5. In light of the clear intent and the comprehensiveness of RCRA, we are unwilling to interpret § 1006(a) to mean that, merely by exercising its discretionary authority under the AEA with respect to nonnuclear wastes, DOE can exempt itself from RCRA's regulatory scheme.

We recognize nonetheless that there may be particular operational needs or problems generated by the unique requirements of DOE's nuclear operations that in some cases will require some modification in, or exemption from, particular substantive standards imposed by the EPA or the states pursuant to RCRA. For example, it may be that inclusion of small amounts of nuclear wastes in a chemical waste stream would require some modification in otherwise applicable RCRA standards or regulations,[26] or that certain aspects of industrial processes that are unique to the fabrication of nuclear weapons materials and components require different handling of solid wastes generated

[26] The inclusion of small amounts of nuclear materials in such streams would not necessarily prohibit EPA from regulating those streams merely because RCRA does not apply to certain types of nuclear materials. That such wastes are commingled with nonnuclear wastes suggests that in many cases the amount of nuclear waste would not be large enough to require special handling, and therefore there would be no reason for exclusive DOE control over its handling. We believe these types of problems could be addressed by EPA and DOE in their discussions to implement this opinion.

by those processes.[27] Those situations will have to be identified and handled by DOE and EPA on a cooperative basis, in accordance with the interpretation of § 1006(a) we have outlined here.

Conclusion

Implementation of this opinion will require DOE and EPA to discuss in detail the impact of RCRA regulations on operation of DOE's Atomic Energy Act facilities, and to determine how best to accommodate the purposes of the AEA with the specific requirements of RCRA. We recognize that the advice given here is general, and may not resolve many of the particular questions that will arise in the course of those discussions. We note, however, that EPA has conducted similar discussions with DOE in order to implement provisions of the FWPCA, and has engaged in such discussions with other federal agencies, including the Department of Defense, to implement the requirements of RCRA and the FWPCA. We suggest that those discussions might provide a framework for addressing the applicability of RCRA to DOE's Atomic Energy Act facilities. We will, of course, be available to provide additional legal analysis, should that prove necessary.

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Office of Legal Counsel

[27] The internal DOE order prescribing hazardous waste management practices, *see* DOE Order 5480.2 (Dec. 13, 1982), appears to contemplate this type of problem. Under that order, full compliance with the prescribed procedures (most of which are consistent with RCRA) may be excused "due to unique characteristics of the sites and/or facilities . . . or due to unrealistically high costs compared to the risks involved." If full compliance cannot be achieved because of high costs, "alternative methods of handling waste that will provide comparable levels of safety and environmental protection at reduced costs" must be taken.

Although we do not suggest that every situation that might warrant relaxation of DOE's internal order would constitute an inconsistency for purposes of § 1006(a), those types of situations could possibly provide a basis for noncompliance with particular RCRA requirements, if the particular characteristics or high costs involved arise because of the unique nature of the nuclear processing operations.

Constitutionality of the Social Security Act Amendments of 1983

An amendment to the Social Security Act repealing the exemption for nonprofit organizations, including religious organizations, thereby requiring such organizations to pay and withhold tax with respect to the Social Security Fund, does not violate the First Amendment's Free Exercise or Establishment Clauses.

Assuming the tax payment and withholding requirement conflicts with the free exercise of religion in some cases, the government nevertheless has an overriding interest in securing the financial solvency of the fund and making sure that its coverage is comprehensive.

The repeal of the exemption does not violate the Establishment Clause because it has a clear secular purpose, does not inhibit or advance religion because it is neutral in its general application, and does not excessively entangle the government with religion. Social Security taxes are like other business and income taxes to which religious organizations are already subject.

February 14, 1984

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

This responds to the request for our opinion whether § 102 of the Social Security Amendments of 1983 (Act), Pub. L. No. 98– 21, 97 Stat. 65 (1983), violates the First Amendment. We do not believe that § 102 violates either the Free Exercise Clause or the Establishment Clause of the First Amendment.

I. Background

The Act was passed in 1983 primarily in an effort to address certain financial problems facing the social security system. Section 102 of the Act, 97 Stat. 70, repealed the existing exemption applicable to employees of non-profit organizations, 42 U.S.C. § 410(a)(8)(B) and 26 U.S.C. § 3121(b)(8)(B), including "religious" organizations such as churches.[1] As a result, payment of social

[1] Prior to the repeal, 42 U.S.C. § 410(a)(8)(B) and 26 U.S.C. § 3121(b)(8)(B) exempted service for tax-exempt organizations described in 26 U.S.C. § 501(c)(3) from the definition of employment. However, the law permitted such non- profit organizations to waive their immunity voluntarily so that they could participate in the system if they wished. An estimated 80 percent of the non-profit organizations to which the exemption applied had determined to participate in the system at the time the Act was being considered. H.R. Rep. No. 25, Part I, 98th Cong., 1st Sess. 15 (1983). Once an organization joined the system, it had to remain

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security taxes by these institutions for most of their employees is now mandatory rather than voluntary. Congress made this change because it was "deeply concerned" that more and more non-profit organizations were terminating their voluntary inclusion in the system, thereby threatening the retirement benefits of their employees. H.R. Rep. No. 25, Part I, 98th Cong., 1st Sess. 16–17 (1983). A larger concern, applicable generally to the coverage and financing provisions of the Act, was the restoration of the financial soundness of the Old Age and Survivor Insurance Program. *Id.* at 3, 13. The mandatory inclusion of the non-profit organizations, for example, is expected to raise $2.3 billion dollars over the next two years, about half of which will come from religious organizations. Written Statement of John E. Chapoton, Assistant Secretary for Tax Policy, Department of the Treasury, Before the Senate Finance Committee (Dec. 14, 1983).

There was very little debate over § 102, beyond its inclusion in summaries of the Act's provisions. *See, e.g.*, 129 Cong. Rec. 4496 (1983) (statement of Rep. Rostenkowski); *id.* at 5470 (statement of Sen. Dole).[2] The House Report, however, did note that Congress had made coverage voluntary when it extended the system to non-profit organizations in 1950 because of concerns by religious groups over "Federal influence over religious activities" and "separation of church and State." H.R. Rep. No. 25, Part I, supra, at 16. These concerns had been addressed by at least one of the commissions examining reform of the system. *Report of the Universal Social Security Coverage Study Group on the Desirability and Feasibility of Social Security Coverage for Employees of Federal, State, and Local Governments and Private, Nonprofit Organizations* 258–59 (1980).[3] Because the House Report noted that these concerns had been raised when optional coverage was extended to these groups in 1950 and then went on to explain the policy reasons for including the non-profit organization employees in the Act, we must assume that Congress was aware of the First Amendment considerations and issues which would be raised, but determined that the proposal was not unconstitutional.

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[1] (. . . continued)
in it for a minimum of ten years before it could terminate coverage for its employees. *Id.* The Act did not repeal the exemption available for ministers or members of religious orders. 42 U.S.C. § 410(a)(8); 26 U.S.C. § 3121(b)(8). These classes of persons may file for an exemption from coverage for their self employment earnings, a choice they must generally make within two years of ordination. Only individuals who are neither ministers nor members of religious orders are covered by the change in the Act.

[2] There was a short debate on what the effective date of § 102 should be. *See* 129 Cong. Rec. 6914–16 (1983).

[3] This Report, in turn, relied in part on an opinion from Professor Norman Dorsen of New York University Law School. *Id.* at 261–65. Both the Report and Professor Dorsen concluded that an Establishment Clause attack would probably fail. However, Professor Dorsen did not believe that protecting the financial security of the system was a sufficiently compelling state interest to overcome the Free Exercise interests of those who had conscientious religious objections to paying into the system, *id.* at 265, and therefore felt that an exemption for those holding contrary religious beliefs had to be included to prevent a violation of the Free Exercise Clause. However, the Supreme Court has subsequently made it clear that Professor Dorsen's evaluation of the weight that would be accorded the government's interest in a strong social security system was incorrect. *See United States* v. *Lee*, 455 U.S. 252 (1982) (discussed below).

> Whenever called upon to judge the constitutionality of an Act of Congress — "the gravest and most delicate duty that this Court is called upon to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.) — the Court accords "great weight to the decisions of Congress." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973). The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 164 (1951) (concurring opinion), we must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality.

Rostker v. *Goldberg*, 453 U.S. 57, 64 (1981).

The constitutionality of § 102 has been raised in the discussion of S. 2099, a bill to postpone the effective date of § 102 for two years, that was introduced by Senator Jepsen and is now under consideration by the Senate Finance Committee. We discuss below the two possible First Amendment grounds of attack on § 102. We agree with Congress' sub silentio conclusion that § 102 is constitutional.

II. Free Exercise Clause

The Constitution provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I, § 1. Section 102 has been attacked, *see* 129 Cong. Rec. 32611–12 (1983), on the grounds that mandating contributions by individuals and organizations whose sincere religious beliefs prohibit participation in the social security system violates the free exercise of their religious beliefs. The Supreme Court has recently articulated the analytical framework for this question in *United States* v. *Lee*, 455 U.S. 252 (1982). The Lee opinion makes clear that the government's interest in assuring mandatory and continuous participation in and contribution to the social security system is extraordinarily high. In *Lee*, an Amish farmer refused to withhold social security taxes from his Amish employees or to pay the employer's share of such taxes because he believed that payment of the taxes and receipt of the benefits would violate the Amish faith.[4] *Id.* at 254–55. He claimed, and the Court accepted his argument, that imposition of social security taxes violated his First Amendment free exercise rights and those of his Amish employees. *Id.* at 255, 257.

[4] "The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system .... We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith." *Id.* at 257.

> The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional. *See, e.g., Prince* v. *Massachusetts,* 321 U.S. 158 (1944); *Reynolds* v. *United States,* 98 U.S. 145 (1879). The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.

Id. at 257–58. The Court then identified the government's compelling interest assuring "mandatory and continuous participation in and contribution to the social security system:"

> The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees. . . . The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. . . . Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

Id. at 258–59 (footnotes omitted). A remaining inquiry in the Lee case was whether accommodating the Amish belief would unduly interfere with fulfillment of the governmental interest. The Court focused on the fact that the social security contributions are a tax and that in the area of taxation, religious practices must yield to the government's interest in maintaining an organized society.

> The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. *See, e.g., Lull* v. *Commissioner,* 602 F.2d 1166 (CA4 1979), *cert. denied,* 444 U.S. 1014 (1980); *Autenrieth* v. *Cullen,* 418 F.2d 586 (CA9 1969), cert. denied, 397 U.S. 1036 (1970). Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Id. at 260.[5] The *Lee* decision was decided by the Supreme Court in a unanimous judgment.[6] The Court held that compelling an individual to participate in the

[5] Thus, cases involving application of taxes are distinguishable from those involving less compelling government interests such as education, *see Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), or labor management relations, *Catholic Bishop* v. *NLRB,* 559 F.2d 1112 (7th Cir. 1977), *aff'd on statutory grounds,* 440 U.S. 506 (1979). *See Parker* v. *Commissioner,* 365 F.2d 792, 795 (8th Cir. 1966), *cert. denied,* 385 U.S. 1026 (1967). *See also Jaggard v. Commissioner,* 582 F.2d 1189 (8th Cir. 1978), *cert. denied,* 440 U.S. 913 (1979); *Graves*

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social security system is not an impermissible interference with that individual's constitutional right to the free exercise of his religion.[7]

Turning to § 102, we assume, as the Court did in *Lee*, that there are religious organizations whose tenets would be offended by payments on behalf of employees into the social security system. Because this is "only the beginning, however, and not the end of the inquiry," *id.* at 257, the next issue is whether there is a compelling governmental interest that will overcome the imposition on the religious liberty of those individuals who would have conscientious objections to mandatory coverage by the system. We have little difficulty in concluding that the courts will find that the same interest at stake in *Lee* was implicated in passage of § 102. Congress, in discussing § 102, emphasized both its concern that employees of non-profit organizations not "forfeit the advantages of a nearly universal social insurance system," H.R. Rep. No. 25, *supra*, at 16, and the need to protect the solvency of the system by spreading the coverage as broadly as possible to gain extra revenue. S. Rep. No. 23, 98th Cong., 1st Sess. 12 (chart detailing revenue gain).[8] If the stability of the social security system and the administrative advantages of universal coverage were sufficient in 1982 to overcome free exercise rights as the Court determined in the *Lee* case, we believe that those interests have, if anything, become stronger given the broadly based and bipartisan consensus in 1983 that without the Act the financial soundness of the entire system was in jeopardy.

Finally, we believe that a court would conclude, as in *Lee*, that accommodation of those individuals and organizations with religious objections, while mandating coverage of others, including religious organizations, with no religious objection to the social security system, would unduly interfere with fulfillment of the governmental interest. The Supreme Court recognized that Congress grants exemptions to various taxing schemes, including the social security system. In fact, in *Lee* the Court noted that Congress had provided an exemption from the system for self employed Amish because of their religious objections. 26 U.S.C. § 1402(g). The Court stated that this was a reasonable accommodation,[9] but did not draw from this conclusion any rule that Congress

[5] (. . . continued)
v. *Commissioner*, 579 F.2d 392 (6th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *Winters* v. *Commissioner*, 468 F.2d 778, 781 (2d Cir. 1972), *Basic Unit Ministry* v. *United States*, 511 F. Supp. 166, 169 (D.D.C. 1981), *aff'd*, 670 F.2d 1210 (D.C. Cir. 1982); *Varga* v. *United States*, 467 F. Supp. 1113, 1118 (D. Md. 1979), *aff'd mem.*, 618 F.2d 106 (4th Cir. 1980). *Cf. Ward* v. *Commissioner*, 608 F.2d 599 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

[6] Justice Stevens wrote a separate opinion concurring in the judgment. *Id.* at 261.

[7] *See also Olsen* v. *Commissioner*, 709 F.2d 278 (4th Cir. 1983) (self employment tax); *Victory Baptist Temple, Inc.* v. *Industrial Comm'n*, 422 N.E.2d 819, 2 Ohio App. 3d 418 (Ct. App.) (workmen's compensation), *cert. denied*, 459 U.S. 1086 (1982).

[8] Moreover, § 102 is located in Title I of the Act which is entitled "Provisions Affecting the Financing of the Social Security System." 97 Stat. 65. Congress' overriding interest in expanding coverage, such as by including employees of nonprofit groups and new federal employees and by preventing terminations by State and local governments, to new sources of revenue in order to shore up the system is evident in all three reports. H.R. Rep. No. 47, 98th Cong., 1st Sess. 118–19 (1983); S. Rep. No. 23, 98th Cong., 1st Sess. 1, 12 (1983); H.R. Rep. No. 25, Part I, 98th Cong., 1st Sess. 3, 13 (1983).

[9] "Confining the § 1402(g) exemption to the self employed provided for a narrow category which was readily identifiable." *United States* v. *Lee*, 455 U.S. at 261.

was compelled to extend the exemption to all other Amish. Rather, the Court concluded the opinion by saying:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees . . . . The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

455 U.S. at 261. Because of the government's overwhelming interest in a social security system which is as uniform as possible, the Free Exercise Clause does not prohibit the non-discriminatory application of a standard tax to a religious organization or its employees. We therefore believe that the elimination by § 102 of the exemption for non-profit organizations, including religious ones, is permissible even if it does offend the religious convictions of some who will be required to participate.

III. Establishment Clause

The Constitution also provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, § 1. Section 102 has been attacked on the grounds that compelling the participation of churches will inevitably entangle the government in the affairs of the churches, thereby violating the Establishment Clause.

Whether a statute violates the Establishment Clause is frequently analyzed under the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971). First, the challenged statute must have a secular purpose. Section 102 has at least two *bona fide* secular purposes: providing income security for workers and their families by insuring that they are protected by the social security system and providing money to the underfunded system's trust funds. Second, the primary effect of the challenged statute must be one that neither advances nor inhibits a particular religion. The Social Security tax's primary purpose raising revenue does not inhibit religion. *Cf. United States* v. *Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (concluding that "there is virtually no room for a 'constitutionally required exemption' on religious grounds from a valid tax law that is entirely neutral in its general application").

Third, the statute must not foster excessive government entanglement with religion. Excessive entanglement involves some of the principal evils at which the Establishment Clause was aimed: government sponsorship, financial support or active involvement by the sovereign in a religion. *Lemon* v. *Kurtzman*, 403 U.S. at 612. For example, in *Lemon* the Supreme Court struck down a statute providing reimbursement to parochial schools for the salaries of teach-

ers who taught non religious subjects. The Court held that the very effort by the state to ensure that the money was properly spent would require a degree of oversight and surveillance that would entangle the government. *Id.* at 619–20. The churches would no longer be the exclusive judges of the teachers' conduct. Thus, courts must examine whether enforcement of the law will impinge on the church's substantive decisionmaking power or intrude on questions of church doctrine.

We do not believe that the mere transmission to the government of money for social security taxes will involve excessive entanglement of the churches and the federal government.[10] Churches must presently pay some federal taxes, such as excise taxes on telephones and income taxes on unrelated business income. Moreover, they already are obligated to withhold income taxes from their employees. *See Eighth Street Baptist Church, Inc.* v. *United States*, 295 F. Supp. 1400 (D. Kan. 1969), *aff'd*, 431 F.2d 1193 (10th Cir. 1970) (per curiam). We are not aware of any case successfully challenging this essentially administrative duty as excessively entangling for the churches. The Act will not force the churches to share their decisionmaking power: they are free to allocate their resources as they see fit after they pay their taxes. Because it is permissible for Congress to impose non-discriminatory and uniform taxes on churches on the same basis as other entities and since churches already are required to withhold income taxes for their lay employees, we do not believe that requiring churches to pay the employer's portion of applicable social security taxes or to withhold the employee's portion violates the Establishment Clause.[11]

Conclusion

Section 102 of the Act violates neither the Free Exercise Clause nor the Establishment Clause of the First Amendment. We will be glad to discuss this matter with you if you have any further questions.

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[10] *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970), is not to the contrary. In *Walz*, the Court upheld a state's tax exemption for church property against an Establishment Clause challenge. The Court pointed out that removing the tax exemption might lead to more church entanglement with the government since liens, foreclosures and lawsuits would arise if the property were taxed. 397 U.S. at 674. Although some commentators have argued that this means that exemptions are constitutionally required, *see* Note, *Tax Exemptions, Subsidies and Religious Freedom After Walz* v. *Tax Commission*, 45 N.Y.U. L. Rev. 876 (1970), the Supreme Court's summary distinguishing of the exemption for self-employed Amish in *United States* v. *Lee*, 455 U.S. 252, 261 (1982), lends little credence to this argument. Rather, *Walz* should be read for the proposition that tax exemptions themselves are not unconstitutional.

[11] It is also instructive that over the years a large number of churches have opted into the system voluntarily, *see supra* note 1, without any evidence of impermissible entanglement.

Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress

Congress may constitutionally authorize the Special Counsel of the Merit Systems Protection Board to conduct any litigation in which he is interested, except litigation in which the Special Counsel's position would be adverse to that taken by the United States in the same litigation. Such opposition would place the President in the untenable position of speaking with conflicting voices in the same lawsuit. In addition, because the Special Counsel is an Executive Branch officer subject to the supervision and control of the President, a grant by Congress to the Special Counsel of authority to submit legislative proposals directly to Congress without prior review by the President would raise serious separation of powers concerns.

February 22, 1984

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

This responds to your request for our views regarding the legislative recommendations of the Special Counsel of the Merit Systems Protection Board to permit the Special Counsel to "litigate before the courts on its behalf on any matter in which the Special Counsel has previously been involved," and empowering the Special Counsel to "submit directly to Congress any legislative recommendations that the Special Counsel deems necessary to further enhance the ability of the office to perform its duties under law." You indicated in your submission that your Office and the Civil Division are preparing a letter opposing such a grant of litigating authority to the Special Counsel. With respect to the Special Counsel's desire to submit legislative recommendations directly to Congress, you indicated that although you have been advised that the Office of Management and Budget (OMB) has secured the agreement of the Special Counsel to conform to the OMB legislative clearance process, you seek our advice on the question whether Congress constitutionally may authorize the Special Counsel to submit legislation to Congress directly, without first securing the approval of OMB, the legislative clearance office for the Executive Branch.

As discussed further below, we conclude that, as a legal matter, Congress constitutionally may authorize the Special Counsel to conduct, or otherwise participate in, any litigation in which he is interested except litigation in which he would be taking a position that is adverse to that taken by the United States

in the same litigation; although, as you point out, there are numerous policy reasons for opposing such a grant of authority. In addition, we conclude that, because the Special Counsel is an Executive Branch officer subject to the supervision and control of the President, Congress may not grant him the authority to submit legislative proposals directly to Congress without prior review and clearance by the President, or other appropriate authority, without raising serious separation of powers concerns.

I. Special Counsel as an Executive Officer

We will preface our responses to the specific questions raised in your memorandum by first reviewing the history of the Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111, as it relates to the Special Counsel's status as an Executive Branch officer, including the concerns raised by the Department of Justice at the time of the Act's enactment.

The Civil Service Reform Act of 1978 was enacted to update, overhaul and make more efficient the federal civil service system by: (1) codifying merit system principles and subjecting employees who commit prohibited personnel practices to disciplinary action; (2) providing new protections for employees who disclose illegal or improper Government conduct; (3) establishing a new performance appraisal system and a new standard for dismissal based on unacceptable performance; (4) streamlining the processes for dismissing and disciplining federal employees; and (5) abolishing the Civil Service Commission and establishing in its stead the Office of Personnel Management within the Executive Branch, and an "independent Merit Systems Protection Board and Special Counsel to adjudicate employee appeals and protect the merit system." S. Rep. No. 969, 95th Cong., 2d Sess. 2 (1978). *See also* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 1 (1978).

The Act established the Merit Systems Protection Board as a bipartisan body of three members, to be appointed by the President with the consent of the Senate, and removable "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. §§ 1201, 1202. The Board is authorized to hear and adjudicate all matters within its jurisdiction, to enforce its orders against any federal agency or employee, to stay certain agency personnel actions, and to conduct special studies relating to the civil service and other merit systems within the Executive Branch and to issue reports thereon to the President and the Congress. *Id.* § 1205(a). In addition, the Act provided for a Special Counsel to the Board, to be appointed by the President, with the consent of the Senate, for a term of five years, and removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1204. The Special Counsel's primary duties under the Act are to receive and investigate allegations of prohibited personnel practices, to participate in proceedings before the Board when such participation is warranted, and to submit an annual report to Congress on his activities, including "whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate." *Id.* § 1206.

Although the legislative history of the Act suggests that Congress intended both the MSPB and the Special Counsel to be independent of Presidential supervision and control,[1] this Department advised both Congress and the President that the bill which ultimately was enacted contained several provisions which raised very serious constitutional concerns. Those concerns focused primarily on the Act's attempt to limit the President's power of removal over the Special Counsel, whom, in view of his primarily prosecutive functions, this Office determined to be an Executive officer. Similarly, in the Department's comments to OMB on the enrolled bill, we advised that Congress could not constitutionally limit the grounds for removal of the Special Counsel by the President. Thus, this Department has consistently taken the position, and we believe correctly, that although the Board may function as a quasi-adjudicative independent body, the Special Counsel is an Executive officer and as such is subject to the President's supervision and control. *See also* "Presidential Appointees — Removal Power," 2 Op. O.L.C. 120 (1978).

III. Litigation Authority of the Special Counsel

Under current law, the Special Counsel's litigating authority is limited to "interven[ing as a matter of right] or otherwise participat[ing] in any proceeding before the Merit Systems Protection Board." 5 U.S.C. § 1206(i). We understand from your memorandum that the Special Counsel now seeks to expand this authority to permit him to "appear as counsel on behalf of any party in any civil action brought in connection with any function carried out by the Special Counsel pursuant to this title or any other provision of law and [to] initiate and prosecute on behalf of any party in any such case an appeal of the decision of any district court of the United States or the United States Claims Court in such case."[2] As you have indicated, this proposal would permit the Special Counsel to seek judicial review of final orders or decisions of the Merit Systems Protection Board, as well as to prosecute appeals of federal court decisions, arguably even in instances in which he was not a party to the proceedings before the Board.

As you are aware, this Administration, as a policy matter, has generally opposed any legislative proposal that would further erode the Attorney General's litigating authority under 28 U.S.C. §§ 516 & 519. This opposition, shared by previous Administrations, is grounded in the need for centralized control of all government litigation. Such control furthers a number of important policy goals, including the presentation of uniform positions on important legal issues, the selection of test cases that would produce results most favorable to governmental interests, more objective handling of cases by attorneys unaf-

[1] *See, e.g.*, S. Rep. No. 969, 95th Cong., 2d Sess. 28–29 (1978).

[2] This language is taken from the text of S. 1662, a bill reported by the Senate Committee on Government Affairs on July 21, 1983, to "amend title 5, United States Code, with respect to the authority of the Special Counsel of the Merit Systems Protection Board." Although you have advised us that the Special Counsel has submitted to the Committee an alternative to S. 1662, we believe that the comments in this memorandum will be equally applicable to the Special Counsel's alternate proposal.

fected by an agency's narrower concerns, and the facilitation of Presidential supervision over Executive Branch policies implicated in government litigation. *See generally* "The Attorney General's Role as Chief Litigator for the United States," 6 Op. O.L.C. 47 (1982). Thus, there are numerous policy grounds on which to oppose a grant of litigating authority to the Special Counsel.

With respect to the legal considerations relevant to the proposed legislation, an agency's authority to litigate independently of the Attorney General in any particular circumstance generally depends on whether such authority is vested by statute in the agency. However, when the agency asserting such authority is an Executive Branch agency, constitutional issues arise if Congress has simultaneously vested litigating authority over the case in either the Attorney General or another Executive Branch officer. Those issues involve the President's authority to exercise supervisory control over his subordinates so that he may properly discharge his constitutional obligation to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3, and Congress' potential violation of the constitutional separation of powers by interfering with the President's exercise of that authority. *See Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935); *Myers* v. *United States,* 272 U.S. 52 (1926).

Although the Special Counsel's legislative proposal defines his litigating authority so broadly as to provide no clear indication of the actual circumstances in which it could be exercised, we may assume that the Special Counsel would seek to initiate, or otherwise participate in, litigation in which both independent and Executive Branch agencies would be defending themselves against allegations of prohibited employment practices. In such circumstances, the litigating authority that would be vested in the Special Counsel pursuant to his proposal could not be construed constitutionally to place the President in the untenable position of speaking with two conflicting voices by both prosecuting and defending the same lawsuit. To permit otherwise would constitute an abdication by the President of his obligation to execute the laws faithfully, and would fall short of "that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers* v. *United States*, 272 U.S. at 125.[3] Thus, in litigation challenging the personnel practices of independent agencies, there would be no constitutional impediment to the Special Counsel's exercise of statutorily vested litigating authority so long as the Attorney General or any other duly authorized Executive Branch officer[4] has not taken a position in the

[3] *See also* "Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities," 7 Op. O.L.C. 57 (1983).

[4] Although the Attorney General is the chief legal officer for the United States, *see* 28 U.S.C §§ 516 & 519, there are circumstances in which other Executive Branch officers, subject to the supervision and control of the President, are authorized by statute to represent the United States in litigation *See, e.g* , 29 U.S.C. § 663 (granting the Solicitor of Labor authority to bring actions under the Occupational Safety and Health Act of 1970, "subject to the direction and control of the Attorney General"); 49 U.S.C. § 1810(b) (granting the Secretary of Transportation authority to litigate imminent hazards under the Hazardous Materials Transportation Act, or upon his request the Attorney General shall do so); 28 U.S.C. § 2348 (granting certain Executive

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litigation on behalf of the United States that would be inconsistent with what the Special Counsel seeks to present. In litigation involving Executive Branch agencies, the Special Counsel's litigating authority would necessarily be limited to the presentation of views which would not conflict with those presented on behalf of the agency.

Nor may Congress authorize the Special Counsel to do otherwise. To permit Congress to do so would vest an essentially executive function, performed by a subordinate of the President, outside of the President's control, and thereby undermine the President's authority to control subordinate officers and the affairs of the Executive Branch. In short, to allow Congress to vest simultaneously litigating authority over the same case in two or more subordinates of the President would constitute an unconstitutional interference by the Legislative Branch with Executive process, a clear violation of the separation of powers. *See Humphrey's Executor* v. *United States*, 295 U.S. at 629; *Myers* v. *United States*, 272 U.S. at 164.[5]

III. Authority of the Special Counsel to Submit Legislative Proposals Directly to Congress

As noted in your submission, the Special Counsel has proposed legislation authorizing him to submit directly to Congress legislative recommendations that he "deems necessary to further enhance the ability of the office to perform its duties."[6] As discussed further below, we believe that such a statutory grant

[4] (. . . continued)
Branch agencies the authority to appear through their own counsel in proceedings to review orders, although the Attorney General "is responsible for and has control of the interests of the Government in all court proceedings under [the Act]."). *See generally Report of the Attorney General's Task Force on Litigating Authority* (Oct. 28, 1982).

[5] An additional impediment to the Special Counsel's exercise of litigating authority in litigation involving Executive Branch agencies is § 1-402 of Executive Order 12146, reprinted in 28 U.S.C. § 509 note, pursuant to which the President, in the exercise of his constitutional authority over his subordinates, has required Executive agencies "whose heads serve at the pleasure of the President" and which are unable to resolve legal disputes among themselves to "submit the dispute to the Attorney General *prior to proceeding in any court*" (emphasis added).

[6] The proposal outlined in S. 1662 contains a concurrent reporting requirement:

> Each year, the Special Counsel shall prepare and submit to the President and, at the same time, to the appropriate committees of the Congress, a statement specifying estimates of expenditures and proposed appropriations for the Office of the Special Counsel for the fiscal year beginning on October 1 of the next succeeding calendar year after the calendar year in which the statement is submitted and the 4 fiscal years after that fiscal year.
>
> * * *
>
> Whenever the Special Counsel considers it appropriate to make recommendations for legislation relating to any function of the Special Counsel provided by this title in addition to the recommendations for legislation set forth in the latest annual report submitted pursuant to subsection (m) of [§ 1206], the Special Counsel shall submit the recommendations to the President and, at the same time, to each House of Congress.

Section 1206(m) requires the Special Counsel to submit an annual report to Congress on his activities, "including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this section and the actions taken by

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of authority to an Executive Branch officer, if construed to require concurrent transmittals that would preclude Presidential review of the proposed legislative recommendations prior to their submission to Congress, would constitute an unconstitutional intrusion by the Legislative Branch into the President's exclusive domain of supervisory authority over subordinate officials in the performance of their executive functions.[7]

The separation of powers principle is rooted in the Constitution's division of the Government into three separate Branches and the assignment of specific functions thereto. Article II vests the whole of the executive power in the President, charging him, *inter alia,* to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This means that the President must possess "exclusive and illimitable power" over his subordinates as they assist him in discharging his constitutional obligation to execute the laws faithfully, unencumbered by interference from the coordinate Branches:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the House of another who is master there.

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[6] (. . . continued)
the agencies as a result of the reports or recommendations." In addition, the report "shall include whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate."

Although the Department, to our knowledge, heretofore has not had occasion to construe this particular provision, we have construed similar provisions in the past to avoid impinging on the constitutional prerogatives of the Executive. *See, e.g.,* Statement of Attorney General Elliot Richardson (June 1973) (construing 5 U.S.C. § 2954, which requires Executive agencies to submit to the House or Senate Committees on Government Operations "any information requested of it relating to any matter within the jurisdiction of the committee," to grant to the pertinent committees access to only type of information that traditionally has been made available to Congress and that is not subject to valid claims of executive privilege); "Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress," 6 Op. O.L.C. 632 (1982) (construing § 506(f) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L No. 97–248, 96 Stat. 324, 677, which requires the Administrator to transmit certain budget information and legislative recommendations directly to Congress concurrently with their transmission to the Secretary of Transportation, the President or OMB, to require that only "final" budget information and legislative recommendations be sent, *i.e.,* information that has been reviewed and approved by appropriate senior officials).

Thus, we would construe the Special Counsel's existing authority pursuant to § 1206(m) to require him to submit only such information and legislative recommendations as have been cleared for transmittal by OMB, or other appropriate reviewing authorities.

[7] Of course, if such legislation were enacted, we would avoid the constitutional issue if possible, *see United States* v. *Rumely,* 345 U.S. 41, 45 (1956), by construing it as we do § 1206(m), to authorize the Special Counsel to submit only "final" recommendations to Congress, *i.e.,* those recommendations which have been reviewed and approved by appropriate senior officials in the Executive Branch. *See also* 6 Op. O.L.C. 632, *supra.*

Humphrey's Executor v. *United States,* 295 U.S. at 629–30. Although the rigid separation of powers standard first articulated in *Humphrey's Executor* has been viewed as more flexible in subsequent decisions by the Court, in each subsequent articulation remains the core concern that the President retain effective control over all matters within the Executive Branch in order to discharge properly his constitutional obligation faithfully to execute the laws. In *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Court recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," but it emphasized that there was a "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." 424 U.S. at 120–21. The Court further declared that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." *Id.* at 123. Most recently, the Court stated in *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 443 (1977), that congressional enactments may not interfere with the Executive process unless such interference is "justified by an overriding need to promote objectives within the constitutional authority of Congress." *See generally* 6 Op. O.L.C. 632, *supra.*

Under the above standards, we believe that to permit Congress to authorize or require an Executive Branch officer to submit budget information and legislative recommendations directly to Congress, prior to their being reviewed and cleared by the President or another appropriate reviewing official, would constitute precisely the kind of interference in the affairs of one Branch by a coordinate Branch which the separation of powers is intended to prevent.

The Special Counsel's proposal would severely impair the President's ability to perform his constitutional obligation to "recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. As the President's subordinate, the Special Counsel is obligated to make his recommendations to the President, so that the President, on behalf of the Executive Branch, may judge which are "necessary and expedient," and thus should not interdict the process by making individual recommendations directly to Congress. For Congress to require the Special Counsel to report to it directly without such review would constitute a grave interference with the President's performance of his constitutional obligation, as well as "irreparably damage, if not destroy, the normal exchange of views between agency heads and the President (through OMB) before budget submissions [and legislative recommendations] are finally approved." 6 Op. O.L.C. at 641.[8]

[8] In addition, such an interdiction regarding budget information would violate the process through which the President exercises his constitutional authority to supervise the affairs of the Executive Branch in the performance of his statutory obligation under 31 U.S.C. §§ 1104 *et seq.* to transmit an annual budget to Congress. The President has required all budget submissions to be reviewed by OMB, and OMB Circular No. A-10 requires that

> the confidential nature of agency submissions, requests, recommendations, supporting materials

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By contrast, the Special Counsel has not articulated an "overriding need [of Congress] to promote objectives within the constitutional authority of Congress," to justify such a significant intrusion into the Executive process and the President's ability to supervise and control his subordinates. *Nixon* v. *Administrator of General Services,* 433 U.S. at 443. Presumably, the "need" is a strong desire on the part of Congress to be able to evaluate the Special Counsel's performance of his functions and to seek the Special Counsel's assistance in developing legislation which would enhance his performance of those functions. However, in view of the fact that such information may be obtained from the Special Counsel after review by appropriate Executive Branch officials and be no less valuable to Congress, the "need" can scarcely be considered "overriding."

Although we do not know the precise formulation of this provision in the Special Counsel's "alternative" proposal, this Office has analyzed similar provisions in the past and has found that, if construed literally, they would unconstitutionally infringe the separation of powers. In 1977, the Office commented on a bill that would establish Offices of Inspectors General in various Executive Branch agencies, and require the Inspectors General to submit certain information directly to Congress without clearance or approval by appropriate authorities. We stated that the bill would

> make the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches, in violation of the doctrine of separation of powers. In particular, the Inspector General's obligation to keep Congress fully and currently informed, taken with the mandatory requirement that he provide any additional information or documents requested by Congress, and the condition that his reports be transmitted to Congress without executive branch clearance or approval, are inconsistent with his status as an officer in the executive branch, reporting to and under the general supervision of the head of the agency. Article II vests that executive power of the United States in the President. This includes general administrative control over those executing the laws. *See Myers* v. *United States,* 272 U.S. 52, 163–164 (1926). The President's power of control extends to the entire executive branch, and includes the right to coordinate and supervise all replies and comments from the executive branch to Congress. *See Congress Construction Corp.* v. *United States,* 314 F.2d 527, 530 532 (Ct. Cl. 1963).

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[8] (. . . continued)
and similar communications should be maintained, because these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress . . . Budgetary materials should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head of each agency is responsible for preventing premature disclosures of this budgetary information.

"Inspector General Legislation," 1 Op. O.L.C. 16, 17 (1977). More recently, we advised that a provision requiring the Federal Aviation Administrator to transmit certain budget information and legislative recommendations directly to Congress at the same time that they are transmitted to the Secretary of Transportation, the President, or OMB would, if construed literally, unconstitutionally interfere with the Executive process and thereby violate the separation of powers. *See* 6 Op. O.L.C. 632, *supra.*

As we have concluded in the past, we now conclude that the Special Counsel's proposal, which would require an Executive Branch officer, the Special Counsel, to submit confidential or deliberative information directly to Congress without providing an opportunity for review by a superior Executive officer, would interfere unduly with the President's authority to supervise and control the affairs of the Executive Branch. Such legislation would effectively sever the Special Counsel from his superiors within the Executive Branch with respect to the areas of his responsibility on which he reports, and thereby make him an "independent agency reporting both to Congress and to the President." We believe that Congress' perceived "need" to receive legislative recommendations and other information directly from the Special Counsel without their first having been reviewed by his superiors within the Executive Branch cannot justify the infringement of the separation of powers principle that would necessarily result from such legislation.

Conclusion

In conclusion, we believe that the Department should continue to oppose the grant of litigating authority to the Special Counsel on policy grounds, and to raise the constitutional grounds discussed above where appropriate. In addition, we believe that the submission of legislative recommendations and other information by the Special Counsel directly to Congress, without prior review by appropriate Executive Branch officials, would violate the constitutional separation of powers by interfering with the Executive's ability to supervise and control his subordinates in the performance of their executive functions. Accordingly, we believe that S. 1662, and the Special Counsel's "alternative" proposal, should be opposed, and that he should be advised that, as an Executive Branch officer, his direct submissions to Congress are unauthorized.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Acting Attorneys General

From 1870 until 1953, the Solicitor General served as Acting Attorney General in the event that the office of Attorney General was vacant or the Attorney General was absent or disabled. This plan of succession was modified by Reorganization Plan No. 4 of 1953 and by the codification in 1977 at 28 U.S.C. § 508 providing for the following statutory succession: Deputy Attorney General, Associate Attorney General, and in such order as the Attorney General shall designate, the Solicitor General and the Assistant Attorneys General.

March 30, 1984

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

We have prepared in the time available a list of all of the documented occasions in which individuals have served as Acting Attorney General because of a vacancy in the office of the Attorney General.[1] From the time of the establishment of the Department of Justice in 1870 until 1953, the statute governing succession to the office of Attorney General designated the Solicitor General as the individual who would be Acting Attorney General in case of the absence or disability of the Attorney General, or of a vacancy in the office.[2] Reorganization Plan No. 4 of 1953, § 2, 67 Stat. 636 (1953), designated the Deputy Attorney General to be the first in order of succession, followed by the Solicitor General. This change was subsequently codified in 28 U.S.C. § 508. In 1977, the statute was amended to include the Associate Attorney General as the official who is next in line immediately after the Deputy Attorney General. The Solicitor General and Assistant Attorneys General were listed as the officials next in the line of succession, subject to the Attorney General's discretion as to their sequence. The statute now reads as follows:

> (a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.
>
> (b) When, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attor-

[1] Undoubtedly there are other occasions that are not as well documented but that could be located with further research. This list should not be viewed as exhaustive.

[2] *See* Act of July 20, 1870, ch. 150, § 2, 16 Stat. 162, 162; Rev. Stat. § 347 (1873); 5 U.S.C. § 293 (1952).

ney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

28 U.S.C. § 508.

We have found records of the following officials having acted as Attorney General during vacancies in that office pursuant to these various provisions:

Name	*Dates of Service*	*Reason for Vacancy*
Solicitor General Robert H. Bork[3]	October 21, 1973 to January 3, 1974	Resignation of Elliot L. Richardson
Deputy Attorney General Richard G. Kleindienst	March 2, 1972 to June 12, 1972	Resignation of John N. Mitchell
Deputy Attorney General Ramsey Clark	October 3, 1966 to March 2, 1967	Resignation of Nicholas deB. Katzenbach
Deputy Attorney General Nicholas deB. Katzenbach	September 4, 1964 to February 10, 1965	Resignation of Robert F. Kennedy
Solicitor General Phillip B. Perlman	April 7, 1952 to May 27, 1952	Resignation of J. Howard McGrath
Solicitor General Francis Biddle	July 10, 1941 to September 5, 1941	Resignation of Robert H. Jackson
Solicitor General James M. Beck	March 4, 1925 to March 16, 1925	Resignation of Harlan Fiske Stone
Solicitor General John K. Richards	April 1, 1901 to April 5, 1901	Resignation of Joseph McKenna
Solicitor General John K. Richards	January 18, 1898 to February 1, 1898	Resignation of John W. Griggs
Solicitor General Samuel H. Phillips	October 24, 1881 to January 2, 1882	Resignation of Wayne MacVeagh
Secretary of the Interior Orville H. Browning	March 3, 1868 to July 14, 1868	Resignation of Henry Stanberry

[3] At the time of Mr. Bork's service, there were vacancies in the offices of both the Attorney General and the Deputy Attorney General, each having resigned on the same day. The office of the Associate Attorney General had not yet been created. In *United States* v. *Halmo*, 386 F. Supp. 593 (E.D. Wis. 1974), the court held that Mr. Bork became Acting Attorney General pursuant to 28 U.S.C. § 508(b). The court also upheld his service as Acting Attorney General for an unlimited period of time.

Name	*Dates of Service*	*Reason for Vacancy*
Assistant Attorney General J. Hubley Ashton	July 17, 1866 to July 23, 1866	Resignation of James Speed
Secretary of the Navy John Y. Mason[4]	March 18, 1848 to July 1, 1848	Resignation of Nathan Clifford

There is only one period on this list (for two-and-a-half months in late 1973) during which there was a sustained vacancy in both of the Department's two top positions. The longest absence we have documented in the office of Attorney General during which an Acting Attorney General served is approximately five months. We are aware of no other hiatus between confirmed Attorneys General in excess of five months.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[4] The President designated Mr. Browning, Mr. Ashton, and Mr. Mason prior to the establishment of the Department of Justice. Mr. Mason had previously served as Attorney General from March 4, 1845 until September 9, 1846.

Constitutionality of Proposed Regulations of Joint Committee on Printing

Proposed regulations issued by the Joint Committee on Printing, which purport to regulate a broad array of printing activities of the Executive Branch, are not authorized by statute.

The proposed regulations are unconstitutional on two grounds. First, because members of the Joint Committee on Printing are not appointed in accordance with the Appointments Clause, art. II, § 2, cl.2 of the Constitution, they may not perform Executive functions, such as rulemaking, which may be performed only by properly appointed Officers of the United States. Second, the delegation of legislative power to the Joint Committee on Printing violates the constitutional requirements for legislative action, bicameral passage and presentment to the President.

April 11, 1984

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

This responds to your request for our opinion on the constitutionality, in light of the Supreme Court's decisions in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), and *INS* v. *Chadha,* 462 U.S. 919 (1983), of the proposed regulations published by the Joint Committee on Printing on November 11, 1983. For the reasons discussed below, we conclude that the regulations are statutorily unsupported and constitutionally impermissible.

The proposed regulations would effect a significant departure from the historical role of the Joint Committee on Printing (JCP).[1] Specifically, they would redefine "printing" to encompass virtually all processes by which legible material is created or stored, thus increasing the number of activities purportedly subject to JCP oversight and control. These activities include, among others, planning and design of government publications (defined to mean any textual material reproduced for distribution to government departments or to the public), word processing, data storage and document retrieval, apparently subsuming the operation of every copying facility of a department. The proposed regulations would require executive departments to submit annual plans outlining their intended activities and to seek advance approval of all projected goals, policies, strategies, purchases, publications, and means of distribution. In addition, departments would be asked to submit plans for a

[1] This is not to say that the current role of the JCP necessarily enjoys statutory authority or constitutional sanction. We have not attempted to evaluate those issues in this memorandum.

second and third year, seeking JCP approval of all projections relating to the expanded concept of printing. These obligations would "provide the committee with a broader and better overview of all of the Federal Government's printing and publishing activities." 129 Cong. Rec. 32286 (1983) (remarks of JCP Chairman Hawkins). The revised regulations, governing storage, duplication and distribution of information, "seek to replace JCP micro-management procedures with oversight and policymaking functions." *Id.*

The JCP is composed of the Chairman and two members of the Committee on Rules and Administration of the Senate and the Chairman and two members of the Committee on House Administration of the House of Representatives. 44 U.S.C. § 101. Vacancies are filled by the President of the Senate and the Speaker of the House of Representatives. *Id.* § 102. The authorized functions of the JCP are specified in various provisions of 44 U.S.C.

This memorandum will address, in turn, the three major legal issues suggested by these regulations: (1) whether there is statutory authority for the proposed regulations, (2) whether the regulations would involve congressional performance of executive functions, and (3) whether a joint committee of Congress is seeking to exercise legislative power. We conclude that the proposed regulations fail on all three grounds.[2]

I. Statutory Authority

The first issue we address is the statutory basis for promulgation of these "legislative" rules. The Printing and Documents statute, 44 U.S.C., contains three sections upon which the JCP relies for its "regulatory" authority. The first is 44 U.S.C. § 103, which allows the JCP to "use any measures it considers necessary to remedy neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications." Second, § 501 provides that all government printing, binding, and blank book work shall be done at the Government Printing Office (GPO), *except:* (1) work the JCP considers "to be urgent or necessary to have done elsewhere" and (2) printing in field plants operated by executive or independent departments, "if approved by the Joint Committee on Printing." Finally, § 502 provides that if the Public Printer is unable to do certain printing work at the GPO, he may enter into contracts to have the work produced elsewhere, "with the approval of the Joint Committee on Printing." As far as we are aware, these statutory provisions constitute the full extent to which the entire Congress might have been said to empower the JCP to participate in the decisionmaking process involving printing and distribution of materials published by the Executive Branch.

The proposed regulations were published in the Congressional Record on November 11, 1983, a gesture apparently not mandated by any existing statute.

[2] Because we conclude that the regulations as a whole cannot legally be enforced against the Executive Branch, we do not seek in this memorandum to discuss the legality of various provisions of the regulations individually. Consequently, we have not attempted to resolve the specific question raised in your request regarding the regulations' apparent effect of transferring to the GPO revenues that ordinarily would be paid into the accounts of individual agencies or the United States Treasury.

Nor are we aware of any other procedural requirements that might apply to promulgation of "regulations" such as these. Although Congress has enacted an elaborate scheme in the Administrative Procedure Act (APA) to control the issuance of regulations by executive agencies and to protect the persons subject to them by requiring broad opportunity for public notice and comment and availability of an administrative record reflecting these comments, we do not know of any analogous protections for those putatively subject to "legislative regulations." On the one hand, for the reasons stated in Part II of this memorandum, "legislative regulations" can apply only internally in Congress. Therefore one would not necessarily expect a scheme such as the APA to apply. On the other, it could also be assumed that had Congress contemplated or intended to authorize a committee's issuance of broad, binding regulations that could have an effect on the public and on the Executive Branch, it might have enacted a procedure comparable to the APA to ensure that the practice comports with the principles of due process. Thus, it could be argued that it is doubtful that Congress intended to authorize this committee to assume a regulatory role with respect to persons outside the Legislative Branch. *See INS* v. *Chadha,* 462 U.S. at 951.

At the very least, authority to regulate in a sweeping fashion cannot be presumed without an express indication that Congress has specifically delegated regulatory power.[3] The three statutory provisions mentioned above fall far short of a clear delegation of regulating authority.

A. 44 U.S.C. § 103

The first, § 103 was originally enacted in 1852 in the following form:

> The Joint Committee on Printing shall have power to adopt such measures as may be deemed necessary to remedy any neglect or delay in the execution of the public printing, provided that no contract, agreement, or arrangement entered into by this committee shall take effect until the same shall have been approved by *that house of Congress to which the printing belongs, and when the printing delayed relates to the business of both houses, until both houses shall have approved of such contract or arrangement.*

Ch. 1, 10 Stat. 35 (1852) (emphasis added).

The language of that section, particularly the underlined portion, manifests its purpose: to allow the JCP to take remedial steps with regard to problems that may arise in having Congress' printing performed. The statute sought only to govern printing work for either or both Houses of Congress. The proviso, requiring one- or two-House approval for JCP remedial actions, was removed

[3] *Cf. Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.,* 448 U.S 607, 685–86 (1980) (Rehnquist, J., concurring) (delegation of regulatory authority to executive must provide "intelligible principle" to guide exercise of discretion).

in 1894 when Congress passed an amendment which left the JCP alone in charge of curing delay in congressional printing. The reason for the amendment was that "[i]t seemed to the committee [JCP] that this approval of their action in each instance by Congress would produce delay and defeat rather than advance efforts to prevent neglect or delay." 27 Cong. Rec. 30 (1894) (conference report). Congress gave no indication of any intention to change the scope of the JCP's remedial powers. Evidently, therefore, the committee's powers continued to extend only to the oversight of printing performed for either or both Houses of Congress.

By the time the JCP obtained this authority to remedy delay in the public printing without approval of either or both Houses, Congress had already passed a resolution requiring all public printing to be done at the newly formed government printing establishment (the precursor to § 501). Res. 25, 12 Stat. 118 (1860). Consequently, at the time Congress granted the JCP power over the "public printing," that term applied, without exception, to the operations of the GPO alone. Bearing in mind this relation between the precursors to §§ 103 and 501, we believe the authority given the JCP to remedy delay "in the execution of the public printing" was intended to extend only to the operations of the GPO, itself an organization within the Legislative Branch.[4] No subsequent legislative history of which we are aware has evinced a congressional intention to recast § 103 so that the JCP's remedial powers over the public printing would encompass operations outside the GPO.[5] That section does not supply a foundation for the JCP's attempt to reach beyond the GPO to all related activities irrespective of where they are conducted.

B. 44 U.S.C. § 501

The second provision asserted as authority for the proposed regulations explicitly grants the JCP power to approve certain Executive Branch decisions regarding operation of field plant printing facilities. 44 U.S.C. § 501(2). Section 501 also allows the JCP to *approve* the outside printing of other classes of work when "necessary" or "urgent." *Id.* § 501(1). Neither the statute nor its history gives any suggestion, however, that the power to approve printing work was intended to be expanded into an all-encompassing authority to *regulate* all aspects of operations in the Executive Branch unrelated to the common understanding of "printing."

The legislative history of § 501 reflects an evolution, first, from a rule promulgated in 1860, requiring all printing to be done at the GPO, Res. 25, § 5, 12 Stat. 118 (1860), to an enactment of 1895, allowing exceptions to be

[4] *See Lewis* v. *Sawyer*, 698 F.2d 1261, 1263 (D.C. Cir. 1983) (Wald, J., concurring) (citing § 103 as example of congressional control over GPO in support of conclusion that GPO is a legislative unit).

[5] The section was amended in 1919, when the words "duplication" and "waste" and the phrase "and the distribution of Government publications" were added. Ch. 86, § 11, 40 Stat. 1270 (1919). No discussion or explanation of the change appears in the legislative history. *See* 57 Cong. Rec. 3865 (1919); H.R. Rep. No. 1146, 65th Cong., 3d Sess. 7 (1919).

"provided by law," ch. 23, § 87, 28 Stat. 662 (1895). That provision was altered in 1919, when Congress permitted certain classes of work to be done elsewhere than in the District of Columbia if the JCP deemed it necessary, ch. 86, § 11, 40 Stat. 1270 (1919), based on an explanation that such flexibility would save money for the government, 57 Cong. Rec. 3865 (amending H.R. 14078, 65th Cong., 3d Sess. (1919)). Finally, the two exceptions now codified in § 501 were enacted in 1949 to save further time and expense by permitting printing to be accomplished in the area where it is needed. Pub. L. No. 156, 63 Stat. 405 (1949). The explanations of the various amendments, although brief, indicate that the JCP's role was intended merely to ensure that the considerations of efficiency and economy were met in every case. H.R. Rep. No. 841, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 U.S.C.C.A.N. 1515–16. Congress has never expressed, in connection with § 501, that it expected the JCP's approval power to be expanded into authority for overseeing, specifying, and regulating internal operations of the Executive Branch.

C. 44 U.S.C. § 502

Nor does § 502, which authorizes the Public Printer to obtain certain contract work, expressly or impliedly endow the JCP with the power to regulate the activities of the Executive Branch. By its terms that section allocates powers between the JCP and the GPO, a division of responsibilities among units largely within the Legislative Branch, and does not directly affect any activities of Executive departments.

Notwithstanding the absence of any express legislative authority for the JCP's assumption of the role of a regulatory commission over Executive Branch printing, word processing and information distribution systems, the JCP Chairman has characterized the Committee's efforts as a "regulatory scheme." 129 Cong. Rec. 32286 (1983). By redefining the statutory term "printing," the JCP has, in effect, attempted to control all functions related to the creation of a written word or symbol, including "all systems, processes and equipment used to plan . . . the form and style of an original reproducible image." *Id.* (Proposed Regulations, Title I, number 3). That attempt strays far from the JCP's statutory grant of authority under § 103, § 501, or § 502.

Because no legal foundation can be identified in support of either the "regulatory" expansion of the statutory term "printing" or the breadth of the entire proposed scheme over Executive Branch management decisions, established principles of administrative law compel the conclusion that the JCP has exceeded its statutory authority in issuing the proposed rules. *Cf.* 5 U.S.C. § 706(2)(c) (agency rulemaking); *City of Overton Park* v. *Volpe,* 401 U.S. 402, 415 (1971); *Schilling* v. *Rogers,* 363 U.S. 666, 676–77 (1960); L. Jaffe, *Judicial Control of Administrative Action* 359 (1965).

Although we believe that the proposed regulatory scheme lacks a valid statutory basis, we proceed to examine the implications of the regulations for the constitutional separation of powers.

II. Legislative and Executive Functions

In view of the purported binding effect of the JCP's proposed regulations on Executive Branch agencies, the question arises whether the JCP, a Legislative Branch entity, is seeking to exercise executive functions in a manner that violates constitutional principles of the separation of powers. In *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Supreme Court, *per curiam,* struck down a provision of the Federal Election Campaign Act of 1971 which gave the Federal Election Commission, whose members were not all appointed by the President, the power to perform broad functions, including rulemaking, for enforcement of the Act. *Id.* at 141. The Court found that the Commission, so composed, was constitutionally precluded from performing executive tasks, because of the failure to comply with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2:

> [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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The pivotal term "Officers of the United States" was explained by the Court to mean "any appointee[s] exercising significant authority pursuant to the laws of the United States," 424 U.S. at 126, and again as "all appointed officials exercising responsibility under the public laws of the Nation." *Id.* at 131. Officials meeting these qualifications must be appointed in the manner prescribed in Article II of the Constitution. *Id.* at 126. This is because the Legislature "cannot ingraft executive duties upon a legislative office," *Id.* at 136 (quoting *Springer* v. *Philippine Islands,* 277 U.S. 189, 202 (1928)); nor can it insulate persons performing executive tasks from the President's power to remove them. *Id.* In short, the Court held that Congress may not itself appoint persons to perform duties that may be performed only by an officer of the United States.

In analyzing the powers conferred on the Federal Election Commission, the Court in *Buckley* described three types of statutory functions: "functions relating to the flow of necessary information — receipt, dissemination, and investigation; functions relating to the Commission's task of fleshing out the statute — rulemaking and advisory opinions; and functions necessary to ensure compliance with the statute and rules — informal procedures, administrative determinations and hearings, and civil suits." 424 U.S. at 137. The Court held that "insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees,"

the Commission as then composed could constitutionally exercise them. However, "when we go beyond this type of authority to the more substantial powers exercised by the Commission, we reach a different result." *Id.* at 137–38. The Court held that each of the Commission's functions related to rulemaking and rendering advisory opinions "represents the performance of a significant governmental duty exercised pursuant to a public law," which could be performed only by persons appointed in accordance with the Appointments Clause. *Id.* at 141.

At the same time, the Supreme Court disavowed any intention to "deny to Congress 'all power to appoint its own inferior officers to carry out appropriate legislative functions.'" 424 U.S. at 128. Because, as discussed above, members of the JCP are not appointed in accord with Article II, we must address whether, by issuing and implementing the proposed regulations, the JCP would be performing functions of officers of the United States or merely carrying out appropriate legislative functions.

Applying the rule of *Buckley* v. *Valeo* to the rulemaking powers arrogated to itself by the JCP, we conclude that those powers are not "sufficiently removed from the administration and enforcement of public law to allow [them] to be performed by" persons not appointed in accordance with the Appointments Clause. 424 U.S at 141. We have described above the nature and extent of the JCP's proposed involvement in the printing operations of the Executive Branch, and the putatively binding nature of the JCP rules. Accordingly, like the rulemaking and advice-giving functions of the Federal Election Commission at issue in *Buckley,* the JCP's activities "represent the performance of a significant governmental duty exercised pursuant to a public law." *Id.*

Insofar as the JCP enjoys investigative and informative powers of the type generally delegated to congressional committees, the Constitution is no bar to its exercise of those powers. *Buckley* v. *Valeo,* 424 U.S. at 137; *McGrain* v. *Daugherty,* 273 U.S. 135, 175 (1927). One might assert that the JCP's powers over the GPO are just such internal powers which allow it to control all operations of the GPO and that Congress may constitutionally require all Executive Branch agencies to use the GPO facilities for all their printing needs.[6] Because certain standards and rules must necessarily be permissible in running the operations of the GPO, it might be suggested, the JCP inevitably exerts some powers over Executive agencies, which might then arguably be expanded to other arenas to the extent printing outside the GPO is permitted. However, the proposed regulations bear no relation to the smooth operation of the GPO; rather, they focus primarily on outside activities involving management of information. Thus, the GPO foundation upon which to build the expanded and comprehensive JCP regulatory structure is absent from the proposed regulatory scheme. We do not believe the constitutional demarcation of executive and legislative functions can be so easily eroded.

[6] The constitutionality of a statute requiring all agencies to use the GPO for their printing is not an issue necessary to evaluate the validity of the proposed regulations or the existing statutes. We therefore do not attempt to resolve this question.

The most egregious and illustrative provision in this regard is the requirement that each Executive department submit annually to the JCP a plan outlining its printing and distribution activities anticipated for the fiscal year and the following two years. Under the proposed regulations, the JCP would review each of these plans to determine its conformity with the objectives of the "Federal printing program," specifically evaluating the efficiency and cost effectiveness of the plan and the printing and distribution requirements of the Executive department. Only upon approval of the JCP could a department implement its plan. This "Federal printing program," a construct of the JCP, clearly involves the interpretation and implementation of policy directives that it is the job of the Legislature (acting as a legislature and not a committee) to identify and of the Executive to fulfill. Each step in this "micro-management" process constitutes a uniquely executive function, to execute faithfully the laws as constitutionally enacted by Congress.

In sum, administrative functions such as policymaking and rulemaking are quintessentially and traditionally executive duties; they are the duties of "Officers of the United States." *See Springer* v. *Philippine Islands,* 277 U.S. 189, 202 (1928).[7] Yet the JCP unequivocally acknowledges its intention "to replace JCP micro-management procedures with oversight and policymaking functions," 129 Cong. Rec. 32285 (1983), and to establish a new "regulatory scheme," *id.* at 32285, all with respect to putative control of the Executive Branch. We cannot reconcile this endeavor with the Supreme Court's clear delineation of the functions assigned to the three Branches of the Government by the Constitution.[8]

This is not the first attempt at an express transformation of the JCP to a policymaking executive body. In 1919, Congress attempted explicitly to provide, by statute, for a broad system of JCP regulatory authority not unlike the present scheme. Under the bill, passed by both Houses of Congress,

> no journal, magazine, periodical, or similar Government publication shall be printed, issued, or discontinued by any branch or officer of the Government service unless the same shall have been authorized under such regulations as shall be prescribed by the Joint Committee on Printing . . . . [T]he foregoing provisions of this section shall also apply to mimeographing, multigraphing,

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[7] *Cf. Lewis* v *Sawyer,* 698 F.2d 1261, 1263 (D.C. Cir. 1983) (Wald, J., concurring) (JCP's order that Public Printer halt furlough plans for GPO employees did not "encroach[] on another branch and thereby offend[] the constitutional separation of powers" only because GPO is a legislative, rather than an executive, unit). Each branch of the Federal Government can conduct the hiring and firing of employees within that branch, to carry out the respective mission of that branch, without treading upon the separation-of-powers doctrine. Of course, Congress can regulate hiring and firing of civil servants in the Executive Branch, but only by legislation, not by committee fiat.

[8] This conclusion would seem to apply equally to the "JCP micro-management procedures" currently in place as well as the establishment by the JCP of a new "regulatory scheme." It would seem irrefutable under *Buckley* and *Chadha* that micro-management of Executive Branch agencies is an inherently executive function, and one which must therefore be performed by officers of the United States duly appointed pursuant to Article II of the Constitution.

> and other processes used for the duplication of typewritten and printed matter, other than official correspondence and office records.

H.R. 12610, 66th Cong., 2d Sess. (1919).

President Wilson vetoed the bill, voicing an adamant repudiation of any right Congress claimed to endow a committee "with power to prescribe 'regulations' under which executive departments may operate."[9] This historical perspective highlights an important aspect of the separation of powers issue. Following Congress' failure to accomplish its objective once through a constitutional process, the JCP may not now attempt to effect the same end by "regulation," circumventing the possible intervention of a Presidential veto. This usurpation of executive power is the very evil that the Supreme Court recognized when it quoted from *The Federalist* in its opinion in *INS* v. *Chadha:*

> If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defence.

462 U.S. at 947 (quoting The Federalist No. 73, at 458 (A. Hamilton) (H. Lodge ed. 1888)).

III. Legislative Action

We next consider whether the JCP's proposed regulations can be treated as an exercise of Congress' constitutional power to legislate and, if so, whether the JCP could by itself exercise that legislative power. In 1690, John Locke wrote that "the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands."[10] Nearly three hundred years later, the Supreme Court, in *INS* v. *Chadha,* restated the same principle as firmly embodied in the United States Constitution. The Court forcefully articulated the broad constitutional principle that all exercises of legislative power must undergo bicameral passage and presentment to the President unless the Constitution specifically authorizes a departure from the standard procedure. 462 U.S. at 946–51. Whether a particular action constitutes an exercise of legislative power requiring adherence to the rules of bicameral passage and presentment depends upon whether it is legislative in character. An action by Congress

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[9] Veto Message on Legislative, Executive and Judicial Appropriation Bill, H.R. Doc. No. 764, 66th Cong., 2d Sess. 2–3 (1920). President Wilson's veto message was one basis upon which, in 1933, then Attorney General William D. Mitchell concluded that a statutory provision authorizing a joint committee of Congress to make final decisions regarding certain tax refunds was a trespass upon the constitutional separation of powers. He reasoned that the provision "attempts to entrust to members of the legislative branch, acting *ex officio,* executive functions in the execution of the law, and it attempts to give a committee of the legislative branch power to approve or disapprove executive acts." 37 Op. Att'y Gen. 56, 58 (1933).

[10] J. Locke, *Second Treatise of Government* § 141, at 381 (P. Laslett ed. 1980).

is "legislative" if it purports to have "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . , outside the legislative branch." *Id.* at 952.

Of the three statutory bases relied upon by the JCP for authority to issue its proposed regulations, only one explicitly allows the committee to approve or disapprove decisions of persons outside the Legislative Branch. 44 U.S.C. § 501(2). Section 501(2), which purports to allow the JCP unilaterally to create exceptions to the general rule that all printing must be accomplished through the GPO, would have the effect of empowering a committee of Congress to forestall, regulate, revise or manage executive printing operations which have been authorized through the legislative process in the form of authorization and appropriations acts for the agencies involved. This action inevitably affects the rights, duties, and relations of members of the other branches of government, and appears to meet the test for legislative action.[11]

The Supreme Court has also indicated that, in determining whether an act is legislative in character, it is useful to examine the nature of the congressional action which the committee's power supplants. *Chadha,* 462 U.S. at 962. Until the predecessor to § 501 was amended in 1919 to give some discretion to the JCP,[12] all printing had been centralized in the GPO, "except in cases otherwise provided by law."[13] This history suggests that the Committee's power to create exceptions to the statute originated as a substitute for plenary legislation — an action indubitably legislative in character.

We conclude that § 501 improperly seeks to delegate legislative power to the JCP in abrogation of the constitutional requirements of bicameral passage and presentment. Consequently, even the bare statutory approval power — unembellished by interpretative regulations — must fall as a compromise of the constitutional requirements for legislative action.[14]

Under the other two sources of putative authority propounded by the JCP, the proposed regulations fare no better. Although neither § 103 nor § 502 explicitly authorizes the JCP to affect the rights and relations of extra-legislative officials, the JCP proffers those sections as authority for placing constraints on the implementation of executive printing operations already sanc-

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[11] Similarly, § 501(1) purportedly enables the JCP, by itself, to create exemptions from the legislated rule that all printing be done at the GPO. Although it does not operate expressly upon the statutory functions of the Executive Branch, it does purport to delegate a legislative function to a committee of Congress, which is also impermissible under *Chadha.* 462 U.S. at 952. Except insofar as the provision allows the JCP to control the internal printing affairs of Congress, *id.* at 955 n.21, it inevitably alters the rights, duties and relations of persons outside that branch by permitting a committee to effect an exception to a legislated rule, and therefore is an unconstitutional exercise of legislative power.

[12] Ch. 86, § 11, 40 Stat. 1270 (1919) (printing to be done by GPO "except such classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to have done elsewhere than in the District of Columbia for the exclusive use of any field service outside of said District").

[13] Ch. 23, § 87, 28 Stat. 662 (1895).

[14] This Office recently provided an opinion devoted exclusively to the constitutionality of the statutory approval power granted the JCP in 44 U.S.C. § 501(2). The opinion concluded that this power is invalid under *INS* v. *Chadha,* and that the ability of Executive departments to conduct authorized field-plant printing remains effective. Memorandum for William H. Taft, IV, Deputy Secretary of Defense, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel 15 (Mar. 2, 1984).

tioned with budget authority and appropriated funds. Insofar as the two sections can reasonably support the issuance of regulations restricting the lawful operations of all agencies and departments of the Federal Government, they too authorize a committee's exercise of legislative power and therefore cannot survive under *Chadha*. "A joint committee has not [sic] power to legislate, and legislative power cannot be delegated to it." 37 Op. Att'y Gen. 56, 58 (1933).

IV. Conclusion

The defects in the committee approval and regulatory mechanism discussed here could well have been the object of the views articulated twenty-five years ago by then-Acting Attorney General William P. Rogers:

> Legislative proposals and enactments in recent years have reflected a growing trend whereby authority is sought to be vested in congressional committees to approve or disapprove actions of the executive branch. Of the several legislative devices employed, that which subjects executive department action to the prior approval or disapproval of congressional committees may well be the most inimical to responsible government. It not only permits organs of the legislative branch to take binding actions having the effect of law without the opportunity for the President to participate in the legislative process, but it also permits mere handfuls of members to speak for a Congress which is given no opportunity to participate as a whole. An arrangement of this kind tends to undermine the President's position as the responsible Chief Executive.

41 Op. Att'y Gen. 300, 301 (1957).

For the reasons expressed above, we have concluded that the regulations proposed by the Joint Committee on Printing are without foundation in law. First, no statute grants to the JCP, with adequate specificity, authority to issue regulations purporting to control operations within the Executive Branch for which budget authority and appropriated funds exist. Second, the JCP's attempted performance of executive functions in administering the laws transgresses the rule of separation of powers set forth in *Buckley* v. *Valeo*. Finally, a congressional committee's promulgation of rules binding on the other branches runs afoul of the constitutional requirement, affirmed in *INS* v. *Chadha*, that all legislative actions, with a few specifically stated exceptions not relevant here, undergo bicameral passage and presentment to the President.

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Proposed Legislation to Restrict the Sales of Alcoholic Beverages in Interstate Commerce

Proposed legislation to prohibit the sale in interstate commerce of alcohol to persons under the age of 21 is a valid exercise of Congress' power under the Commerce Clause and consistent with the Twenty-First Amendment. The Twenty-First Amendment permits states to enact legislation more restrictive than would otherwise be permissible under the Commerce Clause; however, it does not deprive the federal government of any authority over alcohol under the Commerce Clause.

The proposed legislation would not be "in violation" of more permissive state laws. Even if it were read to be "in violation" of such laws, a court would likely find that the federal interest in preventing damage to national commerce outweighed any particular state's interest in permitting access to liquor for persons under age 21.

April 16, 1984

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

This responds to your request of January 20, 1984 for our views on H.R. 3870, a bill to restrict the sales of alcoholic beverages in interstate commerce. Although Congress has not yet asked for the Department's views on this bill, you have requested our opinion in view of the questions raised by opponents of the bill and the public debate over it.[1] We have reviewed H.R. 3870 and believe that it is constitutional.

Section 1 of the bill contains congressional findings on the economic damage done by drunk drivers, the disproportionate number of accidents caused by drunk drivers who are under the age of 21, and the benefits to the public welfare that will result from restricting sales of alcohol to those over 21. Section 2 prohibits the sale in interstate commerce of alcohol to those under 21:

> No person may sell or offer to sell any alcoholic beverage to any individual who is under the age of twenty-one if the beverage is or has traveled in interstate commerce or if the sale or offer to sell is made in an establishment which is in or affects interstate commerce.

[1] *See* Wash. Post, Feb. 9, 1984, at A12, col. 6; 70 A.B.A. J.18 (Apr. 1984). The Office of Management and Budget has recently asked for our views on this bill.

Section 3 provides definitions; § 4, penalties; and § 5 authorizes civil actions by citizens against those who violate § 2.[2] Section 6 permits the Secretary of Commerce to waive the application of § 2 in any state that has a law "effective in prohibiting the sale of liquor" to those under 21, and to cancel the waiver if the law is ineffective. Section 7 makes § 2 effective two years after passage of H.R. 3870.

The constitutional question raised by H.R. 3870 is whether § 2 of the Twenty-First Amendment to the Constitution prohibits the federal government from exercising authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, that would otherwise clearly furnish a constitutional basis for enacting this legislation.[3] Although the issue is not, because of its novelty, entirely free from doubt, we believe that the proposed legislation is constitutionally permissible.

Analysis

The Twenty-First Amendment to the Constitution repealed the Eighteenth Amendment and the imposition of nationwide prohibition. U.S. Const. amend. XXI. Section 2 of the Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The effect of § 2 is to permit states to enact legislation more restrictive than would otherwise be permissible under the Commerce Clause. *See United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 300 (1945) (Frankfurter, J., concurring); 76 Cong. Rec. 4141, 4143 (1933) (statement of Sen. Blaine). That is to say, the Twenty-First Amendment permits states to go beyond non-discriminatory regulation based on their police powers[4] and enact discriminatory regulation.[5] However, early arguments that § 2 entirely de-

[2] As reported out by the Committee on Energy and Commerce of the House of Representatives, § 5 of H.R. 3870 would permit any one to file civil suits to enjoin violations of § 2. The suits could be brought only in state court.

[3] Given the phraseology of § 2 of H.R. 3870, we have analyzed this bill under the Commerce Clause. We do not address the federal government's power over alcohol arising under other portions of the Constitution, such as the Export-Import Clause, *see Department of Revenue* v. *James Beam Corp.*, 377 U.S. 341 (1964), or the Fourteenth Amendment's requirement of equal protection, *see Craig* v. *Boren*, 429 U S. 190 (1976).

[4] For example, prior to passage of the Eighteenth Amendment, the Supreme Court rebuffed Commerce Clause challenges to several state statutes prohibiting entirely the sale or manufacture of alcohol. The Court held that the laws were valid exercises of the states' police power over local commerce even though their effects "may reach beyond the State by lessening the amount of intoxicating liquors exported." *Kidd* v. *Pearson*, 128 U.S. 1, 22 (1888). *See also Foster* v. *Kansas*, 112 U.S. 201, 206 (1884); *Bartemeyer* v. *Iowa*, 85 U.S. 129, 133 (1873); *The License Cases*, 46 U.S. (5 How.) 504, 576–77 (1847) (Taney, C.J.).

[5] Thus, state statutes that regulate the entry of alcohol in order to protect a state liquor monopoly, *State Board* v. *Young's Market Co.*, 299 U.S. 59 (1936), or to retaliate against other states' discriminatory laws, *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U.S. 391 (1939), have been upheld even though such legislation "would obviously have been unconstitutional" in the absence of the Twenty-First Amendment. *State Board* v. *Young's Market Co.*, 299 U.S. at 62. Prior to passage of the Eighteenth Amendment, similar discriminatory statutes barring the entry of alcohol into a state except under the auspices of the state liquor monopoly were struck down as an impermissible burden on interstate commerce. *See, e.g., Vance* v. *W.A. Vandercook Co.* (No. 1), 170 U.S. 438 (1898); *Scott* v. *Donald*, 165 U.S. 58 (1897). The legislative history of § 2 indicates that it was passed, at least in part, to assure the "dry" states that they would be able to defend themselves against shipments of alcohol into their states. 76 Cong. Rec. 4141 (1933).

prived the federal government of any authority under the Commerce Clause over alcohol were quickly rejected. *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945); *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 172–73 (1939).[6]

We believe that H.R. 3870 is constitutional for three reasons. First, we do not believe that H.R. 3870 violates the literal language of § 2 of the Twenty-First Amendment. Forbidding the sale of alcohol to those under 21 in a state that permits sales to those over, for example, the age of 18 is not "in violation of the laws" of the state. *Id.* It may replace a permissive state policy with a more restrictive federal statute, but it does so without literally violating a state statute.[7] Thus, the ban on sale of alcohol to those under 21 raises questions under the Twenty-First Amendment only because some have assumed that broad federal deference to state action in this area is a matter of constitutional law rather than policy. Second, even assuming that H.R. 3870 were read to be "in violation" of a more permissive state law because the bill conflicts with the policy expressed by the state law, we believe that it would, under the balancing test articulated in the Supreme Court's most recently decided case in this area, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980) (*Midcal*), pass constitutional muster because the federal interests would outweigh any particular state's interest.

Midcal involved a Sherman Act challenge to a California law governing wine pricing. In resolving whether the Sherman Act applied, the Supreme Court addressed the issue whether § 2 of the Twenty-First Amendment permitted California to countermand the congressional policy in favor of competition. The Court emphasized that § 2 and the Commerce Clause must be viewed as part of a whole. "'Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case.'" *Id.* at 109 (quoting *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324, 331–32 (1964)). The focus of the analysis should be a "pragmatic effort to harmonize state and federal powers" that gives proper respect to both Clauses:

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[6] In *Jameson & Co.* v. *Morgenthau*, the Court said:

> [T]he Federal Alcohol Administration Act was attacked upon the ground that the Twenty-First Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We *see* no substance in this contention.

307 U.S. at 172–73; *see also Hanf* v. *United States*, 235 F.2d 710 (8th Cir.), *cert. denied*, 352 U.S. 880 (1956); *Old Monastery Co.* v. *United States*, 147 F.2d 905 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Jatros* v. *Bowles*, 143 F.2d 453 (6th Cir. 1944); *Arrow Distilleries, Inc.* v. *Alexander*, 109 F.2d 397 (7th Cir), *cert. denied*, 310 U.S. 646 (1940)

[7] Therefore, in states that do not forbid drinking under the age of 18, H.R. 3870's passage will not oust a more permissive state statute. The Fifth Circuit has read the Twenty-First Amendment as providing authority for permissive state alcohol laws to override more restrictive federal regulations, notwithstanding the Supremacy Clause. *Cf. Castlewood Int'l Corp.* v. *Simon*, 596 F.2d 638 (5th Cir. 1979), *vacated*, 446 U.S. 949 (1980), *opinion reinstated on remand*, 626 F.2d 1200 (5th Cir. 1980) (Florida law permitting sales at unlimited discount to retailers prevailed over Department of the Treasury regulation forbidding same; Florida's interest in regulating intrastate retailers greater than federal interest in uniform national regulations). *See also Wine Indus.* v. *Miller*, 609 F.2d 1167 (5th Cir. 1980); *Washington Brewers Inst.* v. *United States*, 137 F.2d 964 (9th Cir.), *cert. denied*, 320 U.S. 776 (1943).

> [T]here is no bright line between federal and state powers over liquor. The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."

Midcal, 445 U.S. at 110.[8]

The analysis of H.R. 3870 must begin, therefore, with an identification of the state and federal interests involved. States that already prohibit drinking by those under 21 have interests that coincide, at least presently, with the federal interests detailed in § 1 of H.R. 3870. The practical effect of the proposed bill would be to assist those states in enforcing their own laws by reducing the availability of alcohol in neighboring states that have more permissive laws.

On the other hand, states that have drinking ages lower than 21 have presumably made a legislative determination that drinking by those over, for example, the age of 18 is permissible. The interests of these states may be described as protecting their separate decisions to permit access to liquor to those over 18.[9]

The federal government's interest is, we assume, the economic injuries and resultant allocation of resources flowing in interstate commerce caused by

[8] In *Midcal*, the Court identified the federal interest as the "familiar and substantial" one of a national policy favoring competition. 445 U.S. at 110. The state's interest in the resale price maintenance statute had been identified by the California Supreme Court as twofold: promotion of temperance and orderly market conditions. *Id.* at 112. That same court had then found, however, that there was in fact little correlation between the statute and either temperance or orderly market conditions. The United States Supreme Court stated, in concluding that the federal interests outweighed state concerns, "[w]e have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition." *Id.* at 113.

[9] There may also be states, particularly those with a monopoly on liquor sales, that have an economic interest in promoting sales to those over 18. To the extent that states advance an economic interest, however, it seems reasonable to assume that the federal government can demonstrate that its economic interest in property and people probably outweighs whatever the particular state's individual interest is in revenue from potential sales. We do not believe that the exercise of Congress' authority in this fashion under the Commerce Clause would be held to violate any state interest protected by the Tenth Amendment. The sale of alcohol by a state monopoly is not one of the "integral government functions," *National League of Cities* v. *Usery*, 426 U.S. 833, 855 (1976), protected by that Amendment from federal interference. *See Ohio* v. *Helvering*, 292 U.S. 360, 368–69 (1934); *South Carolina* v. *United States*, 199 U.S. 437, 463 (1905). Both *Ohio* and *South Carolina* involved state challenges to federal taxes on the state liquor monopoly. The *South Carolina* Court held that the sale of liquor by a state monopoly "is of a private nature" and not a governmental function whose taxation would "impede or embarrass a State in the discharge of its functions." 199 U.S. at 463. This ruling was reaffirmed in the *Ohio* case notwithstanding passage of the Twenty-First Amendment:

> A distinction is sought in the fact that after that case was decided the Eighteenth Amendment was passed, and thereby, it is contended, the traffic in intoxicating liquors ceased to be private business, and then with the repeal of the amendment assumed a status which enables a state to carry it on under the police power. The point seems to us altogether fanciful. The Eighteenth Amendment outlawed the traffic; but, certainly, it did not have the effect of converting what had always been a private activity into a governmental function.

Ohio v. *Helvering*, 292 U.S. at 369.

drunk drivers under the age of 21. H.R. 3870, § 1. The loss of life, the crippling of individuals, the loss to production because of time lost from work, and the property damage caused by accidents involving such drunk drivers will, we assume, be detailed in H.R. 3870's legislative history.[10] Using *Midcal*'s balancing test, we believe that a court could find, assuming a sufficient legislative history, that the federal government's interest in preventing damage to national commerce outweighed any particular state's interest in permitting access to liquor for those under 21.

Finally and, we believe, importantly, given that § 2 of the Twenty-First Amendment was intended to assure that states would be able to enact restrictive legislation retaining prohibition on a local level, 76 Cong. Rec. 4140–41 (1933), it would be anomalous if states could use § 2 to insist on permissive state laws that could frustrate federal efforts directed towards a limited form of temperance.

Conclusion

H.R. 3870 will not mandate importation of alcohol into any state in violation of its laws. Under the *Midcal* test, Congress could, we believe, articulate a federal interest that would outweigh a state's interest in providing its citizens under the age of 21 access to alcohol. We therefore believe that H.R. 3870 will survive constitutional attack.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

[10] We assume that the statistical evidence will be more persuasive than that presented to the Supreme Court in *Craig* v. *Boren*, 429 U.S. 190 (1976), and rejected there as too tenuous. *See id.* at 200–04 (striking down state ban on sale of 3.2 percent beer to males between the ages of 18 and 21).

Application of the Neutrality Act to Official Government Activities

Section 5 of the Neutrality Act, 18 U.S.C. § 960, forbids preparation for, or participation in, military expeditions against a foreign state with which the United States is at peace. This provision is intended solely to prohibit persons acting in a private capacity from taking actions that might interfere with the foreign policy and relations of the United States. It does not proscribe activities conducted by Government officials acting within the course and scope of their duties as officers of the United States.

April 25, 1984

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum is written in connection with recent allegations[1] that several United States Government officials may have violated § 5 of the Neutrality Act, 18 U.S.C. § 960, which forbids the planning of, provision for, or participation in "any military or naval expedition or enterprise to be carried on from [the United States] against the territory or dominion of any foreign prince or state . . . with whom the United States is at peace." To assist you in the discharge of your responsibility under Title VI of the Ethics in Government Act, 28 U.S.C. §§ 591–598, to determine preliminarily whether such charges, if true, might constitute a crime, we have undertaken a thorough examination of the Neutrality Act (Act), with particular attention toward § 5, its legislative history, the historical circumstances surrounding its enactment, existing judicial precedent regarding the Act, and the history of Executive and Legislative relations with respect to the Act's application. Based upon these considerations, we have concluded that the Act does not proscribe activities conducted by Government officials acting within the course and scope of their duties as officers of the United States but, rather, was intended solely to prohibit actions by individuals acting in a private capacity that might interfere with the foreign policy and relations of the United States.

[1] The most recent assertions in this regard that have been brought to our attention are those made in a letter to you, dated April 9, 1984, from a majority of the Democratic Party members of the Committee on the Judiciary of the House of Representatives, taking the position that several Government officials may have violated the Act by participating in a plan "to covertly aid, fund and participate in a military expedition and enterprise utilizing Nicaraguan exiles for the purpose of attacking and overthrowing the government of Nicaragua, a country with which the United States is officially at peace."

I. Evolution of the Neutrality Act

A. President Washington's Proclamation of 1793

The Neutrality Act was enacted in 1794 following President Washington's Proclamation of April 22, 1793, regarding the war between France and Great Britain, requiring the citizens of the United States "with sincerity and good faith [to] adopt and pursue a conduct friendly and impartial toward the belligerent powers," warning citizens "to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition," and threatening to prosecute those "who shall, within the cognizance of the courts of the United States, violate the law of nations with respect to the powers at war, or any of them."[2] The President viewed the Proclamation as a necessary measure toward restraining the natural sympathy and enthusiastic support of the American people for the French cause, born of France's generous aid to the colonists during the American Revolution and the Americans' strong identification with the goals of the French Revolution. *See generally* C. Fenwick, *The Neutrality Laws of the United States* 16–23 (1913) (Fenwick).[3] Writing nearly one-

[2] The Proclamation provided:

> Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, on the one part, and France on the other; and the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial towards the belligerent powers:
>
> I have therefore thought fit by these presents, to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.
>
> And I do hereby also make known, that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them, those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States, against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the Courts of the United States, violate the law of nations, with respect to the powers at war, or any of them.

32 *Writings of George Washington* 430 (J. Fitzpatrick ed 1939). *See also* 1 *Messages and Papers of the Presidents* 156 (J. Richardson ed. 1896).

[3] President Washington wrote to Secretary of State Jefferson on April 12, 1793:

> Your letter of the 7 instant was brought to me by the last post. War having actually commenced between France and Great Britain, it behoves the Government of this Country to use every means in its power to prevent the citizens thereof from embroiling us with either of those powers, by endeavouring to maintain a strict neutrality. I therefore require that you will give the subject mature consideration, that such measures as shall be deemed most likely to effect this desirable purpose may be adopted without delay; for I have understood that vessels are already designated privateers, and are preparing accordingly.
>
> Such other measures as may be necessary for us to pursue against events which it may not be in our power to avoid or controul, you will also think of, and lay them before me at my arrival in Philadelphia, for which place I shall set out Tomorrow....

On the same date, Washington wrote to Secretary of the Treasury Hamilton:

> Hostilities having commenced between France and England, it is incumbent on the Government of the United States to prevent, as far as in it lies, all interferences of our Citizens in them;

Continued

hundred years later, a committee of Congress described the historical circumstances immediately preceding President Washington's Proclamation and the passage of the Act as follows:

> The enthusiasm of republicans for France, and their hostility to England, was not much less marked in America than in France. It brought public opinion to the verge of revolt against the peaceful policy of Washington. Accountable to the people for its resistance to popular clamor and the consequences of its timid submission to the demands of England, whose arrogant pretensions intensified the popular friendship for France, the administration was threatened with formidable resistance, if not the overthrow of its policy.

H.R. Rep. No. 100, 39th Cong., 1st Sess. 2 (1866).

In addition, the United States and France had entered into two "treaties" in 1778, both of which threatened the new nation's posture of neutrality regarding the military affairs of the European countries.[4] The more serious threat was posed by the Treaty of Amity and Commerce, 8 Stat. 12,[5] which made it lawful for French ships and privateers to enter United States ports with their prizes of war and unlawful for ships of other foreign nations carrying subjects or property of France as their prizes of war to enter American ports. *See generally* Fenwick, *supra,* at 16–32.

In the spring of 1793, Edmund Charles Genet, French Minister to the United States, arrived in this country and, pursuant to the Treaty of Amity and Commerce, began issuing commissions to commanders of vessels willing to serve France and authorizing the outfitting of privateers from American ports. Secretary of State Jefferson protested to the French Minister that such conduct was not "warranted by the usage of nations, nor by the stipulations existing between the United States and France," but met with continued resistance from Genet that "no article of [the Treaties] impose[d] . . . the painful injunction of abandoning us in the midst of the dangers which surround us." Fenwick, *supra,* at 18–19. Finally, Jefferson informed Genet that "after mature consideration," President Washington had concluded:

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[3] (. . . continued)

> and immediate precautionary measures ought, I conceive, to be taken for that purpose, as I have reason to believe (from some things I have heard) that many Vessels in different parts of the Union are designated for Privateers and are preparing accordingly. The means to prevent it, and for the United States to maintain a strict neutrality between the powers at war, I wish to have seriously thought of, that I may as soon as I arrive at the Seat of the Government, take such steps, tending to these ends, as shall be deemed proper and effectual. With great esteem etc.

32 *Writings of George Washington, supra,* at 415, 416.

[4] These "treaties" were entered into by the colonists during the American Revolution in exchange for aid from France, *see* 8 Stat. 6, 12, and were not annulled by Acts of Congress until 1798.

[5] The other treaty was the Treaty of Alliance, 8 Stat. 6, regarding which there existed a serious question within Washington's Cabinet as to whether the United States was obligated to take up arms in France's defense. However, because France apparently never forced a resolution of the issue, it remained unresolved. *See* Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy,* 24 Harv. Int'l L.J. 1, 12–13 (1983).

> [T]hat the arming and equipping [of] vessels in the ports of the United States, to cruise against nations with whom we are at peace, was incompatible with the territorial sovereignty of the United States; that it made them instrumental to the annoyance of those nations, and thereby tended to compromit their peace; and that he thought it necessary, as an evidence of good faith to them, as well as a proper reparation to the sovereignty of the country, that the armed vessels of this description should depart from the ports of the United States.
>
> * * *
>
> After fully weighing again, however, all the principles and circumstances of the case, the result appears still to be, that it is the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring Powers; that the granting [of] military commissions, within the United States, *by any other authority than their own,* is an infringement on their sovereignty, *and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country*[.]

Fenwick, *supra,* at 19 (quoting 1 *American State Papers, Foreign Relations* 149 (emphasis added)).[6]

Notwithstanding the President's Proclamation and the continued public reprimands of Minister Genet, privateers continued to be outfitted in American ports for the service of France,[7] with the individuals involved suffering few legal reprisals by the United States Government. Although there were several prosecutions of individual citizens charged with attacking the property and citizens of nations at peace with the United States, the prosecutions were unsuccessful, largely because there were no federal statutes defining such acts as crimes and legal opinion was divided on the question whether violations of international law could provide a basis for a common law federal offense. The

[6] In reporting this incident, Fenwick states that in this passage, "Jefferson set forth in clear and simple terms the principles of neutrality as understood by the President." Fenwick, *supra,* at 19.

[7] However, the instructions — "deductions from the laws of neutrality, established and received among nations" — issued by Secretary Hamilton on August 7, 1793 to customs collectors in major ports appears to have had some effect in decreasing the incidence of privateering. Fenwick describes the instructions as follows:

> The instructions called upon the collectors to be vigilant in detecting any acts in violation of the laws of neutrality, and to give immediate notice of such attempts to the proper authorities No asylum was to be given to vessels, nor to their prizes, of either of the powers at war with France, in accordance with the Treaty of 1778 with France, nor to armed vessels which had been originally fitted out in any port of the United States by either of the parties at war. The purchase of contraband articles, as merchandise, was to be free to both parties. The names of citizens of the United States in the service of either of the parties were to be notified to the local state governor Vessels contravening these regulations were to be refused clearance. Vessels, except those in the immediate service of foreign governments, were to be examined as to their military equipment upon entering and upon leaving port.

Fenwick, *supra,* at 22–23.

most celebrated of these cases is *Henfield's Case,* 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360), in which Henfield was prosecuted at common law for enlisting on the French privateer, "Citizen Genet," in violation of the treaties of the United States and the law of nations. Although, upon the urging of Attorney General Randolph, the court recognized such actions as violations of the sovereignty of the United States in its charge to the jury, Henfield nevertheless was acquitted. *See generally* Lobel, *The Rise and Decline of the Neutrality Act, supra,* at 13–14; Fenwick, *supra,* at 24. Regarding this case, Jefferson wrote in a letter to James Monroe:

> The Atty General gave an official opinion that the act was against law, & coincided with all our private opinions; & the lawyers of this State, New York & Maryland, who were applied to, were unanimously of the same opinion. Lately mr. Rawle, Atty of the U.S. in this district, on a conference with the District judge, Peters, supposes the law more doubtful. New acts, therefore, of the same kind, are left unprosecuted till the question is determined by the proper court, which will be during the present week. . . . I confess I think myself that the case is punishable, & that, if found otherwise, *Congress ought to make it so,* or we shall be made parties in every maritime war in which the piratical spirit of the banditti in our ports can engage.

6 *Writings of Thomas Jefferson* 347–48 (P. Ford ed. 1895) (emphasis added).

In addition, in the summer of 1793, United States officials became aware of Minister Genet's efforts to organize armies to invade New Orleans and the Floridas, then in the possession of Spain, an ally of Great Britain. As a result of these and other similar events, and the apparent ineffectiveness of existing legal mechanisms to restrain such activities, President Washington sought to enact into legislation the principles of neutrality set forth in his Proclamation.

B. The Neutrality Act of 1794

In his annual address to Congress in December 1793, President Washington articulated his views regarding the role of the principle of neutrality in sovereign states and called upon Congress to implement such principles through legislation. President Washington proclaimed:

> In this posture of affairs, both new and delicate, I resolved to adopt general rules, which should conform to the treaties and assert the privileges of the United States. These were reduced into a system, which will be communicated to you.
>
> * * *
>
> It rests with the wisdom of Congress to correct, improve, or enforce this plan of procedure; and it will probably be found expedient to extend the legal code and the jurisdiction of the

> Courts of the United States to many cases which, though dependent on principles already recognised, demand some further provisions.
>
> Where individuals shall, within the United States, array themselves in hostility against any of the Powers at war[;] or enter upon military expeditions or enterprises within the jurisdiction of the United States; or usurp and exercise Judicial authority within the United States; or where the penalties on violations of the law of nations may have been indistinctly marked, or are inadequate — these offences cannot receive too early and close an attention, and require prompt and decisive remedies.

4 *Annals of Congress* 11 (1793).

The Neutrality Act was enacted on June 5, 1794. 1 Stat. 381. Although originally enacted as a temporary measure,[8] the Act was continued in force by the Act of Mar. 2, 1797, 1 Stat. 497, and finally made permanent by the Act of Apr. 24, 1800, 2 Stat. 54. Through several amendments[9] and the re-enactment of its provisions in the revision and codification of Title 18 in 1909, 35 Stat. 1088, 1089, and again in 1948, 62 Stat. 683, 744, the Act today remains substantially similar to that which was first enacted in 1794.

Section 1 of the Act, 18 U.S.C. § 958, provides:

> Any citizen of the United States who, within the jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, against any prince, state, colony, district, or people, with whom the United States is at peace, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

Section 2, 18 U.S.C. § 959, provides in pertinent part:[10]

> (a) Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall

[8] That the Act's operation was originally limited to a term of two years testifies to "the character of the act, and the extent to which it came in conflict with the opinions of the people, as well as the extraordinary influences under which it was enacted." H.R. Rep. No. 100, *supra*, at 2.

[9] *See, e.g.*, Act of Mar. 3, 1817, 3 Stat. 370; Act of Apr. 20, 1818, 3 Stat. 447, Act of Mar. 10, 1838, 5 Stat. 212. Parts of the Act were also amended in 1917, in the "Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States," commonly referred to as the "Espionage Act," 40 Stat. 217.

[10] Subsection (b) of § 2 generally exempts from subsection (a)'s coverage "citizens or subjects of any country engaged in war with a country with which the United States is at war;" subsection (c) generally exempts from the Act's coverage citizens of the foreign nations who are "transiently within the United States . . . [who] enlist on board any vessel of war . . . which at the time of its arrival within the United States was fitted and equipped as such."

be fined not more than $1,000 or imprisoned not more than three years, or both.

Section 3, 18 U.S.C. § 962, provides in pertinent part:

> Whoever, within the United States, furnishes, fits out, arms, or attempts to furnish, fit out or arm, any vessel, with intent that such vessel shall be employed in the service of any foreign prince, or state, or of any colony, district, or people, to cruise, or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace; or
>
> Whoever issues or delivers a commission within the United States for any vessel, to the intent that she may be so employed —
>
> Shall be fined not more than $10,000 or imprisoned not more than three years, or both.

Section 4, 18 U.S.C. § 961, provides in pertinent part:

> Whoever, within the United States, increases or augments the force of any ship of war . . . which, at the time of her arrival within the United States, was a ship of war . . . in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States is at peace, by adding to the number of the guns of such vessel . . . or by adding thereto any equipment solely applicable to war, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Section 5, 18 U.S.C. § 960 provides:

> Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both.

Although the debates in Congress regarding these provisions focused largely on the immediate problems posed by the 1778 "treaties" with France and how they would be affected by the anti-privateering and confiscation of goods provisions of the Act,[11] the Act's legislative history nevertheless reveals other

[11] Section 3 of the Act provided for the confiscation of goods on armed vessels, outfitted within the United States, that committed hostile acts against territories with which the United States was at peace.

key issues that were addressed by the Act's passage. Several commentators have suggested, and the speeches of President Washington, Secretary Jefferson, and various Senators and Representatives support the view, that the United States, in the early stages of its development as a republic, embraced the general principle of neutrality as a means, in view of its military weakness and geographic isolation, of advancing its commercial interests by avoiding involvement in European wars and protecting its independence and sovereignty from violation by foreign states, as well as of consolidating its federal powers and strengthening the sovereignty of the federal government over its individual citizens. *See generally* Fenwick, *supra;* Lobel, *The Rise and Decline of the Neutrality Act, supra,* and sources cited therein. *See also United States* v. *O'Sullivan,* 27 F. Cas. 367, 373–75 (S.D.N.Y. 1851) (No. 15974) (providing an account of the Act's passage).

In 1866, the House Committee on Foreign Affairs, which was engaged in an extensive review of the Act's history, described the state of the new nation after 1783 and the historical circumstances that compelled the Act's passage:

> The independence of the American colonies was acknowledged by Great Britain in 1783. The participation of the colonies in the Indian and French wars, and the severe and long-continued struggle of the Revolution made it necessary that the new government under the Constitution should husband its resources, and, if possible, avoid all complications with foreign nations. The foreign policy of the administration of Washington — as wise and necessary as it was successful — was based upon this idea. It is now conceded that the safety of the republic imperiously demanded this policy.

H.R. Rep. No. 100, *supra,* at 1. In his Farewell Address to the Nation on September 19, 1796, President Washington reiterated these themes:

> The Great rule of conduct for us, in regard to foreign Nations is in extending our commercial relations to have with them as little political connection as possible. So far as we have already formed engagements let them be fulfilled, with perfect good faith. Here let us stop.
>
> Europe has a set of primary interests, which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence therefore it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships, or enmities;
>
> Our detached and distant situation invites and enables us to pursue a different course. If we remain one People, under an

> efficient government, the period is not far off, when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard giving us provocation; when we may choose peace or war, as our interest guided by our justice shall Counsel.

35 *Writings of George Washington, supra,* at 233–34.

Critical to the effort to remain detached from foreign entanglements was establishing to foreign powers and to the citizens of the United States that *only the Government* was authorized to articulate United States foreign policy. Unauthorized acts by private individuals in this regard were not to be recognized by foreign nations, and, indeed, were to be punished by the United States, "because no citizen should be free to commit his country to war." 6 *Writings of Thomas Jefferson, supra,* at 347. In reviewing the history and purposes of the Act, the United States District Court for the Southern District of New York, in a landmark decision in 1851, analogized the neutrality obligations that the drafters sought to impose on individuals through the enactment of civil penal laws to those imposed by the law of nations on sovereign governments:

> As the representative of the people, — their agent, delegated by the people of the United States, — the government adopted an administrative and legislative policy embracing both its direct relationship to foreign states, and the coordinate obligations of the citizens individually to uphold and effectuate that relationship. What the government might not do in its public capacity, without an infraction of the law of nations and subjecting itself to reprisals and war, it claimed the people should be prohibited doing individually . . . . It is most manifest, that, at the earliest day the subject was acted on, *the United States government intended to make the personal duties of citizens co-equal with those of the nation,* in respect to acts of hostility against other states . . . *[and] to compel the citizens to conform in all respects to the principles of the law of nations,* recognized and observed on the part of the government, in regard to friendly powers.

United States v. *O'Sullivan,* 27 F. Cas. at 374, 375 (emphasis added). *See also* Fenwick, *supra,* at 1–14.

During the debate on the Neutrality Act, Representative Ames spoke of the weakness of the United States' general authority and of the threat of "be[ing] driven into a war by the licentious behavior of some individuals." 4 *Annals of Congress* 743 (1794). Representative Wadsworth expressed a similar view:

> If the Executive cannot hinder these people from going to sea in this way, we must be forced into hostilities immediately. We send an Ambassador to England to secure peace; and we follow

> up this application by sending out privateers. Will any nation, in such a case, believe that our desire of peace is sincere? Is the seizing of their ships a sign of it?

Id. at 744. Representative Murray reiterated the importance of securing *governmental* control over the power of individuals to affect foreign policy:

> [W]ere people only meeting to form the very first elements of a civil compact, they would have a right to say to each member of their society, that he should not enlist in any foreign service, to invade a nation perhaps friendly to them, *without their consent.* To countenance recruiting for foreign service, was admitting into the heart of the country an engagement against the sovereignty of the country.

Id. at 746 (emphasis added). This view was reiterated again by the court in the *O'Sullivan* case as an underlying purpose of the Act:

> [T]his government . . . possesses the unquestionable power to prohibit . . . citizens, individually, or in association with others, from entering into engagements or measures within the American territory, or upon American vessels, in hostility to other nations, and which may compromit [sic] our peace with them. *It would be most deplorable if no such controlling power existed in this government, and if men might be allowed, under the influence of evil, or even good, motives, to set on foot warlike enterprises from our shores, against nations at peace with us, and thus, for private objects,* sordid or criminal in themselves — or under the impulse of fanaticism or wild delusions — *bring upon this country, at their own discretion, the calamities of war.* The will of the nation is expressed in this respect, by the statute of [1794].

United States v. *O'Sullivan,* 27 F. Cas. at 383 (emphasis added). Thus, the Neutrality Act, by outlawing private warfare, would ensure that the nation's foreign policy was made by the President, with appropriate participation by Congress, working through the political process in fulfillment of their constitutional roles, and not by the unilateral and unrestricted acts of private individuals.[12]

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[12] In arguing that the Act was intended to proscribe actions by the Government as well as those of individuals acting in their private capacities, some commentators have pointed to the English predecessor to § 2 of the Act, which excepted from the English act's prohibitions those enlistments that were authorized by the Queen, and the failure of the United States Congress to make explicit similar exceptions in its Act. *See, e.g.,* Lobel, *The Rise and Decline of the Neutrality Act, supra,* at 31–33. However, it was clear to early scholars that the drafters' use of the term "any person" in § 2 was not intended to bar enlistments duly authorized by the Government.

Sections 1 and 2 of the Act were designed to protect the nation's sovereignty over its territory and its independence in world affairs by prohibiting belligerents from recruiting troops within its borders "without the consent of the sovereign," 7 Op. Att'y Gen. 367, 368, 381 (1855), and by prohibiting its citizens from engaging in private acts of warfare, *i.e.,* accepting and exercising commissions in the service of nations against nations with which the United States was at peace, which could be interpreted erroneously by foreign

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In calling for amendments to the Act in 1803 to strengthen its provisions to respond more effectively to the involvement of American citizens in the South American colonial wars,[13] President Jefferson re-emphasized the Act's purpose to prevent *individual citizens* from embarking on private expeditions in contravention of the Government's foreign policy goals:

> [L]et it be our endeavor, as it is our interest and desire, to cultivate the friendship of the belligerent nations by every act of justice and of innocent kindness; to receive their armed vessels with hospitality from the distresses of the sea, but to administer the means of annoyance to none; . . . *to restrain our citizens from embarking individually in a war in which their country takes no part;* to punish severely those persons, citizen or alien, who shall usurp the cover of our flag for vessels not entitled to it, *infecting thereby with suspicion those of real Americans and committing us into controversies for the redress of wrongs not our own*[.]

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[12] (. . . continued)
powers as acts of the United States Government. *See generally* Warren, Assistant Attorney General, "Memorandum of Law on the Construction of Section 10 of the Federal Code [currently 18 U.S.C. § 959]" (1915). In his memorandum, Assistant Attorney General Warren traced the development of § 959's predecessors from their origins in the British Act of 13 Anne, ch. 10 (1713), which prohibited the "listing of Her Majesties subjects to serve as soldiers without Her Majesties license," to 1915. In discussing the evolution of this prohibition in the United States, Warren noted that although the American Congress had extended the Act beyond the prohibitions contained in the English act to prohibit *"any person"* within the United States from enlisting in foreign service, and thus made "unlawful the recruiting or enlisting of all foreign citizens within this country," Congress implicitly retained the Act's prohibition against acts to which the Government had not consented. *Id.* at 3–11. *See also* 4 *Annals of Congress* 746 (1794); 7 Op. Att'y Gen. at 381 ("The main consideration is the sovereign right of the United States to exercise complete and exclusive jurisdiction within their own territory; to remain strictly neutral, if they please, in the face of the warring nations of Europe . . . . All which it concerns a foreign government to know is whether we, *as a government*, permit such enlistments.") (emphasis added)

[13] The following account of the impact on the American public of the revolutions by Spanish colonists in the Western Hemisphere during the first two decades of the 19th century provides valuable insight into the tensions between the collective individual wills of the American people and the federal government as a sovereign entity, and the necessity for vigorous enforcement of United States foreign policy of neutrality against those individuals who would violate it.

> The independence of the Spanish republics was hailed by the people of this country as the most auspicious event of the age. No government in Europe except that of Spain had resisted the freedom of the Spanish provinces by force. But all the nations of Europe in alliance with Spain maintained her right to the government of the colonies. Great Britain had been invited by Spain, in conjunction with the European alliance, to mediate between her and the colonies, upon the basis of their continued submission to her authority, with certain ameliorations as to commerce and the appointment of officers. The United States, whose co- operation was solicited by Great Britain, declined to enter into any plan of pacification, except upon the basis of their independence. The recognition of their independence was deferred for several years in deference to the authority of the Holy Alliance. Spain declared that such recognition would be regarded by her as an act of hostility. Their independence was recognized in 1822, after a contest of twelve years. The sympathy of the American people for the Spanish patriots was sincere and universal, and their hostility to the government and institutions of Spain was equally strong. The proximity of the Spanish provinces to our own country, and their inability on account of their want of vessels-of-war, to cope with Spain upon the sea, rendered it difficult to prevent our citizens from giving them aid in their struggle for liberty. It was still more difficult to allay the suspicions of the European governments of our complication with the revolutionists.

H.R. Rep. No. 100, *supra*, at 3.

1 *Messages and Papers of the Presidents, supra,* at 361 (emphasis added). In reviewing the amendments proposed, and the proclamations issued, by Presidents Jefferson and Madison during the colonial rebellions against Spain, the House Committee on Foreign Affairs in 1866 reported:

> It is impossible to suppose that provisions so repressive upon American commerce, so hostile to the cause of liberty in the colonies, and so strongly in favor of a government whose principles were so repugnant to the people as those of Spain, were voluntarily adopted. They had their origin in the interests of European governments hostile to the cause of the colonies. But it was not this consideration alone that led to their permanent enactment. The established policy of the government was that of peace with all nations. To maintain this policy it waived, both at home and abroad, interests to which, under other circumstances, it would have resolutely adhered. The declarations of Washington upon this subject are too familiar to require repetition. *They were accepted by all his successors.*

H.R. Rep. No. 100, *supra,* at 4 (emphasis added). *See generally* Fenwick, *supra,* at 31–41.

This theme has been sounded again and again by Presidents throughout the history of our Nation. President Van Buren, in 1838, admonished American citizens against arming themselves in support of the Canadian revolt against Great Britain, and warned that "any persons who shall compromit [sic] the neutrality of this Government by interfering in an unlawful manner with the affairs of the neighboring British Provinces will render themselves liable to arrest and punishment under the laws of the United States, which will be rigidly enforced." 3 *Messages and Papers of the President, supra,* at 481.

Likewise, Presidents Tyler and Fillmore issued proclamations in 1849 and 1851, respectively, warning against hostile expeditions into Cuba and Mexico; in 1854 and again in 1858 Presidents Pierce and Buchanan warned against individual involvement in support of belligerent factions in Nicaragua; in 1870 President Grant warned against American participation in the Cuban revolution against Spain; and in 1912 President Taft issued a proclamation warning Americans against assisting Mexican insurgents. *See generally* Fenwick, *supra,* at 41–48.

The drafters of the Neutrality Act did not define the phrase "at peace" as it is used in the Act. Indeed, it does not appear that the issue was the subject of debate. However, given the underlying goals of the statute, it is reasonable to conclude that the phrase "at peace" describes the state of affairs in which there is an absence of a congressionally declared war. In a letter to Gouverneur Morris, the United States Minister to France, in 1793, Jefferson wrote:

> If one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of all it's [sic] citizens) has a right to

> go to war, by the authority of it's individual citizens. But this is not true either on the general principles of society, or by our Constitution, *which gives that power to Congress alone, & not to the citizens individually.*

6 *Writings of Thomas Jefferson, supra,* at 371, 381 (emphasis added). Yet, during President Jefferson's administration, as well as those of Presidents following him during the early years of the 19th century, Presidents repeatedly authorized military expeditions into territories against which Congress had not declared war, as well as the arming of vessels to be used against nations against which Congress had not declared war, with no indication that those Presidents, or the Congresses that were sitting at the time, understood such missions to violate the Neutrality Act.

For example, in 1801, President Jefferson dispatched naval forces to Tripoli, after the Pasha of Tripoli increased his demands for tribute to the Barbary pirates and declared war upon the United States. The United States naval action in the Mediterranean extended over a five-year period, during which Lieutenant Decatur destroyed the frigate "Philadelphia," which had been captured and converted by the Tripolitans. In 1806, after issuing a proclamation declaring that information had been received of preparations for an expedition against the dominion of Spain and warning all persons against taking any part in it,[14] President Jefferson ordered Captain Zebulon Pike and his platoon to invade Spanish Territory at the headwaters of the Rio Grande on a secret mission. In 1810, President Madison ordered the Governor of Louisiana to occupy disputed territory in West Florida, east of the Mississippi, with troops;[15] in 1813

[14] *See* Fenwick, *supra,* at 33.

[15] According to Abraham D. Sofaer's account of the expeditions ordered by President Madison into the Floridas and the northern coast of South America in *War, Foreign Affairs and Constitutional Power: The Origins* 296, 300, 303 (1976):

> Madison wrote Jefferson that the crisis in West Florida presented "serious questions, as to the authority of the Executive, and the adequacy of the existing laws of the U.S. for territorial administration." He expressed the fear that acting before Congress had convened would subject an executive order "to the charge of being premature and disrespectful, if not of being illegal." No response from Jefferson has been found; but, whatever Jefferson's view, Madison decided to proceed unilaterally and vigorously . . . [without congressional approval].

After President Madison presented Congress with the *fait accompli,* in the ensuing debate, Sofaer writes that Senator Clay persuaded his colleagues with the following remarks:

> The president has not, therefore, violated the Constitution, and usurped the war-making power, but he would have violated that provision which requires him to *see* that the laws are faithfully executed, if he had longer forborne to act . . . . Had the President failed to exercise the discretionary power placed in him, . . . he would have been criminally inattentive to the dearest interests of this country.

Sofaer then concludes:

> One can fairly state that Madison acted with far more independence and vigor in West Florida than his earlier conception of presidential power would have allowed. He plotted in secret, used agents and troops, threatened force, and eventually proclaimed and effectuated the occupation of an area ruled by Spain. He did these things without calling back Congress, and kept his proclamation secret until it was safely implemented. [However,] *his actions . . . were largely consistent with the view of presidential power advocated by Hamilton and most Federalists . . . . Congress had . . . provided troops, and most early Federalists would have agreed that the President had discretion to use the troops in executing any of his constitutional responsibilities.*

(Emphasis added.)

President Madison ordered United States Marines into Spanish Territory, and in 1816–17, on two occasions, he ordered United States forces into Spanish Florida, during the "Seminole Wars." In 1817, President Monroe sent United States forces to Amelia Island, in the Spanish Territory, to expel smugglers and privateers.

Notwithstanding the many Presidential Proclamations against American involvement in the colonial rebellions against Spain during the early 19th century, there are documented no less than seven invasions by the United States Armed Forces, ordered by Presidents Madison and Monroe, without a declaration of war or other prior congressional authorization, into Spanish Territory. In President Jackson's administration there are seven such documented expeditions into Haiti, the Falkland Islands, Argentina, Sumatra, and Peru, all nations with which the United States was at peace. Likewise, in 1837 President Van Buren ordered the Marines to capture a Mexican brig of war, and in 1839, to land in Sumatra in retaliation for attacks on American ships. In addition, President Pierce, after warning American citizens against involving themselves in civil infractions in Nicaragua, sent United States naval forces to Greytown, Nicaragua in 1853 and again in 1854 to quell civil disturbances there and to protect the lives of American citizens stationed there. Between 1840 and 1900 there were nearly one-hundred documented, and, undoubtedly, many more undocumented, instances of invasions by American forces, at the behest of the President, of nations with which the United States was at peace. *See generally* Emerson, *War Powers Legislation,* 74 W. Va. L. Rev. 53 app. (1971).

This legislative history, when considered together with the historical circumstances surrounding the passage of the Act, provides overwhelming support for the view that the Act was not intended to apply to military activities pursued, or otherwise sponsored, by the Government.[16] This conclusion is strengthened even more by the fact that Jefferson was a member of the President's Cabinet and Madison was a member of the Congress during the period in which the

[16] Although the question may be raised whether the drafters in fact distinguished between Presidentially authorized and congressionally approved actions in excepting from the Act's prohibitions "government-authorized" acts, the many historical examples noted in this memorandum, as well as a recognition of the necessity of ensuring the President's ability to respond rapidly to changing world events, compel us to conclude that, short of acts constituting a declaration of war, Presidential authorization is sufficient under the Act. *See also* Sofaer, *supra,* at 359. Sofaer notes that many Members of Congress came to President Monroe's defense during congressional debate regarding his actions in the Floridas, arguing that the President was not limited to fighting only wars formally declared war by Congress, but could authorize military actions short of war. Representative Alexander Smyth of Virginia remarked on the floor of the House:

> It by no means follows, as some seem to suppose, that because the President cannot declare war, that he can do nothing for the protection of the nation, and the assertion of its rights The power to declare war is a power to announce regular war, or war in form, against another Power. But it never was intended, by reserving this power to Congress, to take from the President the power to do any act necessary to preserve the nation's rights, and which does not put the nation into a state of war with another Power. If Congress, in addition to the power of declaring war, assume to themselves the power of directing every movement of the public force that may touch a neutral; or that may be made for preserving the national rights; or executing the laws and treaties; they will assume powers given to the President by the Constitution.

33 *Annals of Congress* 678 (1819).

Proclamation of 1793, which gave rise to the Neutrality Act, was issued and the Neutrality Act was debated and passed. Both construed the Act to apply only to unauthorized acts of private individuals and not to acts properly carried out pursuant to Presidential authority, as evidenced by their numerous military ventures, some of which are noted above, into nations with which the United States was officially at peace. Such contemporaneous interpretations of laws by "the founders of our Government and framers of our Constitution when actively participating in public affairs" has been held by the Supreme Court to be near conclusive proof of the proper construction to be accorded provisions, particularly when such interpretations are long acquiesced in. *See, e.g., J.W. Hampton, Jr., & Co.* v. *United States,* 276 U.S. 394, 411–12 (1926). *See also United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 322–29 (1936); *The Pocket Veto Cases,* 279 U.S. 655, 688–90 (1929); *Myers* v. *United States,* 272 U.S. 52, 175 (1926); *Martin* v. *Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 351–52 (1816); *Stuart* v. *Laird,* 5 U.S. (1 Cranch) 299, 309 (1803).[17]

Moreover, given the Act's purpose to enhance the President's ability to implement the foreign policy goals that have been developed by him, with appropriate participation by Congress, it would indeed be anomalous to interpret the Act to prohibit Government officials, acting properly within the course and scope of their authority, from carrying out the orders of the President, "the sole organ of the nation in its external relations and its sole representative with foreign nations" in pursuit of those goals. *See United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. at 319. Although the fact that the Act was not intended to apply to government-sponsored activity was not made explicit in the Act's text, our view is supported by the general rule of statutory construction, which holds that unless affirmative reasons indicate otherwise, "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." *United States* v. *United Mine Workers,* 330 U.S. 258, 272 (1947). *See also Hancock* v. *Train,* 426 U.S. 167 (1961). For these reasons, we believe that the purposes of the Act, as expressed by President Washington, his Cabinet, and the Members of Congress, together with the undeniable history of government-sponsored military expeditions into countries with which the United States has been at peace, and subsequent legislation, compels the conclusion that the Act was not intended to proscribe such official activity.

II. Post-Enactment History: Applications of the Act

The first prosecutions for violating the various provisions of the Neutrality Act were all brought against private individuals, for knowingly committing acts of hostility, unauthorized by the Government, against nations with which the United States was at peace. *See, e.g., United States* v. *Peters,* 3 U.S. (3

[17] Although these cases refer to the construction of constitutional provisions, the analytical principle announced by the Court may also be used to gain insight into the proper construction of statutes.

Dall.) 121 (1795); *The Betty Carthcart,* 17 F. Cas. 651 (D.S.C. 1795) (No. 9742); *The Nancy,* 4 F. Cas. 171 (D.S.C. 1795) (No. 1898). The legal issue in these early cases focused on what constituted the "arming" of a vessel, the distinction between "commercial" and "hostile" intent, and the authority of the United States Government to define the political bodies in whose service, and against which, the prohibited acts had been committed, and not on whether the Act prohibited the Government from engaging in such activity. *See, e.g., Wiborg* v. *United States,* 163 U.S. 632 (1896); *United States* v. *Quincy,* 31 U.S. (6 Pet.) 445 (1832); *United States* v. *Guinet,* 2 U.S. (2 Dall.) 321 (1795); *United States* v. *Skinner,* 27 F. Cas. 1123 (C.C.D.N.Y. 1818) (No. 16309). *See also* 21 Op. Att'y Gen. 267 (1895); 13 Op. Att'y Gen. 177 (1869); 3 Op. Att'y Gen. 739 (1841),

In none of these early cases or opinions was there any discussion of the applicability of these provisions to expeditions led or authorized by government officials, yet, as noted above, there has been documented during this period numerous instances of military ventures by United States forces into countries with which the United States was "at peace," and, no doubt, many more instances of providing assistance to nations engaged in belligerent acts against nations with whom the United States is "at peace." *See generally* Emerson, *War Powers Legislation, supra.* Although some commentators have argued that for purposes of the Neutrality Act, a distinction should be made between the use of regular United States Armed Forces, which would not be covered, and the use of other government-sponsored "paramilitary" groups, which would be covered, *see* Lobel, *The Rise and Decline of the Neutrality Act, supra,* no historical evidence has been cited in support of this distinction.

The fact that during the years immediately following the passage of the Act, expeditions into the Central and South American territories were launched by private parties, groups of individuals acting pursuant to Presidential authority, and United States troops, and that only the individuals involved in the first category of expeditions were prosecuted, supports the view that the Act was intended to apply no more to "paramilitary" troops then to the regular "armed forces" troops, when acting under orders of the President.

To be sure, courts construing the Act during the 19th century understood its provisions to prohibit "individuals [from] being at war whilst their government is at peace":

> *The rule is founded on the impropriety and danger of allowing individuals to make war on their own authority,* or, by mingling themselves in the belligerent operations of other nations, to run the hazard of counteracting the policy or embroiling the relations of their own government . . . . By these laws it is prescribed to the citizens of the United States, what is understood to be their duty as neutrals by the law of nations, and their duty also which they owed to the interest and honor of their own country.

United States v. *O'Sullivan,* 27 F. Cas. at 376 (emphasis added). *See also United States* v. *Three Friends,* 166 U.S. 1, 52, 53 (1897) ("[N]o nation can

permit *unauthorized* acts of war within its territory in infraction of its sovereignty . . . . [T]he act [was passed] . . . in order to provide a comprehensive code in prevention of *acts by individuals* within our jurisdiction inconsistent with our own authority.") (emphasis added).

Moreover, courts in the nineteenth century clearly recognized the President's constitutional preeminence in the area of foreign policy, and the discretion vested in him and his authorized agents by the Constitution regarding such affairs. Although we are aware of no court decisions from the nineteenth century ruling on challenges, brought under the Neutrality Act, to military actions taken by the President or his agents,[18] in 1860, the circuit court for the Southern District of New York, ruled that it was entirely lawful for the President to order the shelling of a town in Nicaragua in 1854 that had refused to redress damages incurred by American officials during a riot there.[19] In rejecting a claim for damages against the naval commander who had carried out the President's orders, the court held:

> 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, that 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; and different departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force a department of state and a department of the navy.
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> I have said, that the interposition of the president abroad, for the protection of the citizen, must necessarily rest in his discretion; and it is quite clear that, in all cases where a public act or order rests in executive discretion, neither he nor his authorized agent is personally civilly responsible for the consequences. As was observed by Chief Justice Marshall, in *Marbury* v. *Madison,* 1 Cranch [5 U.S. 137], 165 [(1803)]: "By the constitution of

[18] *But see Dellums* v. *Smith,* 577 F. Supp. 1449 (N.D. Cal. 1984), discussed below.

[19] The facts, as alleged, were:

> that the community at Greytown [Nicaragua] had forcibly usurped the possession of the place, and erected an independent government, not recognized by the United States, and had perpetrated acts of violence against the citizens of the United States and their property, and had, on demand for redress refused it, and that the defendant, under public orders from the president and secretary, as a commander in the navy, and then in command of the Cyane, did cause the place to be bombarded and set on fire, as he lawfully might for the cause aforesaid.

Durand v. *Hollins,* 8 F. Cas. 111, 111 (1860).

> the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts, and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."

Durand, 8 F. Cas. at 112. This incident, involving the use of American military power in Nicaragua, is one of seven documented instances of the use of military force by the United States in Nicaragua between 1853 and 1912, none of which was formally authorized by Congress. *See* Emerson, *War Powers Legislation, supra.* We are not aware of any instance in which there were demands or suggestions that the President's authorizing of such activities be prosecuted under the Neutrality Act.

Throughout the nineteenth and early twentieth centuries, Presidents sent American forces on innumerable military expeditions without prior congressional approval. For example, in 1853, Commodore Perry, pursuant to orders of President Pierce, led an expedition consisting of four men-of-war to Japan to negotiate a commercial treaty; and in 1854 he returned to Japan with ten armed ships to conclude the negotiations. In 1900, during the Boxer Rebellion, President McKinley ordered 5,000 troops to China to join the international military force protecting foreign legations; and in 1918, President Wilson committed 8,000 American troops to the Allied effort in Russia to counter the Bolshevik Revolution. *See generally* Emerson, *War Powers Legislation, supra.* In none of these instances were allegations of violations of the Neutrality Act raised by either Congress or the American public.

Prior to the court's recent ruling in *Dellums* v. *Smith,* 577 F. Supp. 1449 (N.D. Cal. 1984), discussed in Part III below, the only instance in the Act's history of nearly two centuries in which a court had considered the question of its applicability — in particular, the applicability of § 5 (18 U.S.C. § 960) — to expeditions "authorized" by the Government involved a claim by private individuals, strenuously denied by the Government, of Government complicity in their mission. *See United States* v. *Smith,* 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16342). In that case, Smith defended against the charge that he had set out on an expedition "against the dominions of Spain in South America," in violation of § 5, *id.* at 1233, by arguing that the expedition "was begun, prepared, and set on foot with the knowledge and approbation of the President of the United States, and . . . of the Secretary of State of the United States." *Id.* at 1196. Although Administration officials disavowed any knowledge of Smith's expedition, the court charged the jury to determine Smith's guilt or innocence without regard to the President's alleged approval or disapproval of the ven-

ture, because the President "cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids." *Id.* at 1230. The Court stated:

> If, then, the president knew and approved of the military expedition set forth in the indictment against a prince with whom we are at peace, it would not justify the defendant in a court of law, nor discharge him from the binding force of the act of congress; because the president does not possess a dispensing power. Does he possess the power of making war? That power is exclusively vested in congress.

Id.

As Smith was on a private mission, completely unrelated to the conduct of the official foreign policy of the United States, the court's language is *dicta.* Nevertheless, the *Smith* decision constitutes a single piece of data, in a voluminous body, concerning the Neutrality Act which appears to be inconsistent with our construction of the Act and our reading of the Act's legislative history. We believe that to the extent the court's language implies that the Act was intended to criminalize military endeavors directed by the President which are consistent with the Government's overall foreign policy agenda as developed by the President with appropriate participation by Congress, this decision is incorrectly decided. Moreover, its precedential value is completely undermined by contrary logic, legislative history, statutory construction principles, and historical practice. As discussed at considerable length above, it seems clear that the Act was intended to punish only *unauthorized* expeditions, undertaken by individuals acting in a private capacity, which would contravene or undermine the official foreign policy of the United States.[20]

The foregoing constitutes a survey of contemporaneous and other[21] historical constructions of the language of the Act's provisions. Although this history,

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[20] This conclusion is particularly reinforced in the *Smith* case by reference to the fact that the prosecution was brought by President Jefferson, "with the concurrence of Mr. Madison, secretary of state," for committing private acts, inconsistent with United States foreign policy, in violation of the sovereignty of the federal government. *See United States* v. *O'Sullivan,* 27 F. Cas. at 375 (discussing *Smith*). Clearly, as evidenced by the foregoing history of numerous military ventures launched by both Jefferson and Madison (after the latter became President in 1809), the prosecution was brought *precisely because* Smith's acts were unauthorized Regarding President Jefferson's having instituted the *Smith* prosecution, the *O'Sullivan* court concluded, "so it seems the policy and intent of this law has always been understood by the executive under every administration." *Id.* at 376.

[21] In 1917, the Act was supplemented by the addition of several related neutrality provisions passed in an Act commonly referred to as the "Espionage Act," 40 Stat. 217.

One of the neutrality provisions enacted as a part of the Espionage Act is presently codified at 18 U.S.C. § 956, which prohibits "two or more persons within the jurisdiction of the United States [from] conspir[ing] to injure or destroy specific property situated within a foreign country and belonging to a foreign government . . with which the United States is at peace." Only one prosecution appears to have been brought under this provision, *United States* v. *Elliott,* 266 F. Supp. 318 (S.D.N.Y. 1967), and in that case, the defendant raised selective prosecution and equal protection claims. In dismissing those claims, the court stated:

> He has not offered evidence even touching upon an example of any other person who conspired to destroy property in any nation with which the United States was clearly at peace and who was

Continued

with few exceptions, supports the view that the Act was not intended to proscribe military expeditions undertaken by the Government, the strongest support for this position may be in the more recent history of extensive covert "paramilitary" activity, authorized by the President and carried out by his agents, with varying degrees of disclosure to Congress, in nations against which Congress has not declared war. We turn now to that history.

III. Contemporary History of the Act

No recent President has refused to commit United States regular armed forces or "paramilitary" operatives, depending upon the need, to actual hostilities because of a lack of congressional declarations or approval when, in the exercise of his "inherent" powers over the conduct of foreign affairs,[22] and in the fulfillment of his constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and of his role as "Commander-in-Chief of the Army and Navy of the United States," *id.* § 2, it is his judgment that such action is necessary to preserve the national security of the United States. Among the more well-known examples of such actions are those of President Truman in Korea, President Eisenhower in Lebanon, President Kennedy in Cuba and Southeast Asia, Presidents Johnson and Nixon in South-

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[21] (. . . continued)

> not prosecuted. Instead, he has raised *situations such as North Vietnam or the Bay of Pigs where government complicity would effectively bar any prosecution.*

Id. at 324 (emphasis added).

The other set of provisions enacted with the espionage laws authorized the President, "[d]uring a war in which the United States is a neutral nation" to enforce the United States' posture of neutrality by requiring "owner[s], master[s], or person[s] in command" of any vessels within the jurisdiction of United States ports to "furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed . . . to commit hostilities upon the subjects . of any foreign prince or state . . . with which the United States is at peace . . . and that the said vessel will not be sold or delivered to any belligerent nation, . . . within the jurisdiction of the United States, or, having left that jurisdiction, upon the high seas." 40 Stat. at 221–22; 18 U.S.C. § 963. *See also* 18 U.S.C. §§ 964–967. Section 964 provides in part that

> [d]uring a war in which the United States is a neutral nation, it shall be unlawful to send out of the United States any vessel built, . . . as a vessel of war . . . with any intent or under any agreement or contract that such vessel will be delivered to a belligerent nation, . . . or with reasonable cause to believe that the said vessel will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

Section 964 codifies the substantive rule of international law forbidding the delivery of armed vessels to belligerent powers by neutral nations that § 963 authorized the President to enforce. *See* H.R. Rep. No. 30, 65th Cong., 1st Sess. 9 (1917).

In 1940, Attorney General Jackson construed this provision to preclude the President from dispatching to the British Government, in exchange for certain services pursuant to an Executive Agreement, "mosquito boats" which were at the time under construction for the United States Navy, because they would have been "built, armed, or equipped with the intent, or with reasonable cause to believe, that they would enter the service of a belligerent after being sent out of the jurisdiction of the United States." 39 Op. Att'y Gen. 484, 496 (1940). Although some commentators have suggested that Attorney General Jackson's opinion supports the view that all of the Neutrality Act provisions were intended to apply to Government activities, we believe that § 964 by its terms is limited to circumstances involving a declared war, unlike the other neutrality laws, and was proposed to Congress by Attorney General Gregory in 1917 for the purpose of providing "for the observance of obligations imperatively imposed by international law upon the United States." H.R. Rep. No. 30, *supra*, at 9.

[22] *See United States* v *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)

east Asia and Chile, President Ford in Angola, and President Carter in Iran. *See generally* Senate Select Comm. to Study Governmental Operations with respect to Intelligence Activities, Final Report on "Foreign And Military Intelligence," S. Rep. No. 755, 95th Cong., 2d Sess. (Book I) (1976) (Church Committee Report); Emerson, *War Powers Legislation, supra;* Monaghan, *Presidential War-Making,* 50 B.U. L. Rev. 19 (1970).[23]

Although all of these actions generated some controversy — in fact, one may fairly say that virtually all of them generated heated debate and remain controversial today — no significant doubt was ever cast on the legality of the President's conduct under the Neutrality Act.

In addition to the numerous documented uses of troops by Presidents without congressional authorization, the Eisenhower, Kennedy and Johnson administrations alone conducted over 400 covert military operations in countries with which the United States was "at peace," including Laos, Angola and Cuba. Church Committee Report, *supra,* at 46.[24] In none of the many instances of such action has there been raised a credible allegation or serious debate in Congress regarding possible violations of the Neutrality Act.

Moreover, there is strong contemporary evidence that the Neutrality Act is not regarded by Congress as applying to military deployments by the President or covert activities of the Central Intelligence Agency or the Department of Defense. This evidence takes the form of the recent enactment by Congress of provisions to "regulate" the President's use of the regular armed forces and of covert operations conducted by the CIA and the Department of Defense. The War Powers Resolution,[25] the Hughes-Ryan Amendment to the 1974 Foreign Assistance Act,[26] the Intelligence Authorization Act,[27] the "Boland Amend-

[23] Less well-remembered examples include President Eisenhower's evacuation of United States nationals from Egypt during the Suez crisis in 1956; the 5,000 troops that President Eisenhower sent to Beirut to "protect American lives" and "assist" Lebanon in preserving its political independence during Lebanon's civil "strife" in 1958; and President Johnson's "airlift" actions in the Congo in 1964 during the civil rebellion in that country as well as his deployment of troops in the Dominican Republic in 1965. *See* Emerson, *War Powers Legislation, supra.*

[24] "Covert action" was defined by the Senate Select Committee on Intelligence Activities as "clandestine activity designed to influence foreign governments, events, organizations or persons in support of U.S. foreign policy conducted in such a way that the involvement of the U.S. Government is not apparent." Church Committee Report, *supra,* at 131.

[25] In brief, the War Powers Resolution, 50 U.S.C. §§ 1541–1548, purports to require the President to report to Congress within 48 hours of introducing U.S. Armed Forces, *inter alia,* "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," and to terminate such use within 60 days, unless Congress has declared war or enacted a specific authorization for such use.

[26] The Hughes-Ryan Amendment, 22 U.S.C. § 2422, provides:

> No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives.

[27] The Act, 50 U.S.C. § 413(a)(1), continued the Hughes-Ryan Amendment's executive reporting requirement, but limited the reporting to the Senate and House Select Committees on Intelligence. It also provided that the Director of Central Intelligence had to give prior, instead of timely, notice of "any significant

Continued

ment" to the Further Continuing Appropriation Act of 1983,[28] and the similar restrictions adopted by Congress in the Intelligence Authorization Act for Fiscal Year 1984,[29] all purport to impose various reporting requirements and expenditure limits on the President regarding the conduct of military activities, which necessarily embrace activities that would otherwise be prohibited by the Neutrality Act if carried out by individuals acting without Government authorization.

These provisions constitute an explicit recognition by Congress of the President's authority to conduct such activities against countries with whom the United States is "at peace" within the meaning of the Act. The Church Committee, after extensive hearings and exhaustive study of the matter over a period of fifteen months, concluded:

> The argument that through the provision of funds to the CIA Congress has effectively ratified the authority of the CIA to conduct covert action rests on the assumption that . . . Congress has known that the CIA was engaged in covert action and has provided funds to the CIA with the knowledge and intent that some of the funds would be used for covert action.
>
> * * *
>
> One of the reasons offered for the 1974 Amendment to the Foreign Assistance Act was that it would ensure that Congress would have sufficient information about covert action to determine if such activities should continue.
>
> * * *
>
> [A]lthough the actual state of congressional knowledge about covert action prior to the 1970s is unclear[,] Congress . . . now knows that the CIA conducts covert action. Congress also knows that the Executive claims Congress has authorized the Agency

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[27] (. . . continued)
anticipated intelligence activity." Only under extraordinary circumstances is the President authorized not to provide a full report to these committees, and even then he must (a) report to the chairman and ranking minority member of each committee and other leaders of Congress, (b) provide notice in a timely fashion subsequent to the covert operation taking place, and (c) provide a statement of the reasons for not giving prior notice. 50 U.S.C § 413(a), (b).

[28] The Boland Amendment to the Act, Pub. L. No. 97–377, 96 Stat. 1830, 1865, provided:

> None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.

[29] The 1984 restriction provides:

> During fiscal year 1984, not more than $24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.

Pub. L. No. 98–215, 97 Stat. 1475.

> to do so. Finally, Congress knows that the CIA receives its funds through secret transfers of funds appropriated to the Department of Defense and that some of the transferred funds are used to finance cover the action. In the future the failure by Congress to prohibit funds from being used for covert action by the CIA would clearly constitute congressional ratification of the CIA's authority, eliminating any ambiguity.

Church Committee Report, *supra,* at 498, 499, 501 (footnotes omitted).

Moreover, these provisions were enacted with virtually no discussion of the Neutrality Act, which suggests that Congress did not view the Act as being relevant to Presidentially authorized expeditions, whether they be covert activities of the Central Intelligence Agency or the Department of Defense, or overt activities of the United States Armed Forces. In addition, such legislation constitutes a recognition by Congress of the historic practice of Chief Executives, as well as of the changing nature of military operations and the increasing complexity in foreign alliances, which require the President to be able to respond immediately to world crises and threats to national security, short of usurping Congress' constitutional prerogative to declare war.[30]

Notwithstanding the overwhelming support for the view that the Act was not intended to apply to Government officials acting pursuant to Presidential orders, and particularly in view of the recent explicit congressional authorizations of CIA activity in foreign countries noted above, the United States District Court in *Dellums* v. *Smith,* 577 F. Supp. 1449 (N.D. Cal. 1984),[31] recently ordered the Attorney General to conduct a preliminary investigation, pursuant to Title VI of the Ethics in Government Act, 28 U.S.C. §§ 591–598, to determine whether allegations that Government officials had violated the Neutrality Act by their recent actions in Nicaragua warranted application for the appointment of an independent counsel under the Ethics in Government Act. Although not directly deciding that issue, the court noted that "the history of the Neutrality Act and judicial precedent demonstrate the reasonableness of the view that the Act applies to all persons, *including the President.*" 577 F. Supp. at 1454 (emphasis added). The action was brought as a mandamus action by a Member of Congress, in his capacity as a private citizen, and two other citizens, alleging that they had sustained various injuries from the Government's activities concerning Nicaragua, to compel the Attorney General to conduct a pre-

[30] When asked about the applicability of the Neutrality Act to covert activities carried out during the Kennedy Administration, Attorney General Robert Kennedy replied:

> There have been a number of inquiries from the press about our present neutrality laws and the possibility of their application in connection with the struggle for freedom in Cuba.
>
> First, may I say that the neutrality laws are among the oldest laws in our statute books. Most of the provisions date from the first years of our independence and, with only minor revisions, have continued in force since the 18th century. *Clearly they were not designed for the kind of situation which exists in the world today.*

Statement of Attorney General Kennedy to the Press (Apr. 20, 1961) (*cited in* Lobel, *The Rise and Decline of the Neutrality Act, supra,* 24 Harv. Int'l L. J. at 44 n.243.)

[31] *See also Dellums* v. *Smith,* 577 F. Supp. 1456 (N.D. Cal. 1984) (denial of stay); *Dellums* v. *Smith,* 573 F. Supp. 1489 (N.D. Cal. 1983).

liminary investigation, pursuant to the Ethics in Government Act, into whether the President and other Executive Branch officials had violated the Act. In concluding that the Neutrality Act could reasonably be construed to proscribe official Government activity, for purposes of invoking the Ethics in Government Act,[32] the court relied primarily on *United States* v. *Smith,* the deficiencies of which we have noted above.[33] Although *Dellums,* unlike the *Smith* case, cannot be dismissed as not involving truly "official" Government conduct, we nevertheless believe that the case was erroneously decided. The United States Court of Appeals for the Ninth Circuit has stayed the district court's order pending resolution of the issue on appeal.[34]

Conclusion

As we have demonstrated, the Neutrality Act was enacted primarily to protect the territorial sovereignty and independence of the United States from foreign entanglements during the early years of its history, as well as to enhance its ability to conduct a unified and consistent foreign policy, unimpeded by the acts of individual citizens. That purpose has remained constant through its several amendments and codifications over the last two centuries. With the two possible exceptions noted in this memorandum of district court decisions, the Act has been consistently construed by Presidents, Congresses, and judges to apply to unauthorized acts of individuals. All prosecutions brought under the Act have been brought against individuals on unauthorized missions pursuing private "foreign policy" goals. Although the fact that the Act was not intended to apply to Government officials acting within the course and scope of their official duties was not made explicit in the text of the Act, we believe that the historical circumstances surrounding its enactment, together with the historical practice of Presidents from times contemporaneous with the Act's passage to the present day, compel the conclusion that neither § 960 of the Act, nor any of its other provisions, impose criminal sanctions on the activities carried on by the Central Intelligence Agency and its agents, under the President's direction, in Nicaragua.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[32] The court stated:

> The present question is thus limited to whether the view is reasonable that the Neutrality Act proscribes the activities alleged by plaintiffs. For reasons set forth below, the question must be answered in the affirmative.

577 F. Supp. at 1452.

[33] The other evidence cited by the court in support of its conclusion appeared to be lifted, wholesale, out of plaintiff's brief without any further consideration. Even given this, the court intimated an ambivalent view of the evidence, when it noted that "[t]he contention that the Neutrality Act reaches executive officials is at least as persuasive as defendant's claim that it does not." 577 F. Supp. at 1452.

[34] NOTE: After this opinion was issued by the Office of Legal Counsel, the court of appeals reversed the district court's decision in *Dellums* on the ground that the plaintiffs lacked standing to bring the action. *See Dellums* v. *Smith,* 797 F.2d 817 (9th Cir. 1986)

Effect of *INS* v. *Chadha* on the Authority of the Secretary of Defense to Reorganize the Department of Defense Under U.S.C. § 125

The Secretary of Defense retains authority under 10 U.S.C. § 125 to effect reorganizations of all functions of the Department of Defense, notwithstanding the Supreme Court's decision in *INS* v. *Chadha* invalidating the legislative veto. An analysis of the legislative history of 10 U.S.C. § 125 with respect to the presumptions in favor of severability indicates that the unconstitutional veto provisions in that statute, which permitted either House of Congress to reject a proposed reorganization involving a "major combatant function" that would "tend to impair the defense of the United States," as determined by its Armed Services Committee, are severable from the delegation of authority to the Secretary. However, the Secretary must continue to report all reorganization plans to Congress and wait thirty days before taking action.

April 26, 1984

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL, DEPARTMENT OF DEFENSE

This memorandum responds to a request for our interpretation of the statutory authority of the Secretary of Defense (Secretary) to reorganize the Department of Defense, 10 U.S.C. § 125, notwithstanding the Supreme Court's decision in *INS* v. *Chadha,* 462 U.S. 919 (1983). Because the statute provides for a one-house veto, a device held unconstitutional in *Chadha,* we have been asked, specifically, to determine (1) whether the Secretary continues to have the power to reorganize "major combatant functions," after reporting his intentions to Congress; and (2) whether the Secretary may continue to effect a reorganization of responsibilities not involving major combatant functions, after reporting its terms to Congress. Based on the analysis set forth below, we have concluded that the Secretary's statutory authority to effect reorganizations of all functions of the Department of Defense is severable from the unconstitutional veto provision, and therefore remains effective.[1] The Secretary must, however, continue to report all reorganization plans to Congress and wait thirty days before taking action.

[1] Our analysis and conclusions relate only to the statutory authority granted to the Secretary in § 125(a). We do not attempt to resolve whether the President could delegate reorganizational authority to the Secretary as a result of his constitutionally committed power as Commander-in-Chief.

I. The Statute

Section 125, part of the Department of Defense Reorganization Act of 1958,[2] sets out the requirements for transfer, reassignment, consolidation, or abolition (hereinafter collectively referred to as "reorganization") of functions, powers and duties assigned by law to the Department of Defense. Under the statute, the Secretary may propose to reorganize any such functions, but must report the details to the Committees on Armed Services of both the Senate and the House. 10 U.S.C. § 125(a). The reorganization becomes effective following thirty days of continuous session after the report is made unless either committee, before that time, has reported to its respective House a resolution rejecting the plan. A committee may report a resolution to reject the proposal only if the proposal involves reorganization of a "major combatant function," as determined by the committee,[3] and would, in the committee's judgment, "tend to impair the defense of the United States." *Id.* Once a resolution of disapproval is reported by one of the two committees, the affected House has an additional forty days in which to adopt the resolution. If the resolution of disapproval is not adopted, the reorganization goes into effect on the forty-first day following the committee's report.

Three types of reorganizations need not be reported to the committees. The President may make temporary reorganizations during hostilities, for which no report is required. *Id.* § 125(c). Additionally, the Secretary is explicitly authorized to assign or reassign (but not to abolish) responsibility for developing and operating new weapons or weapons systems. If the plan involves substantial reduction or elimination of a major weapons system, however, the proposed action must be reported to Congress. *Id.* No veto mechanism is involved. Finally, the statute excludes from both the reporting requirement and the veto power the transfer of supply or service activities common to more than one military department. *Id.* § 125(d).

In short, all reorganizations, except the three just mentioned, must be reported to the two Armed Services Committees of Congress. Unless the reorganization involves major combatant functions, however, the committees have no authority to recommend, nor the Houses to implement, a veto of the plan.

II. Constitutionality

In *INS* v. *Chadha,* 462 U.S. 919 (1983), the Supreme Court struck down the one-house veto as an unconstitutional exercise of legislative power. Relying on

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[2] Ch. 412, 63 Stat. 514 (1958).

[3] "Combatant functions" are described at 10 U.S.C. §§ 3062(b), 5012, 5013, 8062(c). These provisions set forth the responsibilities for maintaining armed forces in the Department of the Army, the Department of the Navy, the Marine Corps, and the Air Force, respectively. The distinction between combatant and noncombatant functions was described by Representative Vinson, Chairman of the House Armed Services Committee, as the difference between the fighting capacity of a service and its business functions, such as purchasing of food, furnishing of medical services, and running of Post exchanges. 104 Cong. Rec. 10891 (1958).

the significance accorded by the Framers of the Constitution to the legislative procedures of bicameral passage and presentment of legislation to the President for signature or veto, the Court held that any legislative action, if not specifically exempted in the Constitution itself, must comply with the procedures articulated in the Presentment Clauses, U.S. Const. art. I, § 7, cls. 2, 3. 462 U.S. at 946–51. The test devised in *Chadha* for identifying legislative action is whether the action has the effect of "altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . , outside the legislative branch." *Id.* at 952. If the action constitutes an exercise of "legislative power," then the constitutional procedures of bicameral passage and presentment must be observed.

Section 125(a) authorizes two actions the constitutionality of which is affected by *Chadha*. First, it permits the Armed Services Committees of both Houses to determine what functions are "major combatant functions" and whether a proposed reorganization will "tend to impair the defense of the United States." Second, the statute permits either House to prevent a reorganization by passing a resolution disapproving it.

The first of these actions effectively empowers a committee of Congress either to approve a plan submitted by the Secretary or to take preliminary steps to postpone or defeat it. The committee is directed to use its own discretion to distinguish between "major" combatant functions and others and to make decisions regarding the defense of the United States. Thus the Secretary's statutory right to effect reorganizations and their timing are entirely contingent upon the committee's judgment as to whether the veto mechanism should be invoked. This function of the committee affects the rights, duties and relations of Executive Branch officials by subjecting the Secretary's plan to a possible one-house resolution and by triggering an additional forty-day continuous session waiting period during which the proposed action is suspended. The committee discretion authorized by § 125 is a legislative action, which must be accomplished, if at all, through the plenary legislative process.

The one-house veto authorized by the statute has the effect of nullifying the statutory discretion of the Secretary or reversing the exercise of that discretion, and thus alters the rights and relations of Executive Branch officials. This veto procedure, effected through the device of a one-house resolution, is precisely the kind of mechanism that the Supreme Court struck down in *Chadha*. As will be shown below, it was devised explicitly for the purpose of circumventing the plenary legislative process. This purpose is further evidence that the one-house action is legislative in character.

Finally, neither the committee action nor the one-house action authorized by § 125(a) falls among the exemptions from bicameral passage and presentment expressed clearly and unambiguously in the Constitution. *See* 462 U.S. at 955 (listing four constitutional provisions authorizing one-house action). Thus, both the committee suspension provision and the one-house veto device of § 125 are prohibited under *INS* v. *Chadha*.

III. Severability

A. Presumptions

The Secretary's statutory authority to reorganize combatant and non-combatant functions, notwithstanding the unconstitutionality of the veto mechanism, depends upon whether the delegation of power to do so under § 125 is severable from the unconstitutional provisions contained in the statute.

The severability of an unconstitutional provision from the rest of a statute presents a question of legislative intent: would Congress have wished the remainder of the statute to continue in effect had it recognized that the provision was unconstitutional? *See Dorchy* v. *Kansas,* 264 U.S. 286, 290 (1924). *"Unless it is evident* that the Legislature would not have enacted those provisions which are within its power, independent of that which is not," the invalid portion should be severed and the remaining statutory authority upheld. *INS* v. *Chadha,* 462 U.S. at 932 (citations omitted; emphasis added).

The Supreme Court thus expressed a presumption that constitutional provisions survive the excision of unconstitutional provisions, absent clear congressional intent to the contrary. The Court in *Chadha* declared that a further presumption of severability is accorded any statute that contains a severability clause. 462 U.S. at 932. Finally, the Court recognized a third important presumption in favor of severability: a provision is "presumed severable if what remains after severance 'is fully operative as a law.'" *Id.* at 934 (quoting *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U.S. 210, 234 (1932)).

Identifying a severability clause that is specifically applicable to § 125 is a rather complicated endeavor. When this section was enacted as part of the Department of Defense Reorganization Act of 1958, that Act did not contain a severability clause. The National Security Act of 1947, however, which the 1958 Act amended, originally contained a severability clause. Ch. 343, 61 Stat. 509 (1947). Moreover, the Act which codified the National Security Act into positive law in 1956 also included a severability clause:

> If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.[4]

We believe that this severability clause applies to the reorganization section at issue because of that section's status as an amendment to the National Security Act of 1947. Generally an amended statute is to be understood in the same sense as if it had been composed originally in its amended form.[5] *Blair* v.

[4] Act of Aug 10, 1956, ch. 1041, § 49, 70A Stat. 640. The 1956 Act repealed all sections of the 1947 Act that were covered by the provisions newly codified. *Id.* § 53, 70A Stat at 641.

[5] The reorganization section, originally codified as 5 U.S.C § 171a, was transferred to Title 10 in 1962. Pub. L. No. 87-651, title II, § 201(a), 76 Stat. 515 (1962). Congress at that time did not intend to make any substantive changes in the statute. S. Rep. No. 1876, 87th Cong., 2d Sess. 6, *reprinted in* 1962 U.S.C C.A.N. 2456.

Chicago, 201 U.S. 400, 475 (1906). Under *Chadha,* the severability clause creates an additional presumption of severability, which can be overcome only if legislative history demonstrates, clearly and unmistakably, that Congress would not have delegated the authority at issue if it had known that the veto mechanism was unconstitutional. *See* 462 U.S. at 932.

The third presumption, arising when what remains after severance is "fully operative as a law," is also applicable in the present circumstances. Without the legislative veto, which applies only to reorganizations of combatant functions, the Secretary's statutory power to reorganize combatant functions would operate just as his powers over non-combatant functions have operated. Thus any reorganization plan would be reported to the Armed Services Committees of both Houses, as specified in § 125, and would take effect after thirty days of continuous session if no preventative legislation were passed. The Secretary would be empowered to reorganize all statutory functions in the manner now prescribed for non-combatant functions alone — a report-and-wait scheme like the one upheld in *Chadha. Id.* at 935 & n.9.

B. Legislative History

In assessing the effect of the various presumptions in the context of § 125, legislative history is the guide to congressional intent. During consideration of the Department of Defense Reorganization Act of 1958, Congress explicitly addressed the issue of how much control it wished to retain over the Secretary's exercise of delegated reorganization authority, but it did not allude to the possibility that the one-house veto might be an impermissible means for effecting this control. Rather, Congress appears to have considered three options: to maintain the then-existing scheme under which the Secretary had no statutory power to reorganize combatant functions, to permit these reorganizations in the unrestricted discretion of the Secretary subject only to a report-and-wait obligation, or to grant the reorganization power while retaining control over its exercise through some form of a congressional veto mechanism. Congress chose the last of these three options.

Before the 1958 amendments were passed, separate statutory sections governed the reorganization of non-combatant functions and combatant functions. The National Security Act of 1947, as amended, provided that all authorized functions of the Department of Defense other than combatant functions could be reorganized if a report was submitted in advance to the Armed Services Committees.[6] Combatant functions, however, with no further delineation made between "major" and "minor," could not be reorganized at all under the statute.[7]

The provision that finally became law as § 125 represented a compromise among the various stances urged by the President, the House, and the Senate,

[6] National Security Act of 1947, § 202(c)(1), as amended, ch. 412, 63 Stat. 580 (1949).

[7] National Security Act of 1947, § 202(c)(5), as amended, ch. 412, § 5, 63 Stat. 580 (1949).

respectively. Under a bill submitted by the President,[8] the Secretary of Defense would have had the ability to reorganize all functions, including combatant functions, thirty days after making a report to the Committees on Armed Services. Congress could have prevented a proposed reorganization only by plenary legislation presented to the President for signature.[9]

The House Committee on Armed Services criticized the bill on the ground that the President could be expected to veto any legislation that sought to prevent a reorganization proposed by the Secretary. The House anticipated that a two-thirds majority of each House would have been required to override a Presidential veto and prevent any reorganization.[10] "Here the Committee on Armed Services was faced with one of its most difficult problems: how to retain its constitutional responsibility[11] and at the same time give the Secretary of Defense the necessary flexibility to take action in the interests of economy and efficiency that would not impinge upon the responsibilities of the Congress."[12]

The House solution to its dilemma was a bill authorizing the Secretary to reorganize any non-combatant function by notifying Congress and waiting thirty days. Combatant functions, however, could be reorganized only after the Secretary had consulted with the Joint Chiefs of Staff, reported to Congress and waited thirty days. If objection were raised by any of the Joint Chiefs of Staff, a combatant function would become a "major" combatant function. The bill permitted Congress to prevent the reorganization of a major combatant function by adopting a concurrent resolution opposing the Secretary's plan.[13] Thus, under the House bill, congressional prevention of "minor" combatant and non-combatant reorganizations would have required enactment of a law and Presidential approval or a two-thirds vote in each House overriding the President, while a legislative veto of "major" combatant reorganizations would have required only opposition by a simple majority of each of the Houses of Congress. In the words of the House Report,

> The committee does not believe that it could give to the Secretary of Defense, or any member of the executive branch of the Government, the right to abolish, consolidate, transfer or reassign a major combatant function by simply notifying the Congress and then waiting 30 days. Such a grant of authority on the part of the Congress to the executive branch of the Government

[8] H.R. 11958, 85th Cong., 2d Sess. (1958).

[9] Report of the House Committee on Armed Services, H.R. Rep. No. 1765, 85th Cong., 2d Sess. 12 (1958) (House Report).

[10] *Id.* at 12.

[11] We assume that this reference to "constitutional responsibility" relates to Congress' Article I powers to raise and support armies, to provide and maintain a navy, and to make rules for the government of the land and naval forces. U.S. Const. art. I., § 8, cls. 12–15. Legislative history does not reveal whether the asserted responsibility was viewed as extending beyond the legislation necessary merely to constitute and to fund the armed forces.

[12] House Report, *supra*, at 12–13.

[13] *Id.* at 13.

would constitute a complete surrender of a Constitutional responsibility imposed upon the Congress.[14]

The Senate amendment to the House bill, substantially enacted in § 125, provided that all reorganizations must be reported to the two Armed Services Committees and would take effect after thirty days of continuous session.[15] Either committee could report a resolution to its house recommending that the proposal be rejected if, in the judgment of the committee, the plan involved a "major combatant function" and "would impair the defense of the United States." After a committee had reported such a resolution of disapproval to its house, that house had forty additional days in which to adopt it by simple majority vote. The resolution of either house would defeat the Secretary's proposal.[16]

In conference, the House conferees agreed to the Senate amendment with three modifications not here relevant.[17] In the view of the Conference Committee, "the provision agreed to with respect to combatant functions recognizes the responsibility of the Congress as provided in the Constitution of the United States. It preserves to the Congress its prerogative of making the final determination as to the military needs and requirements of our Nation."[18]

Thus, both the House and the Senate appear to have agreed that reorganization of major combatant functions, albeit with somewhat different definitions,[19] required some type of legislative control. Additionally, they agreed that some alteration of the prior statutory scheme was necessary to provide flexibility to the Secretary.

C. Analysis

Chadha instructs that the severability question is to be resolved by determining whether Congress intended the remainder of an act to stand if any particular provision were held invalid. 462 U.S. at 931–32. The severability clause, of course, attests to this intention. *See Consumer Energy Council of America* v. *FERC,* 673 F.2d 425, 441 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Group* v. *Consumer Energy Council of America,* 463 U.S. 1216

[14] House Report, *supra,* at 14.

[15] Report of the Senate Committee on Armed Services, S. Rep. No 1845, 85th Cong., 2d Sess 6–7, *reprinted in* 1958 U.S.C.C.A.N. 3272, 3278 (Senate Report).

[16] The reason for the Senate's revision of the method for determining "major" combatant functions was that it believed no military official should have the power to delay a Presidential decision; rather, a committee of Congress should perform that function. 104 Cong. Rec. 14263 (1958) (statement of Sen. Kefauver).

[17] H.R. Conf. Rep. No. 2261, 85th Cong., 2d Sess. 13–14, *reprinted in* 1958 U.S.C.C.A.N. 3272, 3284 (Conference Report). The modifications included a provision covering functions "now or hereafter" assigned to the military services; an insertion of the words "tend to" in the phrase "would impair the defense of the United States" as a ground for committee recommendation of disapproval; and an addition of words to clarify that a resolution of disapproval of either House would require only a simple majority. *Id.*

[18] Conference Report, *supra,* at 14, *reprinted in* 1958 U.S.C.C A.N. at 3284–85.

[19] *Compare* House Report, *supra,* at 13 (combatant function becomes "major" if proposal objected to by Joint Chiefs of Staff) *with* Senate Report, *supra,* at 5–6, *reprinted in* 1958 U S.C.C A.N at 3276 ("major combatant functions" to be determined by Armed Services Committees).

(1983). A presumption of severability is not lightly overcome, *Carter* v. *Carter Coal Co.*, 298 U.S 238, 312 (1936), particularly in light of the *Chadha* Court's delineation of three separate sources for such a presumption.

Under the *Chadha* discussion of severability, there are three possible interpretations of the current effect of § 125: First, it is possible that all of § 125(a) is invalid and the Secretary has no power to reorganize any of the functions embraced by § 125(a), combatant and non-combatant alike. This conclusion would be required if the statute were not severable at all and the entire grant of authority contained in § 125(a) could no longer be given effect. Second, only the delegation of authority which the statute subjects to a one-house veto would fall, meaning that the Secretary no longer has any power to reorganize major combatant functions, but retains such authority with respect to all other functions. Such a reading would be the consequence of concluding that the unconstitutional legislative veto is severable from the grant of authority not subject to that veto, but is not severable from the grant of authority directly controlled by the veto. The third possibility is that the grant of reorganization authority stands, requiring only a report to Congress and a thirty-day wait for any reorganization to take effect. This interpretation would be the result of finding that only the legislative veto need be stricken and that the remainder of the statute is unaffected.

As we have already noted, Congress distinguished between the two different types of reorganizations contained in § 125: those that involve combatant functions and those that do not. The former are subject to a committee recommendation of disapproval; the latter are not. Under § 125(a) a proposal to effect a non-combatant reorganization simply becomes effective thirty days after the Secretary reports the plan to Congress. The provision as written provides a workable report-and-wait scheme for non-combatant functions entirely unrelated to the unconstitutional veto device. With respect to reorganizations of non-combatant functions, we have found no clear evidence of a legislative intent which would overcome the presumptions of severability. To the contrary, the structure of the statute is entirely consistent with severability.

The history of this section lends additional support for the distinct consideration of combatant and non-combatant functions, despite the current association of the two in § 125(a). As discussed above, separate statutory sections governed the reorganization of the two classes of functions before 1958. When, in 1958, the President requested report-and-wait authority for all reorganizations, Congress granted that request in part by readopting the report-and-wait scheme for non-combatant reorganizations. Both the House and Senate bills, although disagreeing on other aspects of the new plan, contained identical treatment of the power to reorganize non-combatant functions. This provision provoked no apparent controversy.

Thus, to strike all of § 125(a) as not severable from the unconstitutional veto provision would withdraw from the Secretary powers he enjoyed even before the addition of the legislative veto over combatant reorganizations in 1958. Congress gave no indication that its reenactment of the non-combatant reorga-

nization power was in any way dependent upon the enactment of the separate veto governing combatant functions. We therefore conclude that to strike the entire delegation of authority is not warranted.

The second possible interpretation of § 125(a), which would sever the power to reorganize non-combatant or "minor" combatant functions, but not the power to reorganize major combatant functions, is impeded somewhat by the phrasing of the statute. As § 125(a) now reads, abbreviated for clarity:

> a function . . . may not be substantially [reorganized] unless the Secretary reports the details . . . to the Committees on Armed Services of the Senate and House of Representatives. The [reorganization] takes effect . . . after . . . 30 days . . . unless either of those Committees, within that period, reports a resolution recommending that the [proposal] be rejected . . . because it . . . proposes to reorganize a major combatant function . . . and would, in its judgment, tend to impair the defense of the United States.

The manner in which Congress chose to word the statute makes differentiation between combatant and non-combatant reorganizations somewhat difficult mechanically. However, this problem could be overcome, because the legislative history seems to support a conclusion that Congress designed the statute for efficiency of words and not because it intended both types of reorganization to fail if the disapproval procedure regarding combatant reorganizations failed.

A more serious barrier to this interpretation lies in an additional constitutional problem implicit in the committee's channeling function described above. If the Secretary were to retain only the power to reorganize noncombatant and "minor" combatant functions, he would nonetheless be required to report all plans to the Armed Services Committees and to wait thirty days before implementing them. Combatant functions are defined by statute. The statute offers no guidance, however, for breaking down the "combatant" category into "major" and "minor." This determination is vested by § 125(a) in the sole discretion of the committees.

Thus, under this interpretation, if the Secretary were to submit a plan believed by him to contemplate the reorganization of "minor" combatant functions not impairing the national defense and thus within his power, his characterization of the plan would be subject to review and revision by the committees. If they disagreed with the Secretary's characterization, the committees' contrary characterization would have the effect of nullifying authorized Executive Branch actions. The committees, by hypothesis, would decide whether the particular power at issue fell within the portion of authority that had been stricken or within the portion that had been retained by the Secretary. This action of reviewing and revising is foreclosed by *Chadha* because it constitutes the exercise of legislative power, which may only be accomplished in the manner prescribed for legislation by the Constitution.[20]

[20] Alternatively, a committee's interpretation and enforcement of statutory directives could be viewed as an exercise of *executive* power, which the Supreme Court has held to be reserved to officers of the United States

Continued

Under this interpretation, therefore, the committees would not act merely as agents of Congress to receive executive reports pursuant to a valid report-and-wait procedure. Rather, they would hold discretionary and legislative powers unconstitutionally delegated to them by § 125(a). The committees' unconstitutional role in reviewing the Secretary's decisions precludes any interpretation of the statute that preserves the distinction between "major" combatant functions and others, as Congress has not chosen legislatively to define the difference. Consequently, we conclude that this interpretation is not consistent with *Chadha.*

The final of the three options identified above involves severance only of the unconstitutional veto mechanism and is consistent with the presumptions in favor of severability. It would leave undisturbed the Secretary's grant of authority to reorganize all functions, subject only to a report-and-wait requirement.

In 1958, when Congress amended the National Security Act of 1947, the Secretary's power to reorganize the statutorily defined functions of the Department of Defense extended only to non-combatant functions. At that time, Congress determined that "[o]ur defense organization must be flexible; it must be responsive to rapidly changing technologies; it must be dynamic and versatile," House Report, supra, at 2, and that the existing scheme was inadequate to meet those articulated needs. The House and Senate Reports reveal no disagreement with the proposition that the reorganization authority was in need of expansion; rather, the disagreement focused only on the manner in which such authority would be defined. The 1958 amendments, therefore, appear rooted in a consensus that the Executive Branch should be given increased flexibility in the area of defense reorganization.

As the legislative history discloses, however, Congress declined to allow the Secretary to enjoy this flexibility completely free of committee control. Simply severing the unconstitutional veto provision and leaving the Secretary's reorganization authority otherwise intact would, of course, effectively resurrect the scheme urged by the President in his bill at the time that Congress was considering the Department of Defense Reorganization Act of 1958. Both the House[21] and the Senate[22] expressed dissatisfaction with such report-and-wait authorization and preferred to retain a congressional veto for reorganizations of combatant functions. These objections unquestionably reflect a reluctance on the part of Congress to delegate unfettered discretion to the Secretary, given the clearly preferable alternative of retaining some congressional control. However, "[a]lthough it may be that Congress was reluctant to delegate final

[20] (. . . continued)
appointed pursuant to Article II. *Buckley* v. *Valeo,* 424 U.S. 1, 141 (1976). Furthermore, the committee's putative authority could be construed as *judicial* power, insofar as it involves the interpretation of the statute and review of executive action. This is a function reserved to the judiciary as established by Article III. *See Chadha,* 462 U.S. at 966 (Powell, J., concurring). Under any of these interpretations, the committee's authority to perform this function in the manner designated is inconsistent with the constitutional separation of powers.

[21] *See supra* note 14 and accompanying text.

[22] "The House Armed Services Committee quite rightly rejected this blank check to the administration." 104 Cong. Rec. 14263 (1958) (statement of Sen. Kefauver).

authority . . . , such reluctance is not sufficient to overcome the presumption of severability." *Chadha,* 462 U.S. at 932.

Rather, the question is "what Congress *would have intended,*" had it anticipated that the veto provision was unavailable. *Consumer Energy Council of America* v. *FERC,* 673 F.2d 425, 442 (D.C. Cir. 1982) (emphasis in original), *aff'd sub nom. Process Gas Consumers Group* v. *Consumer Energy Council of America,* 463 U.S. 1216 (1983). And, the presumptions all line up in favor of severability unless there is clear evidence of legislative intent to the contrary. In this context, we attempt to discern what Congress would have chosen to do if it had been required to choose between the complete executive flexibility afforded by the report-and-wait legislation on the one hand, and the complete inflexibility of the then prevailing law on the other. Unless the evidence clearly favors the latter interpretation, *Chadha* compels us to choose the former. Because the emphasis of the 1958 deliberations was a recognized need to remedy a flawed statutory scheme, we cannot conclude with confidence that the legislators would have refused to make any change in that scheme even if the only alternative had been to delegate discretion to the Secretary subject only to advance notice to Congress and the constitutional power legislatively to override the Secretary. Far from supporting a conclusion that Congress would have intended the Secretary's discretion to fall with the unconstitutional provision, the legislative history is silent on this subject. Because the courts have determined that in the face of silence, the presumption of severability must control,[23] we conclude that the unconstitutional portions of § 125(a) are severable from the delegation of authority to the Secretary.[24] The reports still required of the Secretary will provide Congress with oversight and the opportunity to exercise, through legislation, the control over reorganizations that it sought to preserve without undermining the constitutional scheme.

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[23] Even in the absence of a severability clause and in the face of contrary statements by individual members of Congress, the United States Court of Appeals for the Fifth Circuit held a statute to be severable because there was no evidence that *severability* was actually considered. "Mere uncertainty about the legislature's intent is insufficient." *EEOC* v *Hernando Bank, Inc.,* 724 F.2d 2053, 2058 (5th Cir 1984); *accord Muller Optical Co.* v. *EEOC,* 574 F. Supp. 946, 953 (W D. Tenn. 1983). *Contra EEOC* v. *Allstate Ins. Co.,* 32 Fair Empl. Prac. Cas. (BNA) 1337 (S.D. Miss. 1983) (same statute not severable because absence of severability clause creates presumption against severability). Similarly, the D.C Circuit found that the provision before it was not "so essential to the legislative purpose that the statute would not have been enacted without it," despite some legislative history indicating that Congress intended the veto provision to protect against undesirable consequences. *Consumer Energy Council of America* v. *FERC,* 673 F.2d 425, 443, 445 n.70 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Group* v. *Consumer Energy Council of America,* 463 U.S. 1216 (1983). It thus rejected the test devised by the Fourth Circuit in *McCorkle* v. *United States,* 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978), that severability is inappropriate when the veto restricts a grant of power. This test would have the effect of making "all veto provisions prima facie inseverable," *Consumer Energy Council,* 673 F.2d at 445 n.70, a result clearly at odds with the subsequently decided *Chadha* case.

[24] This conclusion is facilitated by the language of the statute itself, which provides that any reorganization takes effect after thirty days *unless* veto action is initiated. The effect of severance is accomplished merely by striking the qualifications following the word "unless." Similarly, this conclusion obviates consideration of the additional forty-day waiting period. That period is triggered by one unconstitutional action and is designed to facilitate another We believe, therefore, that it is no longer effective.

We defer to officials of the Department of Defense to analyze the effect of our conclusions upon the validity of any particular plan of reorganization currently under consideration. We do not believe we should attempt to resolve the specific issues that you have raised, which undoubtedly implicate areas in which your experience and knowledge are superior. However, should you continue to have questions about specific proposals, we would be pleased to address them in the context of a detailed factual background.

Conclusion

In the absence of clearly expressed legislative intent regarding what Congress would have done had it known that the legislative veto alternative was constitutionally unavailable, we have concluded that the delegation of authority to the Secretary of Defense to reorganize all functions is severable from the one-house veto controlling the exercise of certain aspects of that authority. Because the veto contained in § 125 is unconstitutional under *Chadha*, and because Congress failed to indicate clearly and unmistakably that the delegation would not have been made if Congress could not have retained a veto power, we believe the courts would find that the reorganization authority survives the fall of the veto. Thus we conclude that the Secretary, under the valid remainder of § 125(a), may exercise the statutory grant of power to effect reorganizations of all functions, subject only to a thirty-day report-and-wait requirement.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Indemnification Agreements and the Anti-Deficiency Act

In order to comply with the Anti-Deficiency Act, 31 U.S.C. § 1341, indemnification agreements with government contractors, if otherwise authorized, must include a limitation on the amount of liability and must state both that the liability is further limited to the amount of appropriated funds available at the time payment must be made, and that the contracting agency implies no promise that Congress will appropriate additional funds to meet any deficiency in the event of loss.

A government agency may not indemnify its contractors for claims brought against them by reason of their own negligence. Nor may the United States agree in advance to assume liability for the negligence of its employees for which it may not otherwise be responsible under the Federal Tort Claims Act.

May 25, 1984

MEMORANDUM OPINION FOR THE DIRECTOR,
BUREAU OF PRISONS

This memorandum responds to your request for our opinion concerning the authority of the Bureau of Prisons (BOP) to enter into indemnification agreements. Specifically, you have sought our advice concerning two such agreements that you contemplate executing. The first would hold Telephone Company A harmless against any loss or injury arising from use of telephone monitoring equipment which you propose to have installed in a certain United States Medical Center for Federal Prisoners. The second would indemnify physicians on contract with the Medical Center against liabilities incurred as a result of their contract work. Factual and analytical distinctions between the two situations described lead us to reach different conclusions regarding them. We conclude that indemnification of contract physicians is not authorized, but that indemnification of Telephone Company A would be permissible if the scope of the agreement were significantly narrowed in the manner discussed below.

I. Background

You have described to us a proposal to contract with Telephone Company A for service observing equipment to be placed on pay telephones available to inmates at the Medical Center. The purpose of procuring this service is to facilitate prison efforts to discover escape plots, schemes to introduce weapons and drugs into the institution, and other plans by inmates to violate the law. If the monitoring service is obtained, each telephone used by inmates will bear a

sign which advises that "use of institutional telephones constitutes consent to . . . monitoring," and that "[a] properly placed telephone call to an attorney [will not be] monitored." The Warden of the Medical Center has expressed the opinion that Title III of the Omnibus Crime Control and Safe Streets Act is not violated by the Bureau of Prison practices relating to this monitoring.[1]

Notwithstanding the assurances that all monitoring will be conducted in compliance with applicable law, Telephone Company A requires an indemnification agreement, signed by an authorized representative on behalf of the United States, before it will file the necessary tariff with the applicable Public Service Commission. The precise language requested by Telephone Company A is as follows:

> No liability shall rest on or be assumed by the Telephone Company in connection with the use or operation of the monitoring equipment, and by the acceptance of this monitoring equipment service, the subscriber agrees to indemnify and save the Telephone Company harmless from and against any and all claims, demands or liability on account of any or all injury, loss or damage to any person arising out of or in any manner connected with use of said equipment, or in the furnishing of said service and particularly against all claims, demands or suits which may arise or be claimed to have arisen out of any violation or claimed violation of any law respecting telephone and telegraph communications, privacy, electronic surveillance or eavesdropping.

We have less background material regarding the proposed indemnification of contract physicians working at the Medical Center against potential tort liability. We understand that fear of personal liability by physicians stands as an impediment to the Medical Center's ability to retain contract medical staff. BOP believes that indemnification would ease that burden.

II. The Anti-Deficiency Act

At the outset, it appears that no statute expressly prohibits the execution of indemnity agreements on behalf of the United States. Nor does Article I, § 9, cl. 7 of the Constitution, which declares that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," foreclose the government from entering into such contracts. *See Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 321 (1937) (clause affects only power to make actual disbursements).

Two statutes, however, are generally relevant to the resolution of this issue. The Adequacy of Appropriations Act, 41 U.S.C. § 11, proscribes any contractual arrangement of the government "unless the same is authorized by law or is

[1] We have not been asked to comment on the accuracy of this legal conclusion and, because we have insufficient information upon which to evaluate this proposal, we express no views regarding its legality.

under an appropriation adequate to its fulfillment." We know of no law that would specifically authorize the contracts you propose. Similarly, the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1),[2] prohibits an employee of the United States from authorizing "an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."[3]

The Comptroller General has issued a long series of opinions holding that the Anti-Deficiency Act is transgressed by any indemnity provision that subjects the United States to an indefinite, indeterminate, or potentially unlimited liability, because there could never be certainty that sufficient funds had been appropriated to cover all contingencies. *E.g.*, 59 Comp. Gen. 369 (1980); 35 Comp. Gen. 85 (1955); 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928). *Accord California-Pacific Utils. Co.* v. *United States,* 194 Ct. Cl. 703 (1971). Exceptions to this rule have developed, however.

First, the Comptroller General has upheld indemnity clauses when the potential liability of the United States was limited to an amount known at the time of the agreement and was within the amount of available appropriations. For example, an agency's promise, in lieu of paying substantial insurance costs, either to return a rented airplane to its lessor in good condition or to make good the loss was sustained by the Comptroller General on the grounds that the government's maximum liability would not exceed the value of the aircraft, the likelihood of loss was remote, and the agreement was financially advantageous to the government. 42 Comp. Gen. 708 (1963). No reservation or obligation of funds was required in this case. In our view, the indemnifications were upheld by the Comptroller General on these grounds only because the agency could make any conceivable expenditure required by the agreement without creating a deficiency in its appropriated funds. The information we have about your request leads us to believe that neither of the proposed indemnifications falls within this exception because they would create open-ended potential liability for the United States.

The Comptroller General subsequently overruled a portion of the earlier opinion to the extent that it did not require the agency to obligate or reserve funds sufficient to meet the contingent liability. This opinion permitted government assumption of risk for damage to contractor-owned property used predominantly in performance of government contracts. 54 Comp. Gen. 824, 826 (1975). The government was thus able to avoid paying the contractor's high insurance premiums. The opinion emphasized that such a contract is permissible only if it states clearly that government payments will not exceed appropriations available at the time of loss, and that the contract should not be deemed to imply that Congress will appropriate funds to meet deficiencies. *Id.* at 827. These two provisos appear to be mandated by the Anti-Deficiency Act. If the government's potential liability is rendered both limited and determin-

[2] This section, formerly 31 U.S.C. § 665(a), was enacted into positive law and reworded to some extent. Pub. L. No. 97-258, 96 Stat. 923 (1982). Congress did not, however, intend to make any substantive changes in the statute. Pub. L. No. 97-258, § 4, 96 Stat. 1067 (1982); H.R. Rep. No. 651, 97th Cong., 2d Sess. 3 (1982).

[3] Hereafter, both statutes will be referred to collectively as the Anti-Deficiency Act.

able, the agreement to indemnify for property damage will be permissible, assuming it is otherwise authorized.

Another exception was recognized by the Comptroller General to allow the General Services Administration to agree to indemnify a public utility service for injury or damage not caused by the utility company. 59 Comp. Gen. 705 (1980). The factors enumerated in the opinion include the following:

> (1) The contractor was a state-regulated utility which was a virtual monopoly; no other source was available for the needed services;
>
> (2) The tariff requirements were applicable generally to all of the same class of customers, so no danger of discriminatory treatment of the Government existed;
>
> (3) The restrictions were part of a tariff imposed after administrative proceedings in which the Government had an opportunity to participate;
>
> (4) The GSA had procured power in the past under tariffs containing the indemnity clause;
>
> (5) The possibility of loss was remote; and
>
> (6) The restrictions were non-negotiable.

The extent of this exception was limited when the Comptroller General held that the Architect of the Capitol could not agree to indemnify a utility company for losses resulting from its performance of tests on equipment installed in government buildings. Two factors distinguished this case from the earlier one: the Architect had an alternative source for the needed service, and he had not previously accepted the services or agreed to the liability represented by the proposed indemnity agreements. Comp. Gen. Op. B-197583 (Jan. 19, 1981).

Although it appears that some of the factors identified are present in the proposed agreement with Telephone Company A, the Comptroller General has construed the exception so narrowly that we believe the absence of any one of the criteria could be dispositive. Thus, for example, the availability of an alternative source for the monitoring service, the possibility of discriminatory treatment of the government, or absence of a longstanding tariff requirement could, in our judgment, remove the indemnification from the scope of this limited exception.

Finally, exceptions to the Anti-Deficiency Act have been created by statute. For example, 50 U.S.C. § 1431 permits the President to authorize contracts without regard to other provisions of contract law whenever he deems such action would facilitate the national defense, subject to certain limitations. Similarly, the Atomic Energy Act contains authority for exemptions from contract law. *See* 42 U.S.C. § 2202. We are aware of no such statutory exemp-

tion from the constraints of the Anti-Deficiency Act that would apply to the situation at issue here.[4]

Based on the principles discussed above, we find no exception from the general prohibition against unlimited indemnification contracts that would relieve the two agreements you have proposed from the constraints of the general rule. In order to comply with the dictates of the Anti-Deficiency Act, the agreements must include a limitation on the amount of liability and must state both that the liability is further limited to the amount of appropriated funds available at the time payment must be made, and that the contracting agency implies no promise that Congress will appropriate additional funds to meet any deficiency in the event of loss. These limitations are necessary if an agreement is to pass muster under the Anti-Deficiency Act.

III. Other Considerations

Whether a qualification rendering the liability definite and limited would be sufficient to validate the proposed agreements depends on the agency's authorization to make the kind of payments contemplated by the agreements. The Comptroller General has held, for example, that the National Gallery of Art had no authority to use appropriated funds to pay the claims of its employees for injuries caused by a contractor's negligence. The Gallery's agreement to indemnify its contractor for such claims was, therefore, ruled invalid. Comp. Gen. Op. B-137976 (Dec. 4, 1958). The assumption of liability for claims arising out of tortious actions of Telephone Company A would be a similar promise to pay the debts of a contractor, which may not be justifiable under a "necessary expense" theory.[5] Consequently, we believe that the prison could not agree to indemnify Telephone Company A for losses resulting from the Company's own tortious acts and the agreement must be narrowed to exclude any obligation to indemnify the Company for this type of loss.

The same infirmity exists in the indemnification of physicians, if the physicians are considered contractors: an agency may not indemnify its contractors for claims brought against them by reason of their own negligence. If, however, the physicians are considered employees rather than contractors, the agreement

[4] This Office previously provided an opinion in which we addressed the applicability of the Anti-Deficiency Act to an agency's agreement to assume certain responsibilities for administering a national vaccine program, containing a measure of damages should the agency fail to meet those delineated responsibilities. Upon the agency's assurances that it was fully able and willing to perform its contractual duties without exceeding its appropriations, we concluded that the Anti-Deficiency Act did not apply: "the Anti-Deficiency Act does not require the Government's contracting officers to speculate without bounds as to the monetary consequences of a breach." Letter to William H. Taft, IV, General Counsel, Department of Health, Education, and Welfare, from Leon Ulman, Acting Assistant Attorney General, Office of Legal Counsel 7 (July 11, 1976). In contrast, the agreement you have proposed does not create merely a measure of damages, but provides a substantive allocation of liability.

[5] 31 U.S.C. § 1301 requires that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." Although this provision does not require that every item of expenditure be specified in the appropriation act, the discretion of the spending agency is limited to expenses "necessary or proper or incident" to a specified object. 6 Comp. Gen. 619, 621 (1927) (interpreting former 31 U.S.C. § 628).

is still impermissible, but on different grounds. The United States may be sued directly for certain torts committed by its employees acting within the scope of their employment. 28 U.S.C. § 2675. Thus the United States could be held liable, in court proceedings, for the negligence of its employees. That possibility does not, however, affect the ability of the United States to agree in advance to assume liability for acts of its employees for which it might not otherwise be responsible under the Federal Tort Claims Act (FTCA). An employee sued in his or her individual capacity, for example, generally may not be reimbursed by the United States. Comp. Gen. Op. B-152070 (Oct. 3, 1963). Attempts have been made to amend the FTCA to allow indemnification of employees in this situation, *e.g.*, H.R. 24, 97th Cong., 1st Sess. (1981); S. 1775, 97th Cong., 1st Sess. (1981), but those bills have never passed. Thus the physicians, whether considered contractors or employees, may not be indemnified by the prison.

The remaining matter to be addressed is that portion of the proposed contract with Telephone Company A which purports to indemnify the company for claims arising out of the wrongful acts of federal employees in intercepting telephonic communications. In early opinions of the Comptroller General, the rule against indemnifications was bolstered by another principle, in addition to those discussed above. Agencies were prohibited from taking on tort liability by contract because the United States was not otherwise liable for the tortious conduct of its employees. "It is well settled that the United States is not responsible for the negligence of its officers, employees, or agents and such liability cannot be imposed upon it by an attempt on the part of the contracting officer to make it a part of the consideration of the contract." *E.g.*, 16 Comp. Gen. 803, 804 (1937); 7 Comp. Gen. 507, 508 (1928). Although the passage of the FTCA rendered the United States liable for many tortious acts of its employees, 28 U.S.C. §§ 2671–2680, the circumstances under which such liability would attach were carefully tailored by Congress.[6] We believe, therefore, that the principle quoted above still precludes the contractual assumption of tort liability, particularly since application of the FTCA to any specific set of facts could not be certain in advance of judicial determination.[7]

There are certain precautions that BOP could take to protect the telephone company, however. Under Title III of the Omnibus Crime Control and Safe Streets Act, for example, which prohibits certain types of electronic surveillance, an aggrieved person may seek civil damages against any "person" who violates the title. 18 U.S.C. § 2520. The statutory definition of "person" excludes the United States, but includes government employees and private corporations. 18 U.S.C § 2510(6). The Supreme Court has held that a district

[6] 28 U.S.C. § 2674 provides that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." Thus it is possible that state law could provide a remedy for invasion of privacy or the like, which the FTCA would make applicable to the United States

[7] Indemnification for government-caused property damage, the subject of early Comptroller General exceptions to the anti-indemnification rule, is distinguishable because such a government "taking" of property, if not compensated, would be actionable under the Fifth Amendment to the Constitution in the Court of Claims. 28 U.S.C. § 1491 (1982). Such liability is not predicated upon the operation of the FTCA and its monetary extent is generally ascertainable by mere evaluation of the property.

court may order a telephone company to assist in legitimate law-enforcement surveillance operations. *United States* v. *New York Tel. Co.*, 434 U.S. 159, 178 (1977). Such a court order provides the telephone company with a good-faith defense to a Title III action. 18 U.S.C. § 2520; *Jacobson* v. *Rose*, 592 F.2d 515, 522 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979). Congress established the defense in part "to protect telephone companies who cooperate under court order with law enforcement officials." 115 Cong. Rec. 37193 (1969). A court order requesting the assistance of Telephone Company A might provide the telephone company with the protection it seeks.

Finally, the Bureau of Prisons could assume liability for damage to property owned by Telephone Company A and used in performance of its government contract. 54 Comp. Gen. 824 (1975). Such an agreement would have to state clearly that no obligation is assumed in excess of appropriated funds available at the time of collection, and that no promise is to be inferred to the effect that Congress will appropriate additional funds to meet deficiencies. *Id.* at 827.

Conclusion

Whether BOP may enter into an indemnification agreement with Telephone Company A will depend upon the company's willingness to limit the scope of the government's potential liability. If the contract were altered to require the United States to assume liability only for losses arising from property damage caused by the government, we believe the BOP would not contravene the Anti-Deficiency Act or other restrictions by agreeing to it. Appropriate clauses, as explained above, would have to be included to ensure that no obligations in excess of appropriations were created. As the indemnification provision now reads, however, we conclude that it could result in incurring obligations beyond BOP's appropriations and authorization, and therefore its execution would be prohibited by the Anti-Deficiency Act. The agreement with contract physicians is barred altogether by operation of the Anti-Deficiency Act and the Federal Tort Claims Act.

ROBERT B. SHANKS
Deputy Assistant Attorney General
Office of Legal Counsel

Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege

As a matter of statutory construction and separation of powers analysis, a United States Attorney is not required to refer a congressional contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who carries out the President's instruction to invoke the President's claim of executive privilege before a committee of Congress.

May 30, 1984

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

I. Introduction

This memorandum memorializes our formal response to your request for our opinion whether, pursuant to the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194, a United States Attorney must prosecute or refer to a grand jury a citation for contempt of Congress issued with respect to an Executive Branch official who has asserted a claim of executive privilege in response to written instructions from the President of the United States. Your inquiry originally arose in the context of a resolution adopted by the House of Representatives on December 16, 1982, during the final days of the 97th Congress, which instructed the Speaker of the House of Representatives to certify the report of the Committee on Public Works and Transportation concerning the "contumacious conduct of [the] Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee . . . to the United States Attorney for the District of Columbia, to the end that the Administrator . . . may be proceeded against in the manner and form provided by law." H.R. Res. 632, 97th Cong., 2d Sess. (1982).[1] Section 192 of Title 2, United States Code, provides, in general, that willful failure to produce documents in response to a congressional subpoena shall be a misdemeanor. Section 194 provides that if such a failure is reported to either house of Congress it "shall" be certified to the "appropriate United States attorney whose duty it shall be to bring the matter before the grand jury for its action."

[1] Although the December 1982 dispute is now a matter of history, it raises recurring issues.

Your inquiry presents a number of complex issues that will be considered in this memorandum. The first issue is whether the Executive retains some discretion with respect to referral of a contempt of Congress citation to a grand jury. This issue raises questions of statutory construction and the separation of powers with respect to the scope of the Executive's exercise of prosecutorial discretion. The second issue is whether the criminal contempt of Congress statute applies to an Executive Branch official who, on the orders of the President, asserts the President's claim of executive privilege. This issue also involves questions of statutory interpretation and the constitutional separation of powers.

As we have previously discussed with you, and as we explain in detail in this memorandum, we have concluded that, as a matter of both statutory construction and the Constitution's structural separation of powers, a United States Attorney is not required to refer a contempt citation in these circumstances to a grand jury or otherwise to prosecute an Executive Branch official who is carrying out the President's instruction in a factual context such as that presented by the December 16, 1982, contempt citation. First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute 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 in this context.

Our conclusions are predicated upon the proposition, endorsed by a unanimous Supreme Court less than a decade ago, that the President has the authority, rooted inextricably in the separation of powers under the Constitution, to preserve the confidentiality of certain Executive Branch documents. 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.

Before setting out a more detailed explanation of our analysis and conclusions, we offer the caveat that our conclusions are limited to the unique circumstances that gave rise to these questions in late 1982 and early 1983.

Constitutional conflicts within the federal government must be resolved carefully, based upon the facts of each specific case. Although tensions and friction between coordinate branches of our government are not novel and were, in fact, anticipated by the Framers of the Constitution, they have seldom led to major confrontations with clear and dispositive resolutions.

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

Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts*, 37 Harv. L. Rev. 1010, 1016 (1924) (emphasis in original). "The great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). Therefore, although we are confident of our conclusions, prudence suggests that they should be limited to controversies similar to the one to which this memorandum expressly relates, and the general statements of legal principles should be applied in other contexts only after careful analysis.

II. Background

Because the difficult and sensitive constitutional issues that we consider in this opinion could conceivably be resolved differently depending upon the specific facts of a controversy, this analysis is presented in the context of the December 16, 1982, actions of the House of Representatives. The facts surrounding this dispute will be set out in detail in the following pages.

A. EPA's Enforcement of the Superfund Act

On December 16, 1982, the House of Representatives cited the Administrator of the Environmental Protection Agency (EPA) because she declined to produce, in response to a broad subcommittee subpoena, a small portion of the subpoenaed documents concerning the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, 9657 (Supp. V 1981) (Superfund Act). The Superfund Act, adopted in December of 1980, authorizes the federal government to take steps to remedy the hazards posed by abandoned and inactive hazardous waste sites throughout the United States.[2] The EPA, which was delegated part of the President's authority to enforce the Superfund Act in August of 1981,[3] has considerable flexibility with respect to

[2] Another statute, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, provides federal authority to deal with the current disposal of hazardous industrial wastes.

[3] See Executive Order No. 12316, "Responses to Environmental Damage" (Aug. 14, 1981).

how this goal may be accomplished. EPA may request the Department of Justice to proceed immediately against those responsible for the hazardous waste sites to "secure such relief as may be necessary to abate" an "imminent and substantial endangerment to the public health or welfare or the environment." *See* 42 U.S.C. § 9606. Alternatively, EPA may initiate clean-up efforts itself by using funds from the $1.6 billion Superfund. *See* 42 U.S.C. § 9631. If EPA itself implements the clean-up efforts, it may subsequently sue those responsible for the hazardous waste to recover the clean up cost and, in some instances, may obtain treble damages. *See* 42 U.S.C. § 9607. These two basic enforcement mechanisms are supplemented by other broad enforcement powers, which authorize the issuance of administrative orders "necessary to protect the public health and welfare and the environment" and to require designated persons to furnish information about the storage, treatment, handling, or disposal of hazardous substances. *See* 42 U.S.C. §§ 9606, 9604(e)(1). Finally, the Superfund Act imposes criminal liability on a person in charge of a facility from which a hazardous substance is released, if that person fails to notify the government of the release. *See* 42 U.S.C. § 9603.

Prior to the initiation of judicial proceedings, EPA must undertake intensive investigation and case preparation, including studying the nature and the extent of the hazard present at sites, identifying potentially responsible parties, and evaluating the evidence that exists or that must be generated to support government action. *See* Amended Declaration of Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel, EPA, filed in *United States* v. *House of Representatives*, Civ. No. 82–3583 (D.D.C. Jan. 14, 1983). Many sites apparently involve hundreds of waste generators; hence, the initial investigation of a site can take months and involve the examination of tens of thousands of documents. *Id.*

Based on its initial investigations of hazardous waste sites throughout the country, EPA created a comprehensive national enforcement scheme and developed during 1982 an interim priorities list, which identified the 160 sites that posed the greatest risk to the public health and welfare and the environment.[4] EPA also promulgated enforcement guidelines to direct the implementation of the Superfund Act against these potentially hazardous sites. *See* 47 Fed. Reg. 20664 (1982).

Under this basic enforcement scheme, EPA commenced actual enforcement of the Superfund Act. As part of the enforcement effort with respect to each site, EPA generally develops a strategy for conducting negotiations and litigation consistent with its overall enforcement goals and the individual facts of each particular case. Once a case strategy has been developed, EPA notifies responsible parties that it intends to take action at a site unless the parties undertake an adequate clean up program on their own. Following the issuance of notice letters, EPA typically negotiates with responsible parties to agree on a

[4] Subsequently, EPA published a proposed national priorities list (to replace the interim list), which identified the 418 sites that, in EPA's judgment, required priority in use of the Superfund to effect clean up. *See* 47 Fed. Reg. 58476 (1982)

clean up plan. These negotiations may involve hundreds of potentially responsible parties and millions of dollars in clean up costs. Depending upon the strengths and weaknesses of individual cases and the effect on the overall enforcement effort, EPA may decide to settle with some but not all parties and proceed to litigation with a certain number of potential defendants. If EPA decides to bring a lawsuit, it refers the case to the Land and Natural Resources Division of this Department, which is responsible for conducting the actual litigation.[5]

During EPA's enforcement of the Superfund Act, the agency created or received hundreds of thousands of documents concerning various aspects of the enforcement process. Many of these documents concerned the facts relating to specific hazardous waste sites; others involved general agency strategy and policies with respect to the Superfund Act; still others, a small portion of the enforcement files, were attorney and investigator memoranda and notes that contained discussions of subjects such as EPA's enforcement strategy against particular defendants, analyses of the strengths and weaknesses of the government's case against actual or potential defendants, consideration of negotiation and settlement strategy, lists of potential witnesses and their anticipated testimony, and other litigation planning matters. Enforcement officials at both the career and policy level at EPA and in the Land and Natural Resources Division at the Department of Justice determined that some of those documents, which concerned the legal merits and tactics with respect to individual defendants in open enforcement files, were particularly sensitive to the enforcement process and could not be revealed outside the agencies directly involved in the enforcement effort without risking injury to EPA's cases against these actual and potential defendants in particular and the EPA enforcement process in general.[6]

B. The House Subcommittee's Demands for Enforcement Files

In the midst of EPA's ongoing enforcement efforts under the Superfund Act, the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation (Public Works Subcommittee), chaired by Rep. Levitas, began hearings to review EPA enforcement of the Act. In the course of these hearings, the Public Works Subcommittee first demanded access to, and then subpoenaed, a wide range of documents concerning enforcement of the Superfund Act with respect to the 160 sites that were on the

[5] We understand that as of January 14, 1983, EPA had sent more than 1,760 notice letters, undertaken Superfund financed action at 112 sites involving the obligation of in excess of $236 million, instituted Superfund claims in 25 judicial actions, and obtained one criminal conviction. As of the early months of 1983, EPA and the Department of Justice had reached settlements in 23 civil actions providing for the expenditure of more than $121 million to conduct clean up operations and were actively negotiating with responsible parties concerning the clean up of 56 sites throughout the country. *See* Amended Declaration of Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel of the EPA, filed in *United States* v. *House of Representatives*, Civ. No. 82-3583 (D.D.C. Jan. 14, 1983).

[6] *Id.*

agency's interim priorities list. The documents demanded by the Public Works Subcommittee included not only documents concerning the facts relating to these sites and EPA's general policies, but also the sensitive material contained in open case files that set out discussions concerning case strategy with respect to actual and potential defendants.[7] The Public Works Subcommittee subpoena was dated November 16, 1982, and was served on November 22, 1982. It called for production of the subpoenaed documents eleven days later on December 2, 1982. The EPA Administrator responded to the Public Works Subcommittee's subpoena by offering to provide the Public Works Subcommittee with access to an estimated 787,000 pages of documents within the scope of the subpoena.[8] The EPA and the Land and Natural Resources Division officials responsible for conducting EPA enforcement litigation determined, however, that release outside the enforcement agencies of a limited number of the most sensitive enforcement documents contained in open files concerning current and prospective defendants would impair EPA's ongoing enforcement efforts and prevent EPA and the Department of Justice from effectively implementing the Superfund Act.

Therefore, in accordance with the explicit guidelines adopted by the President to govern possible claims of executive privilege, *see* Memorandum re: Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), EPA suggested that some of the documents be withheld under a claim of executive privilege and consulted with this Office and the Office of the Counsel to the President in order to determine whether such a claim might be asserted to avoid impairing the constitutional responsibility of the President to take care that the laws be faithfully executed. A further review of the documents in question by enforcement officials at EPA and the Land and Natural Resources Division was then undertaken to confirm that the particular documents selected for consideration for an executive privilege claim were, in the judgment of those officials, sufficiently sensitive that their disclosure outside the Executive Branch might adversely affect the law enforcement process. The documents were then reviewed by officials in this Office and officials in the Office of the Counsel to the President to confirm that the documents were of the type described by the enforcement officials. Various unsuccessful efforts were thereafter made to resolve the dispute short of a final confrontation. The President, based upon the unanimous recommendation of all Executive Branch officials involved in the process, ultimately determined to assert a claim of executive privilege with respect to 64 documents from open enforcement files that had been identified as sufficiently enforcement sensitive

[7] The subpoena required the EPA Administrator to produce: all books, records, correspondence, memoranda, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, the date of enactment of the Superfund Act, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of the Superfund Act. *See United States v. House of Representatives*, 556 F. Supp. 150, 151 (D.D.C. 1983).

[8] *See* Testimony of Administrator Gorsuch before the Public Works Subcommittee, attached as Exhibit C to Declaration of Robert M. Perry, *supra*.

as of the return date of the subpoena that their disclosure might adversely affect pending investigations and open enforcement proceedings. The President implemented this decision in a memorandum dated November 30, 1982, to the EPA Administrator, which instructed her to withhold the particularly sensitive documents from disclosure outside the Executive Branch as long as the documents remained critical to ongoing or developing enforcement actions. The legal basis for this decision was explained in letters from the Attorney General on November 30, 1982, to the House Public Works Subcommittee and one other House subcommittee.[9] On December 2, 1982, 64 of the most sensitive documents were withheld from the Subcommittee.[10]

C. The Contempt of Congress Proceedings in the House of Representatives

The President's assertion of executive privilege, and the Attorney General's explanation of the law enforcement considerations and constitutional justification for the decision not to release the documents outside the Executive Branch while enforcement proceedings were ongoing, did not dissuade the congressional subcommittees from pressing their demands for the withheld material. After the EPA Administrator asserted the President's claim of privilege at a December 2, 1982, Public Works Subcommittee hearing, the Subcommittee immediately approved a contempt of Congress resolution against her. The full Committee did likewise on December 10, 1982, and rejected a further proposal by the Department of Justice to establish a formal screening process and briefings regarding the contents of the documents.[11] The full House adopted the contempt of Congress resolution on December 16, 1982,[12] and the follow-

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[9] *See* Letters to Hon. Elliott H. Levitas and Hon. John D. Dingell from Attorney General William French Smith (Nov. 30, 1982). The Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee (Energy and Commerce Subcommittee), chaired by Representative John D. Dingell, was pursuing a parallel demand for similar documents relating to enforcement of the Superfund Act with respect to certain specific sites that were among the 160 on the interim priorities list. While the Energy and Commerce Subcommittee sought documents relative to three specific hazardous waste sites, the Public Works Subcommittee subpoena demanded production of virtually all documents for all 160 sites. The President's assertion of executive privilege applied to both subpoenas. Although the Energy and Commerce Subcommittee approved a contempt of Congress resolution against the EPA Administrator, this resolution never reached the full Committee or the floor of the House of Representatives.

[10] As of that date, EPA had been able to examine only a portion of the hundreds of thousands of pages of documents that had been subpoenaed. The 64 documents that were withheld were those among the subpoenaed documents that had been reviewed and determined to fall within the President's instruction not to produce documents the release of which would adversely affect ongoing enforcement proceedings *See* Amended Declaration of Robert M. Perry, *supra*

[11] *See* Letter to Hon. Elliott H. Levitas from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs (Dec. 9, 1982).

[12] The contempt resolution stated:

> Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in

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ing day Speaker O'Neill certified the contempt citation to the United States Attorney for the District of Columbia for prosecution under the criminal contempt of Congress statute.

D. The Criminal Contempt of Congress Statute

The criminal contempt of Congress statute contains two principal sections, 2 U.S.C. §§ 192 & 194.[13] 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 one month nor more than twelve months.

Section 194 purports to impose mandatory duties on the Speaker of the House or the President of the Senate, as the case may be, and the United States Attorney, to take certain 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 said President of the Senate or the 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

[12] (. . . continued)
connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

128 Cong. Rec. 31754 (1982).

[13] A third provision, 2 U.S.C. § 193, which denies the existence of any testimonial privilege for a witness to refuse to testify on the ground that this testimony would disgrace him, is not relevant to the issues discussed in this memorandum.

> 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.*

(Emphasis added.)

E. The Department of Justice Civil Suit

Immediately after the House passed the resolution adopting the finding that the EPA Administrator was in contempt of Congress, the Department of Justice filed a civil suit in the United States District Court for the District of Columbia to obtain a ruling that "insofar as [the EPA] Administrator . . . did not comply with the Subpoena, her non-compliance was lawful" because of a valid Presidential claim of executive privilege.[14] The House moved to dismiss the Department's complaint on jurisdictional grounds, and the Department cross moved for summary judgment on the merits. In a letter to Speaker O'Neill dated December 27, 1982, the United States Attorney indicated that during the pendency of the lawsuit, he would take no further action with respect to the Speaker's referral of the contempt citation. The Speaker responded in a letter dated January 4, 1983, in which he took the position that the United States Attorney must, as a matter of law, immediately refer the matter to a grand jury.

The trial court responded to the cross-motions for dismissal and summary judgment by exercising its discretion under equitable rules of judicial restraint not to accept jurisdiction over the lawsuit, and it dismissed the suit. The court concluded:

> When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. . . .
>
> The difficulties apparent in prosecuting [the] Administrator . . . for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement.

United States v. *House of Representatives*, 556 F. Supp. 150, 152–53 (D.D.C. 1983). No appeal was taken.[15]

[14] *See* Amended Complaint in *United States* v. *House of Representatives*, Civ. No. 82–3583 (D.D.C. Dec. 29, 1982).

[15] Although the United States Court of Appeals for the District of Columbia Circuit previously had been willing to entertain a civil action to resolve a conflict between a congressional subpoena for documents and a Presidential claim of executive privilege when the action was brought by a congressional committee, *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir 1974) (en banc), the trial court decision in the EPA matter casts some doubt on the viability of such an action when Congress, as in this case, does not wish to resolve the controversy in a civil suit. We must assume, for the purpose of this opinion, that a civil suit is an avenue that is open to Congress, but closed to the Executive, absent a legislature willing to have the matter resolved in a civil proceeding.

Of course, the courts might be more amenable to a civil action challenging a contempt citation if they felt that a criminal prosecution in this context was untenable. The district court judge in the EPA matter noted but did not attempt to consider in depth the "difficulties" of prosecuting an executive official for carrying out the President's constitutional responsibility.

F. Resolution of the EPA Dispute

Subsequent to the trial court decision, the two branches engaged in negotiations to reach a compromise settlement. The parties eventually reached an agreement under which the Public Works Subcommittee would have limited access to the withheld documents and would sponsor a resolution to "withdraw" the contempt citation against the EPA Administrator. Pursuant to the agreement, the Subcommittee reviewed the documents, and the House later adopted a resolution withdrawing the contempt citation. H.R. Res. 180, 98th Cong., 1st Sess. (Aug. 3, 1983). The issue whether the House of Representatives in the 98th Congress could "withdraw" the contempt citation of the House during the 97th Congress was never resolved.

During the pendency of the lawsuit and the subsequent settlement negotiations, the United States Attorney for the District of Columbia refrained from referring the contempt citation to the grand jury. The United States Attorney took the position that referral would have been inappropriate during that period and that the statute left him with discretion to withhold referral. *See* Testimony of Stanley S. Harris before the House Committee on Public Works and Transportation, 98th Cong., 1st Sess. 100–07 (June 16, 1983). Following the passage of the resolution withdrawing the contempt citation, "the relevant facts and documents were presented . . . to a federal grand jury, which voted unanimously not to indict [the EPA Administrator]." Letter from Stanley S. Harris, United States Attorney, District of Columbia, to Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives (Aug. 5, 1983).

III. Generally Applicable Legal Principles: The Separation of Powers, the Duties of the Executive to Enforce the Law, and the Derivation and Scope of the Principles of Prosecutorial Discretion and Executive Privilege

A. The Separation of Powers

The basic structural concept of the United States Constitution is the division of federal power among three branches of government. Although the expression "separation of powers" does not actually appear in the Constitution, the Supreme Court has emphasized that the separation of powers "is at the heart of our Constitution," and has recognized "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." *Buckley* v. *Valeo*, 424 U.S. 1, 119–20 (1976). It needs little emphasis that the separation of powers doctrine is vital to any analysis of the relative responsibilities of the branches of our government, *inter se*. In *The Federalist* No. 47, James Madison, who believed that "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the concept of the separation of powers, defended this tripartite arrangement in the Constitution by citing

Montesquieu's well-known maxim that the legislative, executive, and judicial departments should be separate and distinct:

> The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "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." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."

The Federalist No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961); *see Buckley* v. *Valeo*, 424 U.S. at 120–21.[16]

Of the three branches of the new government created in Philadelphia in 1787, the legislature was regarded as the most intrinsically powerful, and the branch with powers that required the exercise of the greatest precautions.

Madison warned that the "legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *The Federalist* No. 48, *supra*, at 309. He admonished that because of their experiences in England, the founders of the thirteen colonies had focused keenly on the danger to liberty from an "overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority," but had tended to ignore the very real dangers from "legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." *Id.* Reflecting the views of many of his colleagues, Madison believed that although the risk of tyranny would naturally come from the King in an hereditary monarchy, in a representative republic, like that created by the constitutional convention, in which executive power was "carefully limited, both in the extent and duration of its power," the threat to liberty would come from the legislature,

> which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

Id.

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[16] Madison characterized Montesquieu as the "oracle who is always consulted and cited on [the] subject [of the separation of powers]." *See The Federalist* No. 47, *supra*, at 301.

The Framers feared that the legislature's power over the purse would foster a dependence by the executive departments on the legislature "which gives still greater facility to encroachments" by the legislature on the powers of the Executive. *Id.* at 310. The concerns of the Framers with respect to the power of the legislature have been recognized by the Supreme Court. The Court, citing many of the above statements, has observed that because of the Framers' concerns about the potential abuse of legislative power, "barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform functions of the other departments." *United States* v. *Brown*, 381 U.S. 437, 444 (1965). Justice Powell noted that "during the Confederation, the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than the Crown." *INS* v. *Chadha*, 462 U.S. 917, 961 (1983) (Powell, J. concurring). After citing several specific legislative abuses that had been of particular concern to the Framers, Justice Powell concluded that it "was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches." *Id.* at 962.

Thus, the careful separation of governmental functions among three branches of government was a very deliberate and vital structural step in building the Constitution. The Framers understood human nature and anticipated that well-intentioned impulses would lead each of the branches to attempt to encroach on the powers allocated to the others. They accordingly designed the structure of the Constitution to contain intrinsic checks to prevent undue encroachment wherever possible. Particular care was taken with respect to the anticipated tendency of the Legislative Branch to swallow up the Executive. The Framers did not wish the Legislative Branch to have excessive authority over the individual decisions respecting the execution of the laws: "An *elective despotism* was not the government we fought for." T. Jefferson, *Notes on the State of Virginia* 120 (Univ. N.C. Press ed. 1955)[17] The constitutionally prescribed separation of powers creates enforceable abuses that had been of particular concern to the Framers, Justice Powell concluded that it "was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches." *Id.* The division of delegated powers was designed "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. The doctrine of separated powers "may be violated in two ways. One branch may interfere impermissibly with the other's performance of its consti-

[17] It is noteworthy, at least from an historical perspective, that the House of Representatives, because of its immense powers, was considered to be the governmental body least vulnerable to encroachments by other segments of government and, at the same time, because of its popular origin and frequent renewal of authority by the people, the body whose encroachment on the other branches would be least distrusted by the public. The Supreme Court later noted:

> It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositories of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it that it should receive the most careful scrutiny.

Kilbourn v. *Thompson*, 103 U.S. 168, 192 (1881).

tutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. *Id.* at 963 (Powell, J. concurring) (citations omitted). Although the Supreme Court has recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," it has also emphasized that the Court "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." *Buckley* v. *Valeo*, 424 U.S. at 121, 123. Therefore, although the Constitution does not contemplate "a complete division of authority between the three branches," each branch retains certain core prerogatives upon which the other branches may not transgress. *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Each branch must not only perform its own delegated functions, but each has an additional duty to resist encroachment by the other branches. "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 (emphasis added).

B. The Duties of the Executive to Enforce the Law

The fundamental responsibility and power of the Executive Branch is the duty to execute the law. Article II, § 1 of the Constitution expressly vests the executive power in the President. Article II, § 3 commands that the President "take Care that the Laws be faithfully executed." Enforcement of the laws is an inherently executive function, and by virtue of these constitutional provisions, the Executive Branch has the exclusive constitutional authority to enforce federal laws. Since the adoption of the Constitution, these verities have been at the heart of the general understanding of the Executive's constitutional authority. During the debates on the Constitution, James Wilson noted that the "only powers he conceived strictly executive were those of executing the laws." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 65–66 (1937). During the first Congress, James Madison stated that "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 *Annals of Congress* 481 (1789). The Supreme Court has recognized this fundamental constitutional principle. In *Springer* v. *Philippine Islands*, 277 U.S. 189 (1928), the Court observed:

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

Id. at 202. More recently, Judge Wilkey, writing for a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit in a decision later affirmed by the Supreme Court, recognized that the Constitution

prevents Congress from exercising its power of "oversight, with an eye to legislative revision," in a manner that amounts to "shared administration" of the law. *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, 673 F.2d 425, 474 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Group* v. *Consumer Energy Council of America*, 43 U.S. 1216 (1983). It thus seems apparent that the drafters of the Constitution intended clearly to separate the power to adopt laws and the power to enforce them and intended to place the latter power exclusively in the Executive Branch.[18] As a practical matter, this means that there are constitutional limits on Congress' ability to take actions that either disrupt the ability of the Executive Branch to enforce the law or effectively arrogate to Congress the power of enforcing the laws.

C. The Derivation and Scope of Prosecutorial Discretion and Executive Privilege

The issues addressed by this memorandum involve two important constitutional doctrines that spring from the constitutional limits imposed by the separation of powers and the Executive's duty to enforce the laws: prosecutorial discretion and executive privilege.

1. Prosecutorial Discretion

The doctrine of prosecutorial discretion is based on the premise that because the essential core of the President's constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress. That principle was reaffirmed by the Supreme Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), in which the Court invalidated the provision of the Federal Election Act that vested the appointment of certain members of the Federal Election Commission in the President *pro tempore* of the Senate and the Speaker of the House. In so holding, the Court recognized the exclusively executive nature of some of the Commission's powers, including the right to commence litigation:

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take care that the laws be faithfully executed." Art. II, § 3.

424 U.S. at 138.

[18] Of equal concern was the need to separate the judicial power from the executive power. The drafters intended to preserve the impartiality of the judiciary as "neutral arbiters in the criminal law" by separating the judiciary from the prosecutorial function. *Nader* v. *Saxbe*, 497 F.2d 676, 679 n.18 (D.C Cir. 1974).

The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals. This principle was explained in *Smith* v. *United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967), in which the court considered the applicability of the Federal Tort Claims Act to a prosecutorial decision not to arrest or prosecute persons injuring plaintiff's business. The court ruled that the government was immune from suit under the discretionary decision exception of the Act on the ground that the Executive's prosecutorial discretion was rooted in the separation of powers under the Constitution:

> The President of the United States is charged in Article 2, Section 3, of the Constitution with the duty to "take Care that the Laws be faithfully executed." The Attorney General is the President's surrogate in the prosecution of all offenses against the United States. . . . The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute. . . . This discretion is required in all cases.
>
> We emphasize that this discretion, exercised in even the lowliest and least consequential cases, can affect the policies, duties, and success of a function placed under the control of the Attorney General by our Constitution and statutes.

375 F.2d at 246–47. The court went on to state that this prosecutorial discretion is protected "no matter whether these decisions are made during the investigation or prosecution of offenses." *Id.* at 248.

The limits and precise nature of the Executive's prosecutorial discretion are discussed in greater detail below. At this point in our examination of the issues considered in this memorandum, it is sufficient to observe that meaningful and significant separation of powers issues are raised by a statute that purports to direct the Executive to take specified, mandatory prosecutorial action against a specific individual designated by the Legislative Branch.

2. Executive Privilege

The doctrine of executive privilege is founded upon the basic principle that in order for the President to carry out his constitutional responsibility to enforce the laws, he must be able to protect the confidentiality of certain types of documents and communications within the Executive Branch. If disclosure of certain documents outside the Executive Branch would impair the President's ability to fulfill his constitutional duties or result in the impermissible involvement of other branches in the enforcement of the law, then the President must be able to claim some form of privilege to preserve his constitutional preroga-

tives. This "executive privilege" has been explicitly recognized by the Supreme Court, which has stated that the privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U.S. 683, 708 (1974). We believe that it is beyond peradventure that the constitutionally mandated separation of powers permits the President to prevent disclosure of certain Executive Branch documents under the doctrine of executive privilege and that the ability to assert this privilege is fundamental to the President's ability to carry out his constitutionally prescribed duties.

The Supreme Court has suggested that in some areas the President's executive privilege may be absolute and in some circumstances it is a qualified privilege that may be overcome by a compelling interest of another branch. *United States* v. *Nixon*, 418 U.S. at 713; *see also Senate Select Comm. on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc). Nevertheless, the unanimous Supreme Court decision in *Nixon* clearly stands for the proposition that there is a privilege, that it stems from the separation of powers, and that it may be invoked (although perhaps overridden by a court) whenever the President finds it necessary to maintain the confidentiality of information within the Executive Branch in order to perform his constitutionally assigned responsibilities.[19]

The scope of executive privilege includes several related areas in which confidentiality within the Executive Branch is necessary for the effective execution of the laws. First, as the Supreme Court has held, the privilege protects deliberative communications between the President and his advisors. The Court has identified the rationale for this aspect of the privilege as the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. *United States* v. *Nixon*, 418 U.S. at 705 (footnotes omitted).

Another category of Executive Branch material that is subject to a President's claim of privilege is material necessary "to protect military, diplomatic, or sensitive national security secrets." *United States* v. *Nixon*, 418 U.S. 683, 706 (1974). In *Nixon*, the Court stated:

> As to those areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In *C.& S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111

[19] Presidents have invoked the privilege throughout our history for a variety of reasons. *See, e.g.*, "History of Refusals by Executive Branch to Provide Information Demanded by Congress," 6 Op. O.L.C. 751 (1982); Memorandum from John Harmon, Assistant Attorney General, Office of Legal Counsel, to Robert Lipschutz, Counsel to the President (June 8, 1977); Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y Gen. 45 (1941).

(1948), dealing with Presidential authority involving foreign policy considerations, the Court said:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In *United States* v. *Reynolds*, 345 U.S. 1 (1953), dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at 10.

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

418 U.S. at 710–11.

An additional important application of executive privilege, which, as noted earlier, relates centrally to the discharge of the President's constitutional duties, involves open law enforcement files. Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature.[20] The basis for this application

[20] As explained by Attorney General (later, Supreme Court Justice) Robert Jackson in April 1941:

> 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.

40 Op. Att'y Gen. 45, 46 (1941). As similarly expressed a few years later by Deputy Assistant Attorney General Kauper:

> Over a number of years, a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress with information from open investigational files. Most impor-

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of the privilege is essentially the same as for all aspects of executive privilege; the Executive's ability to enforce the law would be seriously impaired, and the impermissible involvement of other branches in the execution and enforcement of the law would be intolerably expanded, if the Executive were forced to disclose sensitive information on case investigations and strategy from open enforcement files.

IV. The Duty of the Executive Branch When an Executive Official Has Been Cited for Contempt of Congress for Asserting the President's Claim of Executive Privilege

A. Prosecutorial Discretion

The first specific question that is presented by the circumstances that gave rise to this memorandum is whether the United States Attorney is required to refer every contempt of Congress citation to a grand jury. This question raises issues of statutory construction as well as the constitutional limits of prosecutorial discretion. We deal first with the statutory questions.

As a preliminary matter, we note that § 194 does not on its face actually purport to require the United States Attorney to proceed with the prosecution of a person cited by a house of Congress for contempt; by its express terms the statute discusses only referral to a grand jury. Even if a grand jury were to return a true bill, the United States Attorney could refuse to sign the indictment and thereby prevent the case from going forward. *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965); *In re Grand Jury, January, 1969*, 315 F. Supp. 662 (D. Md. 1970). *See* Hamilton & Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 Harv. J. on Legis. 145, 155 (1984). Thus, as a matter of statutory interpretation, there is no doubt that the contempt of Congress statute does not require a prosecution; the only question is whether it requires referral to the grand jury.[21]

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[20] (. . . continued)

tant, 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 the Deputy Counsel to the President from Deputy Assistant Attorney General Kauper re: Submission of Open CID Investigation Files (Dec. 19, 1969). This significant constitutional privilege provides a foundation for our discussion below of the penalties that Congress may attach to the President's assertion of the privilege in response to a congressional subpoena.

[21] Although it is by no means certain as a matter of law, if the case were referred to a grand jury, the United States Attorney might be required to take certain steps short of signing the indictment, and the grand jury's decision might well become public. In *Cox*, a majority of the court (made up of the three dissenting judges and one concurring judge) took the view that the United States Attorney could be required to prepare an indictment for use by the grand jury. In addition, the district court in *In re Grand Jury*, *supra*, held that even though the United States Attorney could not be required to sign an indictment, in the circumstances of that case "the substance of the charges in the indictment should be disclosed, omitting certain portions as to which

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1. Previous Department of Justice Positions Concerning Prosecutorial Discretion Under the Contempt of Congress Statute

In the past, the Department of Justice has taken the position that if Congress cited an executive officer for contempt because of an assertion of executive privilege and "the Department determined to its satisfaction that the claim was rightfully made, it would not, in the exercise of its prosecutorial discretion, present the matter to a grand jury." Testimony of Assistant Attorney General (now Solicitor General) Rex Lee, *Hearings on Representation of Congress and Congressional Interests in Court, Before the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary*, 94th Cong., 2d Sess. 8 (1976).

This principle of prosecutorial discretion under the contempt of Congress statute was followed by the Department in the cases of three officials of the Port of New York Authority who were cited for contempt of Congress in 1960 for refusing to produce documents to the House Judiciary Committee. As a part of an investigation of the Port Authority, which had been established by an interstate compact approved by Congress, the Judiciary Committee subpoenaed a large number of documents concerning the Port Authority's operations, most of which the Port Authority declined to produce on the orders of the governors of New York and New Jersey (the states within which the Port Authority was located). Because of the failure to produce the documents, the Committee recommended, and the House adopted, contempt resolutions against three principal officials of the Port Authority.[22] On August 23, 1960, these resolutions were referred to the United States Attorney for prosecution. *See* N.Y. Times, Aug. 24, 1960, at 1. The United States Attorney never referred any of these citations to the grand jury. On November 16, 1960, the Department of Justice announced that it would proceed against the officials by information

[21] (. . . continued)
the Court, in the exercise of its discretion, concludes that the public interest in disclosure is outweighed by the private prejudice to the persons involved, none of whom are charged with any crime in the proposed indictment." 315 F Supp. at 678–79. Under this analysis, if the contempt citation were to reach a grand jury and the grand jury were to vote a true bill, a court might be able to require the United States Attorney to prepare an indictment and then might order the disclosure of that indictment as voted by the grand jury. For the reasons set out in our discussion of prosecutorial discretion, the court could not, however, order the United States Attorney to prosecute.

Because the contempt of Congress statute does not require the United States Attorney to refer to a grand jury a citation for contempt of Congress issued to an executive official who has asserted the President's claim of executive privilege, we have not attempted to determine definitively what additional steps, if any, the United States Attorney could be required to take if such a matter were referred to a grand jury.

[22] See 106 Cong. Rec. 17313 (1960) (citation against Austin J. Tobin, Executive Director of the Authority); *id.* at 17316 (citation against S. Sloan Colt, Chairman of the Board); *id.* at 17319 (citation against Joseph G. Carty, Secretary). The contempt resolution in each case read as follows:

> Resolved, That the Speaker of the House of Representatives certify the report of the Committee on the Judiciary as to the contumacious conduct of [name] in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon him and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that [name] may be proceeded against in the manner and form provided by law.

rather than indictment, and therefore would not present the citations to a grand jury. *See* N.Y. Times, Nov. 17, 1960, at 1. On November 25, 1960, the Department announced that it would file an information against only one of the Port Authority officials, Executive Director Austin Tobin, and would not prosecute the remaining two officials. *See* N.Y. Times, Nov. 26, 1960, at 1. The trial began in January 1961 and continued under the supervision of the new Attorney General, Robert F. Kennedy, who never altered the decision not to prosecute the two remaining officials, in spite of a congressional request to do so. Ultimately Tobin's conviction was reversed by the United States Court of Appeals for the District of Columbia Circuit. *Tobin* v. *United States*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).[23]

In the foregoing instance, the Department (under two administrations) exercised its prosecutorial discretion not to refer contempt of Congress citations to a grand jury, notwithstanding the seemingly mandatory phrasing of the statute.[24] For the reasons set forth more fully below, we continue to adhere to the conclusion that the Department retains prosecutorial discretion not to refer contempt citations to a grand jury.

2. Judicial Opinions Interpreting the Language of § 194

Section 194 imposes similarly worded, nominally mandatory, referral obligations on both the Speaker of the House (or the President of the Senate) and the United States Attorney once a contempt of Congress resolution has been adopted by the House or Senate:

> *it shall be the duty* of the said President of the Senate or the 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.

(Emphasis added.)

Although the language, "it shall be the duty of" and "whose duty it shall be," might suggest a nondiscretionary obligation, the United States Court of Appeals for the District of Columbia Circuit has expressly held, at least with respect to the Speaker of the House, that the duty is *not* mandatory, and that, in fact, the Speaker has an obligation under the law, at least in some cases, to exercise his discretion in determining whether to refer a contempt citation. *Wilson* v. *United States*, 369 F.2d 198 (D.C. Cir. 1966). In *Wilson*, the court reversed a conviction for contempt of Congress on the ground that the Speaker had assumed that the statute did not permit any exercise of discretion by him

[23] The Court of Appeals ruled that the documents requested by the Committee went beyond the investigative authority delegated to the Committee by the House.

[24] We know of at least two other individuals who were cited for contempt of Congress, but whose cases were not referred to a grand jury by the Department of Justice. *See* Department of Justice File No. 51–51–484 (1956). The file was closed because the Department concluded that there was an insufficient basis for prosecution.

and he had therefore automatically referred a contempt citation to the United States Attorney while Congress was not in session. The court based its conclusion that the Speaker was required to exercise his discretion on the longstanding practice of both the House and Senate and on congressional debates on contempt citations in which the houses had recognized their own discretion not to approve a contempt resolution. The court concluded that because full House approval of a contempt citation is necessary when Congress was in session, the Speaker is required to exercise some discretion when the House is not in session. 369 F.2d at 203–04.

Although the reasons underlying the court's decision not to impose a mandatory duty on the Speaker in *Wilson* do not necessarily require the same conclusion with respect to the United States Attorney, the decision at least supports the proposition that the seemingly mandatory language of § 194 need not be construed as divesting either the Speaker or the United States Attorney of all discretion.[25]

In several cases, the United States Court of Appeals for the District of Columbia Circuit has at least assumed that the United States Attorney retains discretion not to refer a contempt of Congress citation to a grand jury. In these cases, the court refused to entertain challenges to congressional subpoenas, at least in part on the ground that the prospective witnesses would have adequate subsequent opportunities to challenge a committee's contempt finding, including the opportunity to persuade the United States Attorney not to refer the case to a grand jury. For example, in *Ansara* v. *Eastland*, 442 F.2d 751 (D.C. Cir. 1971), the court declined to entertain a suit to quash a congressional subpoena on the ground that it would be inappropriate, as a matter of the exercise of its equitable power, to interfere with an ongoing congressional process. The court stated that protections were available "within the legislative branch or elsewhere," and then in a footnote indicated that these protections resided "perhaps in the Executive Branch *which may decide not to present the matter to the grand jury* (as occurred in the case of the officials of the New York Port Authority); or perhaps in the Grand Jury which may decide not to return a true bill." 442 F.2d at 754 n.6 (emphasis added).[26] *See also Sanders* v. *McClellan*,

[25] In this respect, we believe that *Wilson* implicitly disapproved the *dictum* of *Ex parte Frankfeld*, 32 F. Supp. 915 (D.D.C. 1940), in which the district court stated:

> It seems quite apparent that Congress intended to leave no measure of discretion to either the Speaker of the House or the President of the Senate, under such circumstances, but made the certification of facts to the district attorney a mandatory proceeding, and it left no discretion with the district attorney as to what he should do about it. He is required, under the language of the statute, to submit the facts to the grand jury.

Id at 916. The *Frankfeld* court expressly linked the responsibilities of the Speaker and the United States Attorney *Wilson* ruled that the Speaker's duty is discretionary, at least when the House is not in session. Therefore, since the Speaker's duty is *in pari materia* with the duty of the United States Attorney, the law, at least in the District of Columbia Circuit, seems to be that both duties should be viewed as containing some elements of discretion.

[26] *Ansara* v. *Eastland* was cited with approval three times by Judge Smith in *United States* v. *House of Representatives*, 556 F. Supp. 150, 152–53 (D.D.C 1983). Thus, although the opinion made a passing reference to the mandatory nature of referral, Judge Smith must have recognized that the United States Attorney retained prosecutorial discretion.

463 F.2d 894 (D.C. Cir. 1972). In *United States Servicemen's Fund* v. *Eastland*, 488 F.2d 1252 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 491 (1974), the court agreed to review a challenge to a congressional subpoena brought by a third party, and it distinguished *Ansara* and *McClellan* on the ground that, because the congressional subpoena was issued to a third party, the plaintiffs had no alternative means to vindicate their rights. 488 F.2d at 1260. Among the alternative means the court cited was the right to "seek to convince the executive (the attorney general's representative) not to prosecute." *Id.*

These cases emphasize the particular significance of prosecutorial discretion in the context of the contempt of Congress statute. In general, with respect to any criminal allegation, prosecutorial discretion plays an important role in protecting the rights of the accused by providing an additional level of review with respect to the factual and legal sufficiency of the charges. This role is even more important when dealing with the contempt of Congress statute because, as the above cases demonstrate, witnesses generally have no opportunity to challenge congressional subpoenas directly. Thus, as the cases indicate, prosecutorial discretion serves a vital purpose in protecting the rights of the accused in contempt cases by mitigating the otherwise stern consequences of asserting a right not to respond to a congressional subpoena.

Thus, the practice of the Congress and the available judicial authority support the proposition that the seemingly mandatory duties imposed on congressional officials by 2 U.S.C. § 194 are and were intended to be discretionary. The practice of the Executive Branch and the court decisions reflect a similarly discretionary role under the statute for the United States Attorney. Because, as the balance of this memorandum reveals, these interpretations are consistent with other common-law principles and avoid conclusions that would be at odds with the separation of powers, we believe that a correct reading of 2 U.S.C. § 194 requires recognition of the prosecutor's discretion with respect to referral to a grand jury.

3. Common-Law Prosecutorial Discretion

In addition to the court decisions that suggest that the United States Attorney may decide not to refer a contempt citation to a grand jury, the common-law doctrine of prosecutorial discretion weighs heavily against and, in our opinion, precludes an interpretation that the statute requires automatic referral. Because of the wide scope of a prosecutor's discretion in determining which cases to bring, courts, as a matter of law, do not ordinarily interpret a statute to limit that discretion unless the intent to do so is clearly and unequivocally stated. The general rule is that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). *See also Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869). The Attorney General and his subordinates, including the United States Attorneys, have the authority to exercise this discretion reserved to the Executive. *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888); *The Gray*

Jacket, 72 U.S. (5 Wall.) 370 (1866). In general, courts have agreed with the view of Judge (now Chief Justice) Burger:

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

Newman v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967). *See also United States* v. *Batchelder*, 442 U.S. 114 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978).

Courts have applied this general principle of prosecutorial discretion in refusing to interfere with a prosecutor's decision not to initiate a case, despite the specific language of 28 U.S.C. § 547, which states in part that "each United States Attorney, within his district, *shall* . . . prosecute *for all* offenses against the United States." (Emphasis added.) For example, in *Powell* v. *Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966), the court denied a mandamus petition that sought to force the Attorney General to prosecute a national bank. The court ruled: "It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General. Mandamus will not lie to control the exercise of this discretion." *Id.* at 234. *See also United States* v. *Brown*, 481 F.2d 1035 (8th Cir. 1973); *Bass Anglers Sportsman's Society* v. *Scholze Tannery, Inc.*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); *United States* v. *Brokaw*, 60 F. Supp. 100 (S.D. Ill. 1945).

Courts exhibit the same deference to prosecutorial discretion even when the specific statute involved uses words that would otherwise have mandatory, nondiscretionary implications. For example, 42 U.S.C. § 1987 states that United States Attorneys are "authorized *and required* . . . to initiate prosecutions against all persons violating any of the provisions of [the federal criminal civil rights statutes]." (Emphasis added.) Although a number of cases have been initiated to force a United States Attorney to bring civil rights actions on the ground that this statute imposes a nondiscretionary duty to prosecute, *see* Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 Yale L.J. 1297 (1965), the courts uniformly have rejected the contention that the statute limits a prosecutor's normal discretion to decide not to bring a particular case. For example, in *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (2d Cir. 1973), the court ruled that the "mandatory nature of the word 'required' as it appears in § 1987 is insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes." 477 F.2d at 381. The court noted that although similar mandatory language was contained in other statutes, "[s]uch language has never been thought to preclude the exercise of prosecutorial discretion." *Id.* *Accord Peek* v. *Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Moses* v. *Kennedy*, 219 F. Supp. 762 (D.D.C. 1963), *aff'd sub nom. Moses* v. *Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965). The language employed in 2 U.S.C. § 194 is neither stronger

nor more clearly mandatory than the language of § 1987, which the courts have decided is insufficient to limit the normal prosecutorial discretion.

In fact, there is nothing to distinguish the contempt of Congress statute from any other statute where the prosecutor retains discretion with respect to who shall be prosecuted. Since the early part of the 19th century, it has been recognized that offenses against Congress that are punishable by Congress through its inherent contempt power may also be violations of the criminal laws and, as such, offenses against the United States, with respect to which the normal rules governing criminal prosecutions apply. *See* 2 Op. Att'y Gen. 655 (1834) (concluding that an assault against a congressman could be prosecuted consistent with the Double Jeopardy Clause under the criminal laws, even if the defendant had already been punished by Congress, because the act created two separate offenses, one against Congress and one against the United States). This principle was adopted by the Supreme Court when it upheld the constitutionality of the contempt of Congress statute. *In re Chapman*, 166 U.S. 661 (1897). In *Chapman*, the Court held that the contempt statute did not violate the Double Jeopardy Clause even though a defendant could be punished through Congress' inherent contempt power as well as under the contempt statute. The Court concluded that a refusal to testify involved two separate offenses, one against Congress and one against the United States, and that

> it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together.

166 U.S. at 672.

The import of the Court's conclusion in this context is clear. Congress' inherent contempt power is the remedy for the offense against Congress, and that remedy remains within Congress' control. The crime of contempt of Congress, like any other federal statutory crime, is an offense against the United States that should be prosecuted as is any other crime. This criminal offense against the United States properly remains subject to the prosecutorial control of the Executive Branch. Therefore, because the contempt statute should be treated as are other federal criminal statutes, we do not believe that § 194 should be read to limit the common law prosecutorial discretion of the United States Attorney. There is nothing in the legislative history of the contempt of Congress statute that is inconsistent with this conclusion. *See* 42 Cong. Globe, 34th Cong., 3d Sess. 4030–44 (1857).

4. Constitutional Considerations

Our construction of § 194 is reinforced by the need to avoid the constitutional problems that would result if § 194 were read to require referral to a

grand jury. As discussed above, the constitutionally prescribed separation of powers requires that the Executive retain discretion with respect to whom it will prosecute for violations of the law. Although most cases expressly avoid this constitutional question by construing statutes not to limit prosecutorial discretion, the cases that do discuss the subject make it clear that common law prosecutorial discretion is strongly reinforced by the constitutional separation of powers. *See, e.g., Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Powell* v. *Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966).

A number of courts have expressly relied upon the constitutional separation of powers in refusing to force a United States Attorney to proceed with a prosecution. For example, in *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961), the court declined to order the United States Attorney to commence a prosecution for violation of federal wiretap laws on the ground that it was

> clear beyond question that it is not the business of the Courts to tell the United States Attorney to perform what they conceive to be his duties.
>
> Article II, § 3 of the Constitution, provides that "[the President] shall take Care that the Laws [shall] be faithfully executed." The prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government.

193 F. Supp. at 634. *See also Goldberg* v. *Hoffman*, 225 F.2d 463, 464–65 (7th Cir. 1955).[27]

The Fifth Circuit, sitting en banc, has underscored the constitutional foundations of prosecutorial discretion. *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965). In *Cox*, the court overturned a district court's order that a United States Attorney prepare and sign an indictment that a grand jury had voted to return. The plurality opinion stated:

> The executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceed-

[27] These conclusions are not inconsistent with Rule 48(a) of the Federal Rules of Criminal Procedure, which requires leave of court before dismissal of a criminal action. This provision is intended primarily to protect defendants against repeated prosecutions for the same offense, and a court's power to deny leave under this provision is extremely limited. *See Rinaldi* v. *United States*, 434 U.S. 22 (1977); *United States* v. *Hamm*, 659 F.2d 624 (5th Cir. 1981); *United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973). The United States Court of Appeals for the Fifth Circuit has stated that the constitutionality of Rule 48(a) is dependent upon the prosecutor's unfettered ability to decide not to commence a case in the first place. *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965). Moreover, Judge Weinfeld has stated that even if a court denied leave to dismiss an indictment, a court "in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine." *United States* v. *Greater Blouse, Skirt & Neckwear Contractors Ass'n*, 228 F. Supp. 483 (S.D.N.Y. 1964).

> ings and in the prosecution of offenses, be faithfully executed. The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

342 F.2d at 171 (footnotes omitted). *See also id.* at 182–83 (Brown, J. concurring); *id.* at 190–93 (Wisdom, J., concurring). Even the three dissenting judges in *Cox* conceded that, although they believed that the United States Attorney could be required to sign the indictment, "once the indictment is returned, the Attorney General or the United States Attorney can refuse to go forward." *Id.* at 179. *See United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case") (citing, *inter alia*, *Cox*).

Although prosecutorial discretion may be regulated to a certain extent by Congress and in some instances by the Constitution, the decision not to prosecute an individual may not be controlled because it is fundamental to the Executive's prerogative. For example, the individual prosecutorial decision is distinguishable from instances in which courts have reviewed the legality of general Executive Branch policies. *See Nader* v. *Saxbe*, 497 F.2d 676 (D.C. Cir. 1974); *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam); *NAACP* v. *Levi*, 418 F. Supp. 1109 (D.D.C. 1976). In these cases the courts accepted jurisdiction to rule whether an entire enforcement program was being implemented based on an improper reading of the law. The cases expressly recognize, however, both that a decision to prosecute in an individual case involves many factors other than merely probable cause, and that "the balancing of these permissible factors in individual cases is an executive, rather than a judicial function which follows from the need to keep the courts as neutral arbiters in the criminal law generally . . . and from Art. II, § 3 of the Constitution, which charges the President to 'take Care that the Laws be faithfully executed.'" *Nader* v. *Saxbe*, 497 F.2d at 679 n.18. Similarly distinguishable are the cases concerning the constitutional limits on selective prosecution, which hold that prosecutorial discretion may not be exercised on the basis of impermissible factors such as race, religion, or the exercise of free

speech. *See, e.g., Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980); *Oyler* v. *Boles*, 368 U.S. 448 (1962).

If the congressional contempt statute were interpreted to divest the United States Attorney of discretion, then the statute would create two distinct problems with respect to the separation of powers. "The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches while others say that a given task is *not* to be performed by a given branch." *United States* v. *Brown*, 381 U.S. 437, 443 (1965). Divesting the United States Attorney of discretion would run afoul of both aspects of the separation of powers by stripping the Executive of its proper constitutional authority and by vesting improper power in Congress.

First, as the cases cited above demonstrate, Congress may not deprive the Executive of its prosecutorial discretion. In areas where the President has specific executive authority, Congress may establish standards for the exercise of that authority, but it may not remove all Presidential authority. For example, Congress may require the President to make appointments to certain executive positions and may define the qualifications for those positions, but it may not select the particular individuals whom the President must appoint to those positions. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976). Similarly, Congress may adopt the criminal provisions for which individuals may be prosecuted and impose certain qualifications on how the Executive should select individuals for prosecution, but it may not identify the particular individuals who must be prosecuted. The courts have declared that the ultimate decision with respect to prosecution of individuals must remain an executive function under the Constitution.

Second, if Congress could specify an individual to be prosecuted, it would be exercising powers that the Framers intended not be vested in the legislature. 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 United States* v. *Brown*, 381 U.S. 437 (1965); *United States* v. *Lovett*, 328 U.S. 303 (1946). The constitutional role of Congress is to adopt general legislation that will be applied and implemented 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); *see United States* v. *Brown*, 381 U.S. 437, 446 (1965). The Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. As the Supreme Court stated in *Lovett*:

> 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.

328 U.S. at 317. Justice Powell has echoed this concern: "The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'" *INS* v. *Chadha*, 462 U.S. 917, 961 (1983) (Powell, J. concurring). As we have shown above, courts may not require prosecution of specific individuals, even though the Judicial Branch is expressly assigned the role of adjudicating individual guilt. *A fortiori*, the Legislative Branch, which is assigned the role of passing laws of general applicability and specifically excluded from questions of individual guilt or innocence, may not decide on an individual basis who will be prosecuted.

These constitutional principles of prosecutorial discretion apply even though the issue here is referral to the grand jury and not commencement of a criminal case after indictment. A referral to a grand jury commences the criminal prosecution process. That step is as much a part of the function of executing the laws as is the decision to sign an indictment. The cases expressly recognize that prosecutorial discretion applies at any stage of the investigative process, even to the decision whether to begin an investigation at all. *See Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Smith* v. *United States*, 375 F.2d 243, 248 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). In the latter case, the court emphasized that prosecutorial discretion was protected "no matter whether these decisions are made during the investigation or prosecution of offenses." 375 F.2d at 248. Moreover, if the Executive has already determined that, as a matter of law, no violation of the law has occurred, it would serve no practical purpose to refer a case to the grand jury. Given the importance of these constitutional principles and the fundamental need to preserve the Executive's power to enforce the laws, we see no reason for distinguishing between the decision to prosecute and the decision to refer to the grand jury in this case.[28]

For all of the above reasons, as a matter of statutory construction strongly reinforced by constitutional separation of powers principles, we believe that the United States Attorney and the Attorney General, to whom the United States Attorney is responsible, retain their discretion not to refer a contempt of Congress citation to a grand jury. It follows, of course, that we believe that even if the provision of a statute requiring reference to a grand jury were to be upheld, the balance of the prosecutorial process could not be mandated.

[28] A statute giving one house of Congress the power to *direct* an Executive Branch official to take any particular action also raises a separate issue under the Supreme Court's decision in *INS* v. *Chadha*, 462 U.S. 917 (1983). Under the current contempt statute, the role of the House or Senate in simply referring a matter to the United States Attorney for possible prosecution raises no substantial issue under *Chadha* because the House or Senate is acting, in a sense, as a private citizen would — by reporting a possible violation of federal criminal law. Thus, *Chadha's* proscription of actions by one house (or two houses or a congressional committee) that are designed to have "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch" would be inapplicable. *Id* at 952. If the contempt statute precluded prosecutorial discretion, however, one house would be empowered to impose on the United States Attorney an affirmative legal duty to initiate a prosecution and to take certain steps in that prosecution. To empower one house of Congress in that manner would appear to be contrary to the clear language and rationale of *Chadha*. This is not, of course, to say that Congress' attempt to impose such an obligation on the United States Attorney by plenary legislation in a specific case would be constitutional; it is to say that a permanent mechanism to be triggered by the vote of one house raises a significant additional constitutional concern.

B. Whether the Criminal Contempt of Congress Statute Applies to an Executive Official Who Asserts, On Direct Orders of the President, the President's Claim of Executive Privilege

We next consider, aside from the issue of prosecutorial discretion, whether the criminal contempt of Congress statute is intended to apply, or constitutionally could be applied, to Presidential claims of executive privilege.

1. Previous Department of Justice Interpretations of the Contempt of Congress Statute

The Department of Justice has previously taken the position that the criminal contempt of Congress statute does not apply to executive officials who assert claims of executive privilege at the direction of the President. In 1956, Deputy Attorney General (subsequently Attorney General) William P. Rogers took this position before a congressional subcommittee investigating the availability of information from federal departments and agencies. In a lengthy memorandum of law, Deputy Attorney General Rogers set forth the historical basis of executive privilege and concluded that in the context of Presidential assertions of the privilege, the contempt of Congress statute was "inapplicable to the executive departments." *See Hearings Before a Subcommittee of the House Committee on Government Operations*, 84th Cong., 2d Sess. 2933 (1956).[29] We are not aware of any subsequent Department position that reverses or weakens this conclusion, and we have found no earlier Department position to the contrary.

We believe that the Department's long-standing position that the contempt of Congress statute does not apply to executive officials who assert Presidential claims of executive privilege is sound, and we concur with it. Our conclusion is based upon the following factors: (1) the legislative history of the contempt of Congress statute demonstrates that it was not intended to apply to Presidential assertions of executive privilege; and (2) if the statute were construed to apply to Presidential assertions of executive privilege, it would so inhibit the President's ability to make such claims as to violate the separation of powers.

2. The Legislative History of the Contempt of Congress Statute

Neither the legislative history nor the historical implementation of the contempt statute supports the proposition that Congress intended the statute to apply to executive officials who carry out a Presidential assertion of executive privilege. The criminal contempt statute was originally enacted in 1857 during proceedings in the House of Representatives to consider a contempt of Congress citation against a New York Times correspondent who had refused to

[29] The memorandum cited, *inter alia*, a 1909 Senate debate over the issue of executive privilege in which Senator Dolliver questioned "where Congress gets authority either out of the Constitution or the laws of the United States to order an executive department about like a servant." 43 Cong. Rec. 3732 (1909) Other historical examples cited by the report are discussed below.

answer questions put to him by a select committee appointed by the House to investigate charges of bribery of certain Representatives. As a result of the committee's unavailing efforts to obtain the reporter's testimony, the committee chairman introduced a bill designed "more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to deliver testimony." 42 Cong. Globe 404 (1857). The bill was supported as a necessary tool in the House's efforts to investigate the allegations of bribery. *See id.* at 405 (remarks of the Speaker), 426 (remarks of Sen. Toombs), 427 (remarks of Rep. Davis), 445 (remarks of Sen. Brown). The bill was rushed through Congress in less than a week in order to permit the House to bring greater pressure on the reporter to reveal the alleged source of the congressional corruption. That the bill was sponsored by the select committee, and not the Judiciary Committee, further demonstrates that the bill was not the result of a general consideration of Congress' contempt power, but was enacted as an expedient to aid a specific investigation. Thus, the circumstances of the bill's passage certainly do not affirmatively suggest that Congress anticipated application of the statute to instances in which the President asserted a claim of executive privilege.

In fact, the sponsor of the bill disclaimed any such far-reaching implications. Representative Dunn asked the sponsor, Representative Orr, what impact the proposed bill would have on diplomatic secrets, one of the principal areas in which the President had historically asserted a privilege of confidentiality. Representative Dunn stated that use of the contempt statute by Congress to force disclosure of such material "might be productive of great mischief, and in time of war of absolute ruin of the country." 42 Cong. Globe 431 (remarks of Rep. Dunn). Representative Orr replied, "I can hardly conceive such a case" and emphasized that the bill should not be attacked "by putting instances of the extremest cases" because the "object which this committee had in view was, where there was corruption in either House of Congress, to reach it." *Id.* at 431 (remarks of Rep. Orr). The implication is that Congress did not intend the bill to apply to Presidential assertions of privilege.[30]

[30] The legislative history contains one reference to the application of the statute against executive officials. During the floor debates, Representative Marshall attacked the bill by claiming that it "proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people." 42 Cong. Globe at 429. This statement does not, however, suggest that the statute was intended to apply to Presidential assertions of executive privilege. Indeed, virtually all previous assertions of executive privilege against Congress had been made by the President himself, and Congress expressed no intent to utilize the criminal contempt provisions against the President. Representative Marshall's statement, therefore, simply lends support to the proposition, with which we agree, that there are certain circumstances in which the congressional contempt statute might be utilized against an executive official, such as instances in which an executive official, acting on his own, engaged in disruptive and contumacious conduct during a congressional hearing, or in which an executive official, acting on his own, committed an offense. *See Marshall* v. *Gordon*, 243 U.S. 521 (1917). As the remainder of Representative Marshall's remarks demonstrate, the principal force driving the bill was Congress' desire to obtain an expeditious method for investigating questions regarding the integrity of Congress and not to provide Congress with a statute requiring the President to prosecute criminally those who had asserted the President's constitutionally based claim of executive privilege. We have found no evidence in the legislative history that supports an intention to apply the proposed statute in such a context.

In the years preceding the adoption of the statute, the President had, on a number of occasions, withheld documents from Congress under a claim of executive privilege, and many of these instances had been hotly contested in the public arena, and at least five of these instances occurred within the decade immediately preceding the enactment of the congressional contempt statute. *See supra* note 19 (collecting authorities). In spite of these highly visible battles over the subject of executive privilege, we have located no indication in the legislative history of the criminal contempt statute that Congress intended the statute to provide a remedy for refusals to produce documents pursuant to a Presidential claim of executive privilege.

The natural inference to be drawn from this vacuum in the legislative history is reinforced by Congress' failure, as far as we know, *ever* to utilize its inherent power of arrest to imprison Executive Branch officials for contempt of Congress for asserting claims of executive privilege, even though Congress had previously asserted and exercised its clearly recognized right to do so with respect to other instances of contempt by private citizens. *See Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821); *Ex Parte Nugent*, 18 F. Cas. 471 (C.C.D.C. 1848). The absence of any congressional discussion of the use of the contempt power against Presidential claims of executive privilege and Congress' previous failure ever to attempt to use its inherent contempt power in such cases, strongly suggest that the statute was not intended to apply to such assertions.

This conclusion is supported by the subsequent history of the congressional contempt statute. Since enactment of the statute in 1857, there have been numerous instances in which the President has withheld documents from Congress under a claim of executive privilege. Despite the fact that many of these disputes were extraordinarily controversial, until the citation of the EPA Administrator in December 1982, 125 years after the contempt statute was enacted, neither house of Congress had ever voted to utilize the contempt statute against a Presidential assertion of executive privilege. In fact, during congressional debates over Presidential refusals to produce documents to Congress, there have been express acknowledgements by members of Congress that Congress had no recourse against the Executive if the President asserted executive privilege. In 1886, the Senate engaged in a prolonged debate over President Cleveland's order to his Attorney General not to produce to Congress documents concerning the dismissal of a United States Attorney. The debate was intense, controversial, and memorable; 23 years after the debate a Senator termed it the "most remarkable discussion which was ever had upon this question [of the President's right to withhold documents from Congress]." 43 Cong. Rec. 841 (1909) (remarks of Sen. Bacon). During this debate, even Senators who insisted upon the Senate's right to receive the documents recognized that if the President ordered them not to be produced, "there is no remedy." 17 Cong. Rec. 2800 (1886) (remarks of Sen. Logan); *see also id.* at 2737 (1886) (remarks of Sen. Voorhees).[31]

[31] The only remedy then recognized by the Senators was the ultimate sanction of impeachment. *See* 17

Continued

Congress' failure to resort to the contempt statute during any of the multitude of robust conflicts over executive privilege during the previous century and one quarter and Congress' own explicit recognition that it was without a remedy should the President order the withholding of documents, strongly suggest that Congress never understood the statute to apply to an executive official who asserted the President's claim of executive privilege.[32]

3. Prudential Reasons for Construing the Contempt Statute Not To Apply to Presidential Assertions of Privilege

Courts traditionally construe statutes in order to avoid serious doubts about a statute's constitutionality. *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). As stated by the United States Court of Appeals for the District of Columbia Circuit, "when one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a 'clear statement' of contrary legislative intent." *United States* v. *Brown*, 483 F.2d 1314, 1317 (D.C. Cir. 1973) (quoting *United States* v. *Thompson*, 452 F.2d 1333, 1337 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972)).

When a possible conflict with the President's constitutional prerogatives is involved, the courts are even more careful to construe statutes to avoid a constitutional confrontation. A highly significant example may be found in the procedural history and holding of *United States* v. *Nixon*, 418 U.S. 683 (1974), in which the Court construed the limitation in 28 U.S.C. § 1291 (that appeals be taken only from "final" decisions of a district court) in order to permit the President to appeal an adverse ruling on his claim of executive privilege without having to place himself in contempt of court. Although the plain language of that statute seemed to preclude an appeal of a lower court's

[31] (. . . continued)
Cong. Rec. 2737, 2800 (1886). As we note below, a much more effective and less controversial remedy is available — a civil suit to enforce the subpoena — which would permit Congress to acquire the disputed records by judicial order. *See also Senate Select Committee on Presidential Campaign Practices* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc).

[32] Congress' practices with respect to the contempt statute and the absence of any previous application of the statute to an Executive Branch official in these circumstances are highly probative of the meaning and applicability of the statute. In general, the Supreme Court has examined historical practice to determine the scope of Congress' powers. For example, in determining the scope of Congress' power to call and examine witnesses, the Court looked to the historical experience with respect to investigations and concluded:

> when [Congress'] practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers; and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

McGrain v. *Daugherty*, 273 U.S. 135, 174 (1927); *see also Fairbank* v. *United States*, 181 U.S. 283, 308 (1901). Moreover, the Court traditionally gives great weight to a contemporaneous construction of a statute by the agency charged with its execution. *See Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961); *Unemployment Compensation Comm'n* v. *Aragon*, 329 U S. 143, 153 (1946). In this instance, Congress is responsible for taking the first step in implementing the contempt statute. Therefore, Congress' previous interpretations and past uses of the statute are analogous to the contemporaneous construction of the agency charged with implementation of the statute, and are of significance in determining the meaning of the statute.

interlocutory ruling on an evidentiary matter, the Court construed the statute to permit an immediate appeal, without going through the otherwise required contempt proceeding:

> The 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 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.

Congress itself has previously recognized the impropriety of resolving executive privilege disputes in the context of criminal contempt proceedings. During the dispute over the Watergate tapes, Congress provided a civil enforcement mechanism through which to test the President's claim of executive privilege. Senator Ervin, the sponsor of the bill, noted in his explanatory statement to the Senate that the use of criminal contempt "may be inappropriate, unseemly, or nonefficacious where executive officers are involved." 119 Cong. Rec. 35715 (1973). In defending the civil enforcement procedure before the district court, Congress argued that in that case the contempt procedures would be "inappropriate methods for the presentation and resolution of the executive privilege issue," and that a criminal proceeding would be "a manifestly awkward vehicle for determining the serious constitutional question here presented." Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, Civ. No. 1593–73, at 5 (D.D.C. Aug. 28, 1973).

The United States Court of Appeals for the District of Columbia Circuit has stated on several occasions that criminal contempt proceedings are an inappropriate means for resolving document disputes, especially when they involve another governmental entity. In *Tobin* v. *United States*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962), the court reversed a contempt of Congress conviction on the ground that the congressional subpoena had gone beyond the investigative authority delegated to the committee that issued the subpoena. After deciding this issue, however, the court felt "inclined to add a few words in conclusion" concerning the problems involved in a criminal contempt of Congress case against a public official. In *dictum*, the court noted that the "conflicting duality inherent in a request of this nature is not particularly conducive to the giving of any satisfactory answer, no matter what the answer should prove to be," and it cited the "eloquent plea" of District Judge Youngdahl in the case below, which read in part:

> Especially where the contest is between different governmental units, the representative of one unit in conflict with another should not have to risk jail to vindicate his constituency's rights.

> Moreover, to raise these issues in the context of a contempt case is to force the courts to decide many questions that are not really relevant to the underlying problem of accommodating the interest of two sovereigns.

306 F.2d at 276. *See also United States* v. *Fort*, 443 F.2d 670, 677–78 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

The analysis contained in *United States* v. *Nixon* demonstrates that principles of the separation of powers compel the application of special rules when a Presidential claim of a constitutional privilege is in tension with the request of another branch for confidential Executive Branch records. In discussing the issue of executive privilege in that case in response to a judicial subpoena, the Court stressed that the President's assertion of privilege was not to be treated as would a claim of a statutory or common law privilege by a private citizen. 418 U.S. at 708, 715. The President's constitutional role as head of one of three separate branches of government means that special care must be taken to construe statutes so as not to conflict with his ability to carry out his constitutional responsibilities. *See, e.g., Myers* v. *United States*, 272 U.S. 52 (1926) (upholding the President's removal power against limitations Congress sought to impose). The same special attention is provided, of course, to the other two branches when they assert responsibilities or prerogatives peculiar to their constitutional duties. *See, e.g., Gravel* v. *United States*, 408 U.S. 606 (1972) (extending immunity of Speech and Debate Clause to congressional assistants); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (granting absolute civil immunity for judges' official actions).

In this case, the congressional contempt statute must be interpreted in light of the specific constitutional problems that would be created if the statute were interpreted to reach an Executive Branch official such as the EPA Administrator in the context considered here.[33] As explained more fully below, if executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege.[34]

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[33] The same principle applies to protect the constitutional functions of the other branches. The separation of powers would similarly seem to require that a statute that made it a crime to disregard a statute passed by Congress be read not to apply to a judge who struck down a congressional enactment as unconstitutional.

[34] In addition to the encroachment on the constitutionally required separation of powers that prosecution of an Executive Branch official in this context would entail, there could be a serious due process problem if such an official were subjected to criminal penalties for obeying an express Presidential order, an order which was accompanied by advice from the Attorney General that compliance with the Presidential directive was not only consistent with the constitutional duties of the Executive Branch, but also affirmatively necessary in order to aid the President in the performance of his constitutional obligations to take care that the law was faithfully executed. *See Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Raley* v. *Ohio*, 360 U.S. 423 (1959).

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4. The Constitutional Implications of Application of the Contempt of Congress Statute to Executive Branch Officials Who Assert the President's Claim of Privilege

The Supreme Court has stated that, in determining whether a particular statute

> disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States* v. *Nixon*, 418 U.S. at 711–712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Nixon v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). Thus, in analyzing this separation of powers issue, one must look first to the impact that application of the congressional contempt statute to Presidential assertions of executive privilege would have on the President's ability to carry out his constitutionally assigned functions. Then, if there is a potential for disruption, it is necessary to determine whether Congress' need to impose criminal contempt sanctions in executive privilege disputes is strong enough to outweigh the impact on the Executive's constitutional role.

In this instance, at stake is the President's constitutional responsibility to enforce the laws of the United States and the necessarily included ability to protect the confidentiality of information vital to the performance of that task. As explained earlier in this memorandum, the authority to maintain the integrity of certain information within the Executive Branch has been considered by virtually every President to be essential to his capacity to fulfill the responsibilities assigned to him by the Constitution. Thus, as discussed above, and as the Supreme Court has recognized, the capacity to protect the confidentiality of some information is integral to the constitutional role of the President.

For these reasons, the Supreme Court has ruled that the President's assertion of executive privilege is *presumptively valid* and can be overcome only by a clear showing that another branch cannot responsibly carry out its assigned constitutional function without the privileged information. *United States* v. *Nixon*, 418 U.S. at 708. In *Nixon*, the Court stated that "upon receiving a claim

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[34] (. . . continued)

Furthermore, a person can be prosecuted under § 192 only for a "willful" failure to produce documents in response to a congressional subpoena. *See United States* v. *Murdock*, 290 U.S. 389, 397–98 (1933); *Townsend* v. *United States*, 95 F.2d 352, 359 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938). There is some doubt whether obeying the President's direct order to assert his constitutional claim of executive privilege would amount to a "willful" violation of the statute. Moreover, reliance on an explicit opinion of the Attorney General may negate the required *mens rea* even in the case of a statute without a willfulness requirement. *See* Model Penal Code § 2.04(3)(b); *United States* v. *Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976) (Mehrige J., concurring).

of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged." 418 U.S. at 713. The United States Court of Appeals for the District of Columbia Circuit has stated that this presumptive privilege initially protects documents "even from the limited intrusion represented by *in camera* examination of the conversations by a court." *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 730 (D.C. Cir. 1974) (en banc). The court went on to note:

> So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations we believed in Nixon v. Sirica, and continue to believe, that the effective functioning of the presidential office will not be impaired.

Id. at 730. In order to overcome the presumptively privileged nature of the documents, a congressional committee must show that "the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions." *Id.* at 731 (emphasis added). Thus, the President's assertion of executive privilege is far different from a private person's individual assertion of privilege; it is entitled to special deference due to the critical connection between the privilege and the President's ability to carry out his constitutional duties.

Application of the criminal contempt statute to Presidential assertions of executive privilege would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions. If the statute were construed to apply to Presidential assertions of privilege, the President would be in the untenable position of having to place a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a responsibility that he found necessary to the performance of his constitutional duty. Even if the privilege were upheld, the executive official would be put to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege. As Judge Learned Hand stated with respect to the policy justifications for a prosecutor's immunity from civil liability for official actions,

> to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to [sic] satisfy a jury of his good faith.

Gregoire v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). The Supreme Court has noted, with respect to the similar issue of

executive immunity from civil suits, that "among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 752 n.32 (1982); *see also Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Butz* v. *Economou*, 438 U.S. 478 (1978). Thus, the courts have recognized that the risk of civil liability places a pronounced burden on the ability of government officials to accomplish their assigned duties, and have restricted such liability in a variety of contexts. *Id.*[35] The even greater threat of criminal liability, simply for obeying a Presidential command to assert the President's constitutionally based and presumptively valid privilege against disclosures that would impair his ability to enforce the law, would unquestionably create a significant obstacle to the assertion of that privilege. *See United States* v. *Nixon*, 418 U.S. 683 (1974).

By contrast, the congressional interest in applying the criminal contempt sanctions to a Presidential assertion of executive privilege is comparatively slight. Although Congress has a legitimate and powerful interest in obtaining any unprivileged documents necessary to assist it in its lawmaking function, Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena.[36] Congress' use of civil enforcement power instead of the criminal contempt statute would not adversely affect Congress' ultimate interest in obtaining the documents. Indeed, a conviction of an Executive Branch official for contempt of Congress for failing to produce subpoenaed documents would not result in any order for the production of the documents.[37] A civil suit to enforce the subpoena would be aimed at the congressional objective of obtaining the documents, not at inflicting punishment on an individual who failed to produce them. Thus, even if criminal sanctions were not available against an executive official who asserted the President's claim of privilege, Congress would be able to vindicate a legitimate desire to obtain documents if it could establish that its need for the records outweighed the Executive's interest in preserving confidentiality.

The most potent effect of the potential application of criminal sanctions would be to deter the President from asserting executive privilege and to make it difficult for him to enlist the aid of his subordinates in the process. Although

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[35] *See also Barr* v. *Matteo*, 360 U.S. 564 (1959), *Spalding* v. *Vilas*, 161 U.S. 483 (1896) Some officials, such as judges and prosecutors, have been given absolute immunity from civil suits arising out of their official acts. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), *Pierson* v. *Ray*, 386 U.S. 547 (1967).

[36] It is arguable that Congress already has the power to apply for such civil enforcement, since 28 U.S C. § 1331 has been amended to eliminate the amount in controversy requirement, which was the only obstacle cited to foreclose jurisdiction under § 1331 in a previous civil enforcement action brought by the Senate. *See Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51 (D.D.C. 1973). In any event, there is little doubt that, at the very least, Congress may authorize civil enforcement of its subpoenas and grant jurisdiction to the courts to entertain such cases. *See Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C Cir. 1974) (en banc); Hamilton and Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 Harv. J on Legis. 145 (1984).

[37] *See* Hamilton and Grabow, *supra*, 21 Harv J. on Legis. at 151.

this significant *in terrorem* effect would surely reduce claims of executive privilege and, from Congress' perspective, would have the salutary impact of virtually eliminating the obstacles to the obtaining of records, it would be inconsistent with the constitutional principles that underlie executive privilege to impose a criminal prosecution and criminal penalties on the President's exercise of a presumptively valid constitutional responsibility. The *in terrorem* effect may be adequate justification for Congress' use of criminal contempt against private individuals, but it is an inappropriate basis in the context of the President's exercise of his constitutional duties. In this respect it is important to recall the statement of Chief Justice Marshall, sitting as a trial judge in the *Burr* case, concerning the ability of a court to demand documents from a President: "In no case of this kind would a court be required to proceed against the President as against an ordinary individual." *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807).[38] This fundamental principle, arising from the constitutionally prescribed separation of powers, precludes Congress' use against the Executive of coercive measures that might be permissible with respect to private citizens. The Supreme Court has stated that the fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential equality. *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629–30 (1935).

Congress' use of the coercive power of criminal contempt to prevent Presidential assertions of executive privilege is especially inappropriate given the presumptive nature of the privilege. In cases involving congressional subpoenas against private individuals, courts start with the presumption that Congress has a right to all testimony that is within the scope of a proper legislative inquiry. *See Barenblatt* v. *United States*, 360 U.S. 109 (1959); *McGrain* v. *Daugherty*, 273 U.S. 135 (1927). As noted above, however, the President's assertion of executive privilege is presumptively valid, and that presumption may be overcome only if Congress establishes that the requested information "is demonstrably critical to the responsible fulfillment of the Committee's functions." *See Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d at 731; *see also United States* v. *Nixon*, 418 U.S. at 708–09. If Congress could use the power of criminal contempt to coerce the President either not to assert or to abandon his right to assert executive privilege, this clearly established presumption would be reversed and the presumptive privilege nullified.

Congress has many weapons at its disposal in the political arena, where it has clear constitutional authority to act and where the President has corresponding political weapons with which to do battle against Congress on equal terms. By wielding the cudgel of criminal contempt, however, Congress seeks to invoke

[38] The *Nixon* Court thought this statement significant enough in the context of an executive privilege dispute to quote it in full at two separate places in its decision *United States* v. *Nixon*, 418 U.S. at 708, 715.

the power of the third branch, not to resolve a dispute between the Executive and Legislative Branches and to obtain the documents it claims it needs, but to punish the Executive, indeed to punish the official who carried out the President's constitutionally authorized commands,[39] for asserting a constitutional privilege. That effort is inconsistent with the "spirit of dynamic compromise" that requires accommodation of the interests of both branches in disputes over executive privilege. *See United States* v. *American Telephone & Telegraph Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). In the AT&T case, the court insisted on further efforts by the two branches to reach a compromise arrangement on an executive privilege dispute and emphasized that

> the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

Id. at 130. Congress' use of the threat of criminal penalties against an executive official who asserts the President's claim of executive privilege, flatly contradicts this fundamental principle.[40]

The balancing required by the separation of powers demonstrates that the contempt of Congress statute cannot be constitutionally applied to an executive official in the context under consideration. On the one hand, Congress has no

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[39] One scholar (former Assistant Attorney General for the Civil Division, and now Solicitor General, Rex Lee) has noted that

> when the only alleged criminal conduct of the putative defendant consists of obedience to an assertion of executive privilege by the President from whom the defendant's governmental authority derives, the defendant is not really being prosecuted for conduct of his own. He is a defendant only because his prosecution is one way of bringing before the courts a dispute between the President and the Congress. It is neither necessary nor fair to make him the pawn in a criminal prosecution in order to achieve judicial resolution of an interbranch dispute, at least where there is an alternative means for vindicating congressional investigative interests and for getting the legal issues into court.

Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y U. L Rev. 231, 259.

[40] Even when a privilege is asserted by a cabinet official, and not the President, courts are extremely reluctant to impose a contempt sanction and are willing to resort to it only in extraordinary cases and only after all other remedies have failed. In *In re Attorney General*, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979), the court granted the government's mandamus petition to overturn a district court's civil contempt citation against the Attorney General for failing to turn over documents for which he had asserted a claim of privilege. The court recognized that even a *civil* contempt sanction imposed on an Executive Branch official "has greater public importance, with separation of powers overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant." 596 F.2d at 64. Therefore, the court held that holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted. *Id.* at 65. In the case of a Presidential claim of executive privilege, there is even more reason to avoid contempt proceedings because the privilege claim has been made as a constitutionally based claim by the President himself and the sanction involved is criminal and not civil contempt. The use of criminal contempt is especially inappropriate in the context under discussion because Congress has the clearly available alternative of civil enforcement proceedings.

compelling need to employ criminal prosecution in order to vindicate its rights. The Executive, however, must be free from the threat of criminal prosecution if its right to assert executive privilege is to have any practical substance. Thus, when the major impact on the President's ability to exercise his constitutionally mandated function is balanced against the relatively slight imposition on Congress in requiring it to resort to a civil rather than a criminal remedy to pursue its legitimate needs,[41] we believe that the constitutionally mandated separation of powers requires the statute to be interpreted so as not to apply to Presidential assertions of executive privilege.[42]

The construction of the statute that is dictated by the separation of powers is consistent with the legislative history of the statute and the subsequent legislative implementation of the statute. Although at the time the criminal statute was enacted, Congress was well aware of the recurring assertions of the right to protect the confidentiality of certain Executive Branch materials, it gave no indication that it intended the contempt statute to tread upon that constitutionally sensitive area. In the many debates on executive privilege since the adoption of the statute, Congress at times has questioned the validity of a Presidential assertion of privilege, but, until December of 1982, it never attempted to utilize the criminal contempt sanction to punish someone for a President's assertion of privilege. Regardless of the merits of the President's action, the fundamental balance required by the Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the Constitution. We therefore conclude that the contempt of Congress statute does not apply to an executive official who carries out the President's claim of executive privilege.

Nearly every President since George Washington has found that in order to perform his constitutional duties it is necessary to protect the confidentiality of certain materials, including predecisional Executive Branch deliberations, national security information, and sensitive law enforcement proceedings, from disclosure to Congress. No President has rejected the doctrine of executive privilege; all who have addressed the issue have either exercised the privilege, attested to its importance, or done both. Every Supreme Court Justice and every Judge of the United States Court of Appeals for the District of Columbia Circuit who has considered the question of executive privilege has recognized its validity and importance in the constitutional scheme. Executive privilege, properly asserted, is as important to the President as is the need for confidenti-

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[41] *See* Hamilton and Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 Harv. J. on Legis. 145 (1984).

[42] We believe that this same conclusion would apply to any attempt by Congress to utilize its inherent "civil" contempt powers to arrest, bring to trial, and punish an executive official who asserted a Presidential claim of executive privilege. The legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect to the penalties imposed). *See* 42 Cong. Globe 406 (remarks of Rep. Davis). Therefore, 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.

ality at certain times in the deliberations of the Justices of the Supreme Court and in the communications between members of Congress and their aides and colleagues. Congress itself has respected the President's need for confidentiality; it has never arrested an executive official for contempt of Congress for failing to produce subpoenaed documents and never, prior to the heated closing moments of the 97th Congress in December of 1982, did a House of Congress seek to punish criminally an executive official for asserting a President's claim of privilege.

Naturally, Congress has and always will resist claims of executive privilege with passion and vigor. Congress aggressively asserts its perceived institutional prerogatives, and it will surely oppose any effort by the President to withhold information from it. If it could eliminate claims of executive privilege by requiring that an official who asserts such a claim on behalf of the President be prosecuted criminally, it would surely be in favor of doing so. Thus, the tension between the relative strengths and institutional prerogatives of Congress and the President necessarily reaches a high level of intensity in any case involving a claim of executive privilege. The specter of mandatory criminal prosecution for the good-faith exercise of the President's constitutional privilege adds a highly inflammatory element to an already explosive environment. We believe that the courts, if presented the issue in a context similar to that discussed in this memorandum, would surely conclude that a criminal prosecution for the exercise of a presumptively valid, constitutionally based privilege is not consistent with the Constitution. The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual.

In some respects, the tensions between the branches, which become exacerbated during these conflicts, and the pressure placed on the President and his subordinates in this context, call to mind the comments of Chief Justice Chase concerning the impeachment trial of President Andrew Johnson, over which the Chief Justice presided. One of the charges against President Johnson was that he had fired Secretary of War Stanton in violation of the Tenure of Office Act, which purported to strip the President of his removal power over certain Executive Branch officials.[43] Chief Justice Chase declared that the President had a duty to execute a statute passed by Congress which he believed to be unconstitutional "precisely as if he held it to be constitutional." However, he added, the President's duty changed in the case of a statute which

> directly attacks and impairs the executive power confided to him by [the Constitution]. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.

[43] The Tenure of Office Act was, of course, later declared to have been unconstitutional. *Myers* v. *United States*, 272 U.S. 52 (1926).

* * *

> How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no *right* to *defend* it against an act of Congress, sincerely believed by him to have been passed in violation of it?[44]

If the President is to preserve, protect, and defend the Constitution, if he is faithfully to execute the laws, there may come a time when it is necessary for him both to resist a congressional demand for documents and to refuse to prosecute those who assist him in the exercise of his duty. To yield information that he in good conscience believes he must protect in order to perform his obligation, would abdicate the responsibilities of his office and deny his oath. To seek criminal punishment for those who have acted to aid the President's performance of his duty would be equally inconsistent with the Constitution.

In the narrow and unprecedented circumstances presented here, in which an Executive Branch official has acted to assert the President's privilege to withhold information from a congressional committee concerning open law enforcement files, based upon the written legal advice of the Attorney General, the contempt of Congress statute does not require and could not constitutionally require a prosecution of that official, or even, we believe, a referral to a grand jury of the facts relating to the alleged contempt. Congress does not have the statutory or constitutional authority to require a particular case to be referred to the grand jury. In addition, because the Congress has an alternative remedy both to test the validity of the Executive's claim of privilege and to obtain the documents if the courts decide that the privilege is outweighed by a valid and compelling legislative need, a criminal prosecution and the concomitant chilling effect that it would have on the ability of a President to assert a privilege, is an unnecessary and unjustified burden that, in our judgment, is inconsistent with the Constitution.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[44] R. Warden, *An Account of the Private Life and Public Services of Salmon Portland Chase* 685 (1874). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that the Tenure of Office Act was unconstitutional. *Id. See* M. Benedict, *The Impeachment and Trial of Andrew Johnson* 154–55 (1973). Ultimately, the Senate did admit evidence that the President had desired to initiate a court test of the law. *Id.* at 156.

Gifts Received on Official Travel

Gifts given to United States employees by a Japanese government agency may be retained consistent with 5 U.S.C. § 7342 and implementing regulations if the items are worth less than $140. More valuable gifts must be deposited with the employing agency.

Gifts from private Japanese organizations are governed by 19 U.S.C. § 209(a). That statute, as consistently construed by the Department of Justice, makes it a crime to receive items of any value given as additional compensation for performing government service. The gifts from private Japanese organizations appear to have been given as a result of the federal employee's official duties, and may not be accepted under § 209(a), and pursuant to the statute, must be returned to their donors.

In addition, Department of Justice conflict-of-interest regulations would independently prohibit acceptance of these gifts if the donors have litigation or financial business with the Department.

June 15, 1984

MEMORANDUM OPINION FOR THE CHIEF,
FOREIGN COMMERCE SECTION, ANTITRUST DIVISION

An employee of the Antitrust Division requested an opinion on the Department's policy regarding disposition of gifts recently received by certain government employees while attending official bilateral antitrust consultations in Japan. We understand the facts to be as follows: Eight employees (four from the Department of Justice and four from the Federal Trade Commission) each were given either a leather wallet or a case for eyeglasses of unknown value by the Japan Fair Trade Commission, a government agency. In addition, each was given a small tape recorder, valued at approximately $120, by the Corporation A in Japan while on a tour of that company's plant. Finally, a regional association of private Japanese manufacturers gave each employee a small item of pearl jewelry, ranging in value from $56 to $78.

The gifts from the Government of Japan are regulated by 5 U.S.C. § 7342, which permits the acceptance and retention by an employee of a gift from a foreign government if the gift is "of minimal value tendered and received as a souvenir or mark of courtesy." 5 U.S.C. § 7342(c)(1)(A); *see* 28 C.F.R. § 45.735–14(d) (1983). "Minimal value," which the statute directs to be determined administratively, is defined, as of 1983, to mean a retail value in the United States of $140 or less. 41 C.F.R. § 101–49.001–5 (1983). Therefore, if the leather item tendered to each employee by the Japanese Government is worth $140 or less, it may be retained. If it is worth more than $140, the statute and

regulations provide a procedure for depositing the gift with the employing agency for disposal or official use.[1] 5 U.S.C. § 7342(c)(2); 41 C.F.R. §§ 101–49.101 *et seq.*

Retention of the gifts given by private organizations — the tape recorders and pearl jewelry — is not covered by the foreign gifts statute because those items were not given by representatives of a foreign government. With respect to these gifts, we believe there is a serious problem under 18 U.S.C. § 209(a), which makes it a crime, with certain exceptions not here relevant, to give or receive "any salary, or contribution to or supplementation of salary, as compensation for" the recipient's services to the federal government. Because the statute has no exception for items of minimal value, the dispositive issue in a § 209 inquiry is whether a gift is offered on account of the recipient's performance of official duties. This Department has consistently construed § 209(a) and its predecessor, 18 U.S.C. § 1914, to forbid only payments intended to serve as additional compensation to an individual for undertaking or performing government service. *See* 41 Op. Att'y Gen. 217, 221 (1955); 39 Op. Att'y Gen. 501, 503 (1940). In addition to the express statutory exceptions to § 209(a), we have recognized implicit exceptions for commemorative awards for public service. We have opined that such awards are permissible primarily because the grantors are typically detached from and disinterested in the performance of the public official's duties. Consequently these gifts do not tend to give rise to the divided loyalty or dependence on outside remuneration that § 209 was designed to prevent.

From the facts outlined above, it appears clear to us that the gifts in question were given under circumstances which were the result of the federal employees' participation in meetings with Japanese representatives, an aspect of their official duty as government employees. Furthermore, they do not appear to be motivated by a disinterested desire to honor distinguished public service. Thus we believe § 209(a) prohibits the employees' acceptance of the gifts which were tendered by private donors.

In addition, the Department's gift regulation, 28 C.F.R. § 45.735–14, would independently prohibit acceptance of these gifts on conflict-of-interest grounds if the donors have the requisite litigation or financial business with the Department. That regulation provides that a Department employee may not accept any gift from a "person" who

> (1) Has, or is seeking to obtain, contractual or other business or financial relations with the Department;
>
> (2) Conducts operations or activities that are regulated by the Department;
>
> (3) Is engaged, either as principal or attorney, in proceedings before the Departmental [sic] or in court proceedings in which the United States is an adverse party; or

[1] Additionally, those employees required to file annual public financial disclosure reports must report this gift if its value meets or exceeds $100. 5 C.F.R. § 734.301(c)

(4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duty.

28 C.F.R. § 45.735–14(a) (1983).[2]

We do not have sufficient information to determine with certainty whether either Corporation A or the trade association would fall into one of these categories. However, it is clear that the regulations define the term "person" broadly enough to encompass both of these entities. *See* 28 C.F.R. § 45.735–3(e) (1983) ("'Person' means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution"). Thus, if either entity conducts business that would classify it as one of the prohibited donors, the regulation would proscribe acceptance of gifts from that entity by Department of Justice employees.[3]

We understand that these gifts have already been accepted and have been transported to the United States via official pouch for appropriate disposition. Unlike the foreign gifts statute, however, § 209 contains no provision for depositing prohibited gifts with the United States. Under § 209(a), it is the mere acceptance of such items that constitutes a crime. Further, even if the gifts were treated as gifts to the agencies themselves, the Department of Justice could not accept them because it does not have gift authority. We must advise, therefore, that the gifts donated by non-governmental entities be returned to their donors, to effect compliance with the statute.

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

[2] The Federal Trade Commission has a similar regulation prohibiting gifts from persons having business with that Commission. *See* 16 C.F.R. § 5.11 (1984).

[3] The gifts by the Japanese Government are exempted from the regulatory prohibition if they conform to the requirements of the foreign gifts statute, discussed above. 28 C.F.R. § 735–14(d) (1983).

Authority of the Equal Employment Opportunity Commission to Conduct Defensive Litigation

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

The litigation authority of the Equal Employment Opportunity Commission is limited to that which is specifically provided by statute, namely, enforcement actions brought against private sector employers. 42 U.S.C. §§ 2000e-4(b), 2000e-5, 2000e-6. Accordingly, the Commission may not independently defend suits brought against it in connection with its federal sector administrative and enforcement and adjudicative functions, or actions brought against it by its own employees challenging Commission personnel decisions. Such suits are to be handled by attorneys under the supervision of the Attorney General.

June 21, 1984

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

This responds to your memorandum seeking the views of this Office regarding the role that the Equal Employment Opportunity Commission (EEOC or Commission) plays in defending suits brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, against the EEOC in connection with its Federal sector administrative enforcement and adjudicative responsibilities, or in actions by its own employees challenging Commission personnel decisions. You have advised us that it has been the position of the Civil Division that the EEOC lacks independent litigating authority when it is sued as a result of personnel decisions regarding Federal employment. The EEOC contends that it can represent itself in court any time it is named as defendant.

As discussed below, we conclude that, in view of the Attorney General's plenary authority over litigation on behalf of the United States and the narrow construction necessarily accorded exceptions to this authority, the EEOC's litigating authority in Title VII suits is limited to that which is specifically provided by statute, namely, enforcement actions brought against private sector employers. *See* 42 U.S.C. §§ 2000e-4(b), 2000e-5, 2000e-6. Likewise, the Commission's general grant of litigating authority, as set forth in § 2000e-4(b) and Reorganization Plan No. 1 of 1978, 92 Stat. 3781 (*reprinted in* 42 U.S.C.

§ 2000e-4 note (Supp. V 1981)), cannot fairly be read to embrace litigation involving challenges to its personnel decisions.[1] Nevertheless, while we conclude that the Commission lacks the authority to litigate independently in these cases, we believe that Commission attorneys may assist Department of Justice, or other duly authorized, attorneys in such cases, or otherwise participate in such litigation under the general supervision of the Attorney General.[2]

I. Background

A. The Attorney General's Litigating Authority

Questions concerning the litigating authority of Executive Branch agencies necessarily must begin with a recognition of the Attorney General's plenary authority over the supervision and conduct of litigation to which the United States, its agencies and departments, or officers thereof, is party. This plenary authority is rooted historically in our common law and tradition, *see Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458–59 (1868); *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866); and, since 1870, has been given a statutory basis. *See* 28 U.S.C. §§ 516, 519.[3] *See generally United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888). The rationales underlying this grant of plenary authority to the Attorney General are many. The most significant are the need to centralize the government's litigation functions under one authority to ensure (1) coordination in the development of positions taken by the government in litigation, and consideration of the potential impact of litigation upon the government as a whole; and (2) the ability of the President, as head of the Executive Branch, to supervise, through the Attorney General, the various policies of Executive Branch agencies and departments as they are implicated in litigation. Because of his government-wide perspective on matters affecting the conduct of litigation in the Executive Branch, the Attorney General is uniquely suited to carry out these functions. *See United States* v. *San Jacinto Tin Co.*, 125 U.S. at 278–80. *See also Report of the Attorney General's Task Force on Litigating Author-*

[1] Although you did not specifically request our views regarding the Commission's authority to conduct defensive litigation arising out of its enforcement responsibilities against private sector employers under Title VII, the Equal Pay Act, 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, because the issue appears to remain unsettled between the Department and the Commission, we have provided our views in Part II.B in an effort to provide a comprehensive analysis of the Commission's authority to conduct defensive litigation on its own behalf.

[2] We understand that in October 1980, the Assistant Attorney General for the Civil Division reached an agreement with the Commission's Deputy General Counsel that the Civil Division "would, as a matter of practice, permit EEOC to defend itself in these lawsuits."

[3] 28 U.S.C. § 516 provides:

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

28 U.S.C. § 519 provides:

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

ity (Oct. 28, 1982)); "The Attorney General's Role as Chief Litigator for the United States," 6 Op. O.L.C. 47 (1982).

Notwithstanding Congress' determination that the litigating functions of the Executive Branch be centralized in the Attorney General, the Attorney General's "plenary" authority over litigation involving the United States is limited to some extent by the "except as otherwise authorized by law" provisions contained in 28 U.S.C. §§ 516, 519. Nevertheless, mindful of the considerations supporting such centralization, the courts have narrowly construed statutory grants of litigating authority to agencies in derogation of the responsibilities and functions vested in the Attorney General, and have permitted the exercise of litigating authority by agencies only when the authorizing statutes were sufficiently clear and specific to ensure that Congress indeed had intended an exception to the general rule. *See, e.g., Case* v. *Bowles*, 327 U.S. 92 (1946); *ICC* v. *Southern Railway Co.*, 543 F.2d 534 (5th Cir. 1976), *aff'd*, 551 F.2d 95 (1977) (en banc); *FTC* v. *Guignon*, 390 F.2d 323 (8th Cir. 1968). *See generally Report of the Attorney General's Task Force on Litigating Authority*, *supra*; 6 Op. O.L.C. 47, *supra*.

Moreover, such exceptions are generally construed to grant litigating authority only with respect to the particular proceedings referred to in the statutory provision, and not as a broad authorization for the agency to conduct litigation in which it is interested generally. *Id. See also* "Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities," 7 Op. O.L.C. 57 (1983).

In short, the general rule regarding litigating authority on behalf of the United States is that it is presumed to be vested exclusively in the Attorney General, to be exercised under the general supervision of the Attorney General or his delegees within the Department of Justice,[4] unless such authority is clearly and unambiguously vested by statute in an officer other than the Attorney General.

B. The EEOC's General Litigating Authority

1. Title VII of the Civil Rights Act

The general litigating authority of the EEOC is set forth in Title VII of the Civil Rights Act of 1964. Section 705 provides in pertinent part:

> (1) . . . The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. . . .

[4] 28 U.S.C. § 510 authorizes the Attorney General "from time to time [to] make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

> (2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

42 U.S.C. §§ 2000e-4(b)(1), (2). In addition, § 2000e-4(g)(6) authorizes the Commission "to intervene in a civil action brought under § 2000e-5 of this title by an aggrieved party against a respondent other than a governmental agency or political subdivision." Sections 2000e-5 and 2000e-6, referred to above, constitute the enforcement provisions for Title VII of the Act and set forth the enforcement responsibilities of the Commission and the Attorney General, respectively. Section 2000e-5 authorizes the Commission, after investigating allegations of unlawful employment practices, filing charges and failing "to secure from the respondent a [timely] conciliation agreement acceptable to the Commission," to bring civil actions "against any respondent *not* a government, governmental agency, or political subdivision named in the charge . . . or to intervene in such civil action upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). In cases in which the respondent is a "government, governmental agency, or political subdivision," litigation authority rests with the Attorney General. *Id.*[5] In addition, § 2000e-5(i) authorizes the Commission to "commence proceedings to compel compliance" in any "case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under [§ 2000e-5]." Section 2000e-6, as amended by Reorganization Plan No. 1 of 1978, 92 Stat. 3781 (*reprinted in* 42 U.S.C. § 2000e-4 note (Supp. V 1981)),[6] limits the government's authority to engage in public sector "pattern or practice" enforcement litigation to the Attorney General. *See generally* 7 Op. O.L.C. 57.

In a 1983 memorandum to the Civil Rights Division, we opined that the limitations on the General Counsel's authority which are set forth in § 2000e-4(b)(1) necessarily are incorporated into the "litigating authority" granted Commission attorneys in § 2000e-4(b)(2). *See* 7 Op. O.L.C. at 61–62. We

[5] As noted above, the Commission retains authority to perform *pre*-litigation functions, *e.g.*, investigations, the filing of charges, and the securing of voluntary compliance and conciliation measures, with respect to public sector employers.

[6] Although the transfer of litigation authority in public sector "pattern or practice" suits from the EEOC to the Attorney General was accomplished pursuant to the President's authority under the Reorganization Act of 1977, 5 U.S.C. § 901, an Act which contains an unconstitutional legislative veto provision, see INS v. Chadha, 462 U S. 919 (1983), the Department has taken the position that the legislative veto provision is severable from the remaining provisions of the Act granting the President reorganization authority *See EEOC* v. *Hernando Bank*, 724 F.2d 1188 (5th Cir. 1984); *EEOC* v *Jackson County*, No. 83–1118 (W.D. Mo. Dec. 13, 1983); *Muller Optical Co.* v. *EEOC*, 574 F. Supp 946 (W.D. Tenn. 1983), *appeal pending*, No. 83–5889. *See also EEOC* v. *City of Memphis*, 581 F. Supp. 179 (W.D. Tenn. 1983) (holding that Congress has ratified the EEOC's authority under Reorganization Plan No. 1 of 1978). *But see EEOC* v. *Westinghouse Electric Co* , No. 83–1209 (W.D. Pa. Jan. 5, 1984); *EEOC* v. *Allstate Insurance Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, No. 83–1021, 52 U.S.L.W. 3889 (June 11, 1984), *appeal pending*, No. 83–4652 (5th Cir.). *See also EEOC* v. *Pan American World Airways*, 576 F. Supp. 1530 (S.D.N.Y. 1984).

concluded that to construe § 2000e-4(b)(2) without regard to § 2000e-4(b)(1) would grant Commission attorneys authority which supersedes that of the General Counsel, under whose supervision they work, pursuant to § 2000e-4(b)(1) and, moreover, that such a construction would be contrary to the general rule that exceptions to the Attorney General's plenary litigating authority are to be narrowly construed. *See also Report of the Attorney General's Task Force on Litigating Authority, supra.*

In a memorandum to this Office, the Legal Counsel to the Commission disputed this analysis.[7] Although the Legal Counsel's argument is not entirely clear, she appears to contend that the Commission was granted broad litigating authority when it was created by Title VII of the Civil Rights Act in 1964, which has not been diminished by subsequent amendments, *i.e.*, § 2000e-4(b)(1), to the Act. Regarding the limitations on the General Counsel's authority which are set forth in § 2000e-4(b)(1), the Legal Counsel opined that "section [2000e-4](b)(1) involves a different matter than section [2000e-4](b)(2), *i.e.*, the enforcement function the Commission acquired in 1972," adding that "[n]o support appears in the legislative history for the argument that [§ 2000e-4](b)(1) was intended to limit the broad grant of authority contained in [§ 2000e-4](b)(2)."

The Legal Counsel correctly notes that in 1964, the newly created Commission was granted authority to appoint attorneys who "may, at the direction of the Commission, appear for and represent the Commission in any case in court," Pub. L. No. 88–352, § 705(h), 78 Stat. 241, 259 (1964), but at that time the only matters on which the Commission was authorized to appear in court were those in which it commenced proceedings against private-sector employers to compel compliance with court orders issued in civil actions brought by aggrieved parties under § 2000e-5, *see* § 706(i), 78 Stat. at 261 (codified at 42 U.S.C. § 2000e-5(i)).[8] Thus, although the Commission was given broad "enforcement" authority under the Act, including the authority to investigate allegations of unlawful employment practices and to undertake efforts to secure voluntary compliance, with the exception noted above of suits to compel compliance with court orders secured by aggrieved parties, none of the Commission's powers under the Act at the time of its creation in 1964 entitled the Commission to conduct litigation on its own behalf. Rather, the Commission's involvement in litigation under the Act was limited to "refer[ring]

[7] Until recently, the EEOC's Office of the Legal Counsel was a subdivision of the Office of the General Counsel, headed by the "Associate General Counsel, Legal Counsel Division." We understand that, pursuant to a reorganization, the Legal Counsel Division has been removed from the General Counsel's Office, establishing it as a separate office under the Chairman's control. Although we take no position on the Commission's authority to effect such a reorganization, we do not believe that through such a reorganization, litigating authority vested by statute in the General Counsel could be transferred to an official outside of the General Counsel's control. Nor do we believe that such authority could be "created" or "inferred," if previously nonexistent, and vested in the newly constituted Legal Counsel Division.

[8] Although the 1964 Act authorized only aggrieved parties to bring unlawful employment discrimination suits under § 2000e-5, subsection (e) of that provision (presently 42 U.S.C. § 2000e-5(f)) did authorize the court, "in its discretion, [to] permit the Attorney General[, upon timely application,] to intervene in such civil action if he certifies that the case is of general public importance."

matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706 [42 U.S.C. § 2000e-5], or for the institution of a civil action by the Attorney General under section 707 [42 U.S.C. § 2000e-6, in cases involving allegations of a 'pattern or practice' of unlawful conduct], and to advis[ing], consult[ing] and assist[ing] the Attorney General on such matters." § 705(g)(6), 78 Stat. at 259.

In 1972, the Act was amended to strengthen the Commission's enforcement authority by establishing a General Counsel and authorizing him to bring actions in federal courts under certain provisions of the Act against private sector employees. *See* generally Pub. L. No. 92–261, 86 Stat. 103 (1972).[9] Section 706 of the Act, 42 U.S.C. § 2000e-5, was amended to grant the Commission authority to "bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge," and to intervene, at the court's discretion, in an action brought by an aggrieved party against a nongovernmental employer "upon certification that the case is of general public importance." *See* 42 U.S.C. § 2000e-5(f). In addition, enforcement authority in "pattern or practice" litigation pursuant to § 707 of the Act, 42 U.S.C. § 2000e-6, was transferred from the Attorney General to the Commission, effective March 24, 1974, by the 1972 amendments.[10]

To assist the Commission in the performance of these expanded enforcement functions, Congress provided for the appointment, by the President, of a General Counsel, whose responsibilities would include "the conduct of litigation as provided in 42 U.S.C. sections 2000e-5 and 2000e-6 . . . [and] such other duties as the Commission may prescribe or as may be provided by law." 42 U.S.C. § 2000e-4(b)(1). *See also* S. Rep. No. 681, 92d Cong., 2d Sess. 20 (1972). It is clear from the legislative history of the 1972 amendments that Congress intended to commit all litigating functions of the agency to the supervision of the General Counsel, and moreover, that the General Counsel's litigating functions were to be "as provided in sections 706 and 707 of the Act." 118 Cong. Rec. 7169 (1972) (section-by-section analysis of H.R. 1746). Thus, to construe § 2000e-4(b)(2) as providing a residual source of litigating authority, unrelated to § 2000e-4 (b)(1), which either expands upon the General Counsel's limited authority provided in § 2000e-4(b)(1) or constitutes an independent grant of litigating authority to Commission attorneys without regard to

[9] Prior to 1972, the position of General Counsel was not specifically provided for by statute, although the Commission generally appointed an attorney to assume the role of supervising the Commission's legal staff in the performance of its legal duties. During consideration of the 1972 amendments, several bills to empower the Commission to issue cease and desist orders, and to create an "independent" General Counsel, who would be appointed by the President and be outside of the control of the Chairman and the Commission, and who would perform prosecutorial functions before such a quasi-adjudicative Commission, were debated at length. Although the bills to vest the Commission with quasi-adjudicative authority were defeated in favor of those granting the Commission authority to file civil actions in federal court, the provisions for a Presidentially appointed General Counsel remained. *See generally* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* (1972).

[10] Section 5 of Reorganization Plan No. 1 of 1978, *supra*, transferred enforcement authority under § 707 in public sector cases back to the Attorney General.

the General Counsel, would fly in the face of well-established rules of statutory construction[11] as well as the general statutory and policy constraints discussed above on construing grants of litigating authority.[12]

[11] The Legal Counsel's interpretation is inconsistent with several general rules of statutory construction, including the rules (1) that sections of a statute should be construed "in connection with every other part or section so as to produce a harmonious whole," 2A *Sutherland Statutory Construction* § 46.05 (4th ed. 1973), (2) that adoption of an amendment is evidence that the legislature intends to change the provisions of the original bill, *see* 2A *Sutherland, supra*, § 48.18; and (3) that statutes *in pari materia* should be construed together, and if there exists "an irreconcilable conflict between the new provision and the prior statutes . . . the new provision will control as it is the better expression of the legislature," 2A *Sutherland, supra*, § 51.02. *See generally Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 345 U.S. 247 (1953); *Bindczyck* v. *Finucane*, 342 U.S. 76 (1951).

[12] The Legal Counsel has cited two cases in support of the argument that § 2000e-4(b)(2) constitutes a general grant of litigating authority to Commission attorneys to conduct defensive litigation on the Commission's behalf, notwithstanding the limitations on the General Counsel's authority in § 2000e-4(b)(1).

The first case, *Falkowski* v. *EEOC*, 719 F.2d 470 (D.C. Cir. 1983), is an action brought against the Commission and the Department of Justice by a disgruntled former EEOC employee seeking reimbursement for past legal expenses and a guarantee of future legal representation in two suits brought against her by a subordinate during her tenure as director of one of the Commission's field offices. In granting the government's motion for summary judgment — the government was represented by Department of Justice attorneys, with EEOC attorneys on the brief — the court stated in a footnote that EEOC attorneys could not have represented the employee, Falkowski, in the earlier litigation because of "the irreconcilable conflict of interest that existed between the agency and Ms. Falkowski in that case." 719 F.2d at 478 n.14. The court noted that the Commission and Falkowski were adverse parties in litigation arising out of the same underlying dispute, and that it would have been "highly improper for EEOC attorneys to undertake such dual representation." *Id.* That the court appears to assume that EEOC attorneys would be representing the Commission in such litigation does not in any way negate Department of Justice participation in and supervision of the litigation on behalf of the Commission. The conflict of interest arises simply from the fact of the EEOC attorneys' *involvement* in the Commission's defense, *i.e.*, from having participated in the case's preparation. Thus, it can hardly be said that the *Falkowski* case stands for the proposition that the Commission's attorneys are statutorily authorized to conduct defensive litigation, independently of the Attorney General, on the Commission's behalf.

The second case cited by the Legal Counsel is *Dormu* v. *Walsh*, No. 73-2014 (D.D.C. Mar. 5, 1975), *aff'd mem. sub nom. Dormu* v. *Perry*, 530 F.2d 1093 (D.C. Cir.), *cert. denied*, 429 U.S. 849 (1976). *Dormu* involved a series of cases filed by a former EEOC employee alleging, *inter alia*, Title VII violations, 42 U.S.C. § 2000e-16, by the Commission. In the particular case cited by the Commission, Dormu sought, and was denied, preliminary injunctive relief restraining the Commission from discharging him, pending the resolution of his claims on the merits. Dormu moved to disqualify the EEOC General Counsel from representing the Commission, on the ground that "[u]nder 28 U.S.C. § 516 only the Department of Justice can conduct any litigations [sic] in which the United States, an agency, or officer thereof is a party." The General Counsel opposed the motion, citing his authority "to represent the Commission in any case in court, 42 U.S.C. § 2000e-4(b)(2)" and the fact that the Department of Justice had referred the case to the Commission, as it was "the practice of the [Department] when the Attorney General [was] served, to refer Title VII cases filed against the Commission to the Commission so that the Commission's Office of General Counsel may defend the suit." The district court denied Dormu's motion and, on appeal, the court in a footnote of its memorandum opinion stated that "[a] ruling on the motion was deferred and the issue was reserved for the merits panel. The statute referred to in the text [42 U.S.C. § 2000e-16(c)] and 42 U.S.C. § 2000e-4(b) rebut appellant's contention on this matter." The merits panel, by order, and without a published opinion, dismissed Dormu's action.

We do not believe that the *Dormu* case provides any credible support for the Legal Counsel's argument. First, Commission attorneys, as the General Counsel acknowledged, were defending the suit, "as was the practice," pursuant to a specific "delegation" of litigation authority from the Department of Justice — the Commission did not purport to rely solely on its statutory authorization. Equally significant is the fact that the court, although ruling against Dormu's motion, did not, in a published opinion, indicate the reasons for its ruling, so that its precedential value is extremely limited. Finally, we cannot fail to note that in the papers filed by the Commission in *Dormu*, the General Counsel did not proffer a distinction, pressed upon us now by the Legal Counsel, between his authority under § 2000e-4(b)(1) and that of Commission attorneys under § 2000e-4(b)(2). Rather, the General Counsel, albeit erroneously, considered himself, as the chief attorney for the Commission, as deriving authority from both §§ 2000e-4(b)(1) and (b)(2).

2. Litigating Authority Acquired by the EEOC Under Reorganization Plan No. 1 of 1978

In addition to its enforcement responsibilities under Title VII, in 1978 the EEOC assumed enforcement responsibilities relative to several additional fair employment laws — the Equal Pay Act (EPA), 29 U.S.C. § 206(d), the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, the Rehabilitation Act, 29 U.S.C. § 791, and Title VII of the Civil Rights Act as applied to federal workers, 42 U.S.C. § 2000e-16. Pursuant to Reorganization Plan No. 1 of 1978, all enforcement authority which had been vested previously in the Administrator of the Wage and Hour Division of the Department of Labor, the Secretary of Labor, and the Civil Service Commission regarding enforcement of the EPA, the ADEA, the Rehabilitation Act, and Title VII of the Civil Rights Act was transferred to the EEOC. *See* Reorganization Plan No. 1 of 1978, 42 U.S.C. § 2000e-4 note, *supra*. To the extent that any of those statutes granted independent litigating authority to the persons or agencies charged with their enforcement, a proposition which is the subject of considerable disagreement between the Department of Justice and the EEOC,[13] such authority was transferred to the Commission by the 1978 Reorganization Plan.

With this understanding of the EEOC's general litigating authority, we turn now to the specific questions raised in your memorandum to us.

II. EEOC'S Authority to Conduct Defensive Litigation

You have asked us to examine the Commission's role in defending suits brought "in connection with [the Commission's] Federal sector administrative enforcement and adjudicative responsibilities" under Title VII of the Civil Rights Act, and in actions brought "by its own employees challenging Commission personnel decisions." As noted above, the Commission's general litigating authority is derived from two sources: § 705 of Title VII, 42 U.S.C. § 2000e-4(b), and Reorganization Plan No. 1 of 1978, *supra*. Because the Commission's Federal sector enforcement authority under Title VII, the EPA, the ADEA, and the Rehabilitation Act was transferred to the EEOC from the Civil Service Commission by the 1978 Reorganization, we must examine the Civil Service Commission's litigation authority regarding these statutes prior to the Reorganization.

A. Litigation Authority Inherited from the Civil Service Commission

Although the 1978 Reorganization Plan transferred to the EEOC all functions related to the enforcement of Title VII of the Civil Rights Act against federal government employers which were previously vested in the Civil

[13] *See Report of the Attorney General's Task Force on Litigating Authority, supra*, Compendium at 40 ("[f]or the present time, the Civil Division and the Commission have 'agreed to disagree' [about the Commission's independent litigating authority post-1978]").

Commission, *see* 42 U.S.C. § 2000e-16, litigation was not among the Civil Service Commission's functions under § 2000e-16.[14] Enforcement litigation authority pursuant to § 2000e-16 was retained by the Attorney General.[15] Although § 2000e-16(c) provides that "an employee . . . aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant," whether an agency may represent itself in such an action depends upon the nature and scope of the particular defendant agency's litigating authority.[16] As noted above in Part I.A., statutory grants of litigating authority to agencies, in derogation of the Attorney General's plenary authority, must be construed narrowly to permit the exercise of such authority only when clearly and specifically provided for. The EEOC's litigating authority under its authorizing statute, 42 U.S.C. § 2000e-4, is limited, as discussed above, to the initiation of, and intervention in, civil actions against private sector employers.

Likewise, the Civil Service Commission's functions under the ADEA and the Rehabilitation Act, currently vested by statute in the EEOC, did not include litigation on its own behalf of either an enforcement or a defensive nature. Section 633a(b) of Title 29 authorizes the EEOC

> to enforce the provisions of [29 U.S.C. § 633a](a) [the ADEA as applied to federal employees] through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. *The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.*

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[14] The Civil Service Commission's functions under § 2000e-16 included, *inter alia*, the review of agencies' national and regional equal employment opportunity plans, the promulgation of rules and regulations "as it deems necessary and appropriate to carry out its responsibilities under this section," and the issuance of final agency orders and appropriate remedies regarding discrimination complaints by federal employees.

[15] Section 2000e-16(d) provides that "[t]he provisions of sections 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder." As discussed above, § 2000e-5 vests litigation authority regarding public sector employers, including the federal government, in the Attorney General. This vesting of authority in the Attorney General facilitates the enforcement process by allowing the Attorney General, if the EEOC is unsuccessful in reaching a satisfactory conciliation agreement, to perform the dispute- resolution functions delegated to him by the President in Executive Order 12146, *reprinted in* 28 U.S.C. § 509 note, in lieu of suing other Executive Branch agencies in court. With respect to independent agencies, and other governmental entities within the scope of § 2000e-16's coverage which are not a part of the Executive Branch, the Attorney General may, in his discretion, sue if necessary to achieve a satisfactory result.

[16] We recognize that in such actions by federal employees, the EEOC, whether or not it is the defendant employer agency, may be named as a co-defendant because of its role in processing employee complaints in the administrative process. In such cases the Attorney General is most likely to be representing the defendant agency; to permit the Commission to represent itself in such circumstances, independently of the Attorney General, would create the risk of conflict in the courts as to the position of the United States in such litigation, *i.e.*, the Executive speaking with two conflicting voices.

(Emphasis added.) In addition, the EEOC is required to "provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age," to receive notices of intent to sue by aggrieved individuals prior to their filing a civil action in federal district court, and to "promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice." 29 U.S.C. §§ 633a(b)(3), (d). The EEOC's functions under the Rehabilitation Act are similarly limited to voluntary conciliation and compliance measures. *See id.* § 791.

We thus conclude that the Commission lacks the authority to defend itself, independently of the Attorney General, against suits brought under Title VII, the ADEA, and the Rehabilitation Act in connection with its federal sector administrative enforcement and adjudicative responsibilities, including suits brought under those provisions by its own employees challenging Commission personnel decisions. However, this conclusion does not preclude Commission attorneys from appearing as co-counsel with Department of Justice Attorneys, as is the case with attorneys from other "client" agencies, filing joint briefs, or otherwise actively participating in the Commission's defense, so long as such activities are carried out under the general supervisory authority of the Attorney General or his delegees within the Department of Justice.

B Litigation Authority Inherited From the Secretary of Labor and the Administrator of the Wage and Hour Division, Department of Labor

Having addressed the question of the Commission's authority to defend itself against suits brought under Title VII, the ADEA and the Rehabilitation Act in connection with its federal sector administrative enforcement and adjudicative responsibilities, including suits initiated by its own employees, we now consider the remaining issue of the EEOC's authority to defend itself in suits arising in connection with its newly acquired enforcement responsibility in the private sector under the EPA and the ADEA. As we have seen in the context of the EEOC's general litigating authority statute, 42 U.S.C. § 2000e-4, and the authority transferred to the EEOC from the Civil Service Commission pursuant to Reorganization Plan No. 1 of 1978, *supra*, the Commission's authority to litigate on its own behalf is limited to certain types of enforcement actions, as distinguished from matters involving defensive litigation. Likewise, to the extent that "litigating authority" was vested in the Secretary of Labor and the Administrator of the Wage and Hour Division by the EPA and the ADEA and transferred to the Commission by the 1978 Reorganization Plan, a proposition regarding which the Department has expressed serious doubts, it was strictly of an offensive enforcement nature and cannot fairly be construed to encompass defensive litigation.

The Secretary of Labor's "litigation" authority under the EPA and the ADEA was limited to "the filing of a complaint" and to "bring[ing] . . . action[s]" under 29 U.S.C. §§ 206, 207, 215 and 217 to redress violations of the

acts on behalf of aggrieved complainants. 29 U.S.C. §§ 216(b), (c), 626(b). This Department has consistently taken the position, however, that such language, simply authorizing an agency to "file a complaint" or to "bring an action" is insufficient to establish independent litigating authority. *See Report of the Attorney General's Task Force on Litigating Authority*," *supra*; 6 Op. O.L.C. 47, *supra*. *See also ICC* v. *Southern Railway Co.*, 543 F.2d 534 (5th Cir. 1976), *aff'd*, 551 F.2d 95 (1977) (en banc). Even if these provisions had vested litigating authority in the Secretary of Labor, and by reference, in the EEOC, such "authority" would be limited to litigation of an offensive, rather than a defensive, nature. Moreover, whatever "litigation authority" the Commission inherited from the Administrator of the Wage and Hour Division was limited to "appear[ing] for and represent[ing] the [Commission] in any litigation, *but all such litigation shall be subject to the direction and control of the Attorney General.*" 29 U.S.C. § 204(b) (emphasis added).[17]

Conclusion

After carefully reviewing the EEOC's authority pursuant to its general authorizing statutes and those pursuant to which it inherited authority from the Secretary of Labor, the Administrator of the Wage and Hour Division and the Civil Service Commission, we conclude that the Equal Employment Opportunity Commission lacks the authority to defend itself, independently of the Attorney General, in suits brought under Title VII of the Civil Rights Act in connection with its federal sector administrative enforcement and adjudicative responsibilities, as well as in suits brought by its own employees challenging Commission personnel decisions. Our conclusion is compelled by the language of the statutes authorizing the Commission's fair employment enforcement activities, as well as the general reservation of litigating authority on behalf of the United States, unless otherwise expressly provided for, to the Attorney General, which is mandated by 28 U.S.C. §§ 516, 519.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[17] Notwithstanding our view that the EEOC did not acquire any litigating authority from the Civil Service Commission, the Secretary of Labor or the Administrator of the Wage and Hour Division under these statutes by operation of the 1978 Reorganization Plan, the EEOC has consistently maintained that it has authority to conduct both offensive and defensive litigation on its own behalf under the statutes for which it acquired enforcement responsibilities. Although the Department of Justice has continued to oppose EEOC's assertions of such claims, an agreement was reached in 1979 between the Department's Civil Division and the Commission whereby the Department would continue to conduct the defensive litigation on behalf of the Commission, with appropriate input from Commission attorneys.

Procedures for Exchanging Instruments of Ratification for Bilateral Law Enforcement Treaties

As long as the Attorney General is duly authorized by the President — or his delegate in the field of foreign affairs, the Secretary of State — there is no legal barrier to the Attorney General witnessing or signing a Protocol of Exchange of Ratifications on behalf of the United States. In addition, there is no legal barrier to the exchange of instruments of ratification occurring at the Department of Justice.

July 17, 1984

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

You have requested our advice regarding the procedures legally required for the exchange of instruments of ratification of certain bilateral law enforcement treaties recently concluded between the United States and other countries. We understand that the Senate has already given its advice and consent to the ratification of these treaties, and that the only questions remaining concern where, and by whom, the instruments of ratification to those treaties are required to be exchanged. We conclude that, if the Attorney General is duly authorized by either the President or his delegate (the Secretary of State), there is no *legal* impediment either to the Attorney General signing the Protocol of Exchange of Ratifications or to the signing ceremonies taking place at the Department of Justice.

As you know, a treaty enters into force in four stages. First, the treaty is negotiated. Generally speaking, in order to negotiate a treaty, a nation's representative must produce "full powers," *i.e.*, a document from the President or his delegate designating him to represent the United States in relation to the treaty. Heads of state, heads of government, and ministers of foreign affairs are generally regarded as representing the state without having to produce full powers, while heads of diplomatic missions and representatives accredited to international organizations are regarded as possessing like powers within their jurisdiction. *See Restatement (Revised) Foreign Relations Law of United States* § 310 (Tent. Draft No. 1, 1980). Thus, the President's negotiating authority with respect to bilateral treaties is ordinarily exercised in his name only by the Secretary of State, Ambassadors, or other delegates who have been provided with full powers. In this Administration, the Attorney General has been provided with the full powers necessary to sign a number of bilateral mutual criminal assistance treaties on behalf of the United States.

Second, the signed treaty is submitted to the Senate for its advice and consent to ratification. Once the Senate gives its advice and consent, the treaty is returned to the President, who must ratify it by signing the instrument of ratification. Third, representatives of the two nations meet to exchange the instruments of ratification, a procedure whereby each country gives notice to the other that it has completed its domestic constitutional processes for approval and entry into force of the agreement. Fourth and finally, the President "proclaims" the treaty, and by Executive Order, declares it to be in force internationally and domestically (to the extent to which it is self-executing).

The questions that you have raised regard the procedure to be followed at the third step of the procedure outlined above, namely, the exchange of instruments of ratification. Specifically, you have asked whether there is any legal barrier to the Attorney General's signing a Protocol of Exchange of Ratifications or to such a signing ceremony occurring at the Department of Justice, as opposed to the Department of State.

In the brief time available, we have uncovered no such legal barriers. The customary procedure for exchanging bilateral instruments of ratification is that the exchange occurs in the capital city of the country *other* than that in which the treaty was signed. Thus, if the United States and Italy were to sign a treaty in Rome, the treaty would usually specify that the exchange of ratifications is to take place in Washington, D.C. It is a customary practice that representatives of the two nations witness the exchange of instruments of ratification by signing a document known as a *proces verbal*, or protocol of exchange. "The protocol of exchange does not constitute a new agreement between the parties to the treaty; it merely evidences the fact that the exchange of instruments of ratification has taken place." 14 M. Whiteman, *Digest of International Law* 65 (1970). Thus, the protocol usually states that representatives of the two countries "being duly authorized by their respective Governments," have met for the purpose of exchanging instruments of ratification by the respective governments of the treaty at issue, and that the exchange has taken place, the respective instruments having been compared and found to be in due form.

Although exchanges are often done by two plenipotentiaries, *i.e.*, representatives endowed with the "full powers" described above, that practice does not appear to be legally required. In July 1974, the Department of State approved a procedure, known as the "Circular 175" Procedure, which provides internal guidelines to be followed in the United States for conclusion of international treaties. The section of that Circular concerning "Effecting the Exchange" of Ratification expressly states that:

> In exchanging instruments of ratification, the representative of the United States hands to the representative of the foreign government a duplicate original of the President's instrument of ratification. . . . A protocol, sometimes called *proces verbal* or "Protocol of Exchange of Ratifications," attesting the exchange

is signed by the two representatives when the exchange is made. *No full power is required for this purpose.*

Rovine, *Digest of United States Practice in International Law — 1974* 199, 209–10 (1975) (emphasis added). To us, this provision suggests that so long as the Attorney General has been "duly authorized" by the President (or his delegate in the field of foreign affairs, the Secretary of State), there is no legal barrier to the Attorney General witnessing or signing a Protocol of Exchange of Ratifications on behalf of the United States, even if the President or the Secretary of State has not otherwise conferred upon the Attorney General the "full powers" that would be required to negotiate or sign the treaty on behalf of the United States.

With respect to the place of exchange, Circular 175 states only that "it is customary for a treaty to contain a simple provision to the effect that the instruments of ratification shall be exchanged at a *designated capital*," *id.* at 209 (emphasis added), without anywhere specifying in which building within the capital the exchange must take place. Assuming that the treaties with which you are concerned specify that the exchange of ratifications must occur in Washington, D.C., we see no legal impediment to that exchange occurring at the Department of Justice, rather than at the Department of State. We express no view, of course, as to whether protocol or custom might dictate otherwise with respect to either of the points discussed above.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Legislation Prohibiting the Mailing of Sexually Oriented Advertisements

A draft bill that would prohibit the mailing of photographic sexually oriented advertisements without the addressee's prior written consent, and that would create strict criminal liability in any person who knowingly sends any sexually oriented advertisements to minors, regardless of whether the advertisements are photographic or not, would likely be held unconstitutional by the courts. The provisions in the draft bill are more extensive than necessary to support the interests asserted by the government, and thus would be held inconsistent with protections accorded commercial speech under the First Amendment.

August 9, 1984

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

This responds to your memorandum seeking the views of this Office regarding the constitutionality of a draft bill, proposed by the Criminal Division, to restrict the mailing of photographic sexually oriented advertisements, "The Sexually Oriented Advertisements Amendments Act of 1984." The bill would amend § 3010 of title 39, the so-called Goldwater Amendment to the Postal Reorganization Act of 1970, Pub. L. No. 91–375, 39 U.S.C. §§ 101 *et seq.*, to create a *subcategory* of sexually oriented advertisements — the general category of sexually oriented advertisements is presently addressed by § 3010 — known as photographic sexually oriented advertisements. The bill would prohibit the mailing of such materials to any individual without his or her prior written consent. Section 1735 of Title 18 would be amended to provide a fine of "not more than $5,000 or imprison[ment of] not more than one year, or both" to willful violators of this provision. In addition, the bill would create strict criminal liability in any person who knowingly sends advertisements, photographic or otherwise, of a sexually oriented character to persons who are under the age of 18. The penalty for violation of this provision under the proposed amendments to 18 U.S.C. § 1735 would be a fine in an amount "not less than $50,000, nor more than $100,000." As amended, § 1735 would provide as an affirmative defense to prosecution for mailing sexually oriented ads to minors "that the minor solicited the mailing from the defendant, and that the defendant believed and had substantial reason to believe that the minor was eighteen years or older."

We believe that this proposed draft bill raises serious constitutional concerns when considered in light of recent decisions of the Supreme Court and lower

courts dealing with the government's authority to regulate sexually offensive commercial speech. These concerns arise primarily out of the bill's failure to strike what we believe the courts would find to be a constitutionally acceptable balance between the mailer's "right to use the mails [which] is undoubtedly protected by the First Amendment," *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 76 (1983) (Rehnquist, J. concurring) (citing *Blount* v. *Rizzi*, 400 U.S. 410 (1971)), and the individual's "right not to be assaulted by uninvited and offensive sights and sounds" "in the privacy of the home," *Bolger*, 463 U.S. at 77 (citing *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978)). Although the courts have recognized that the government clearly may act properly to protect people from unreasonable intrusions into their homes, we are persuaded that the protections currently provided by 39 U.S.C. § 3010 to unwilling recipients of unsolicited advertisements constitute the outer limits of the courts' willingness to uphold governmental prohibitions of commercial speech via the mails, of an offensive, though not "obscene,"[1] nature, absent a more substantial government interest than has been articulated by the Criminal Division.

Similarly, with regard to the draft bill's provisions concerning minors, although the courts have recognized, in certain circumstances, a "compelling" governmental interest in "'safeguarding the physical and psychological well-being of . . . minor[s]'" from participating in the production of non-obscene sexually offensive materials, *New York* v. *Ferber*, 458 U.S. 747, 757 (1982) (upholding criminal statute prohibiting the knowing promotion of child pornography by distributing materials depicting such) (quoting *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607 (1982)), the values protected by the First Amendment are generally no less applicable to protected materials merely because the government seeks to control the flow of information to minors. *See Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 212–13 (1975). *See also Bolger* v. *Youngs Drugs Products, Inc.*, 463 U.S. at 74 n.30 (Rehnquist, J. concurring). Although we recognize that the government has a strong interest in flatly prohibiting the mailing of sexually oriented advertisements, whether photographic or not, to minors, we have serious reservations regarding the ability of the draft bill's proposed strict liability for such distribution to withstand constitutional scrutiny in the courts. We believe that the courts, applying existing Supreme Court precedent, would find that the restrictions contained in the draft bill are more extensive than is necessary to support the

[1] The prevailing guidelines for determining obscenity, which is not protected by the First Amendment, were announced in *Miller* v. *California*, 413 U.S 15 (1973):

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id at 24 (citations omitted). We understand that the term "sexually oriented advertisements," as defined in 39 U S.C. § 3010, is not intended by the drafters to include obscene materials within the meaning of *Miller*. For the purposes of the discussion in this memorandum, therefore, we will assume that there is a distinction between obscene materials and "sexually oriented advertisements."

government's asserted interest, in view of the adequacy of existing statutory provisions and regulations by which minors may be protected, the substantial burden which would be imposed upon mailers to determine the minority status of potential addressees, and the broad "prior restraining" effect that such an amendment would exert, in practice, on mailers with respect to material entitled to some protection under the First Amendment.

I. Existing Law

At present, 39 U.S.C. § 3010 permits any unwilling recipient of sexually oriented advertisements

> on his own behalf or on the behalf of any of his children who has not attained the age of 19 years and who resides with him or is under his care, custody, or supervision, [to] file with the Postal Service a statement, in such form and manner as the Postal Service may prescribe, that he desires to receive no sexually oriented advertisements through the mails. The Postal Service shall maintain and keep current, insofar as practicable, a list of the names and addresses of such persons and shall make the list (including portions thereof or changes therein) available to any person, upon such reasonable terms and conditions as it may prescribe, including the payment of such service charge as it determines to be necessary to defray the cost of compiling and maintaining the list and making it available as provided in this sentence. No person shall mail or cause to be mailed any sexually oriented advertisement to any individual whose name and address has been on the list for more than 30 days.

Id. § 3010(b).[2] In addition, subsection (a) requires any person who mails sexually oriented advertisements to "place on the envelope or cover thereof his name and address as the sender thereof and such mark or notice as the Postal Service may prescribe." Postal Service regulations require, in part, that mailers of such materials place the legend "Sexually Oriented Ad" clearly on the front of the exterior envelope bearing such materials above the addressee's name; or, "if the contents of the mail piece are enclosed in a sealed envelope or cover, inside the exterior envelope or cover, [the mailer may place] conspicuously the words 'Sexually Oriented Ad'" on that inside cover. U.S. Postal Service, *Domestic Mail Manual* § 123.55(a) (incorporated by reference in 39 C.F.R. § 111.1 (1983)).

[2] 39 U.S.C. § 3010(d) defines "sexually oriented advertisement" as

> any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly related to the foregoing. Material otherwise within the definition of this subsection shall be deemed not to constitute a sexually oriented advertisement if it constitutes only a small and insignificant part of the whole of a single catalog, book, periodical, or other work the remainder of which is not primarily devoted to sexual matters.

Section 3011 provides the civil enforcement mechanism for violations of § 3010 and regulations duly promulgated thereunder by the Postal Service. Under this provision, the Postal Service may request the Attorney General to file a civil action on its behalf, seeking injunctive relief,[3] against any person whom the Postal Service believes "is mailing or causing to be mailed any sexually oriented advertisement in violation of [§ 3010]."

Criminal penalties for violations of 39 U.S.C. § 3010 are found at 18 U.S.C. §§ 1735 and 1737. Section 1735 provides a fine of "not more than $5,000 or imprison[ment of] not more than five years, or both, for the first offense and . . . not more than $10,000 or imprison[ment of] not more than ten years, or both, for any second or subsequent" violation of 39 U.S.C. § 3010. Section 1737 provides the same penalties for "print[ing], reproduc[ing], or manufactur[ing] any sexually related mail matter, intending or knowing that such matter will be deposited for mailing . . . in violation of [39 U.S.C. § 3010]."[4]

II. The Constitutionality of the Proposed Amendments

A. The Requirement of Prior Written Consent

As noted above, the draft bill seeks to prohibit the mailing of any photographic sexually oriented advertisement without the recipient's prior written consent.[5] The draft bill defines "photographic sexually oriented advertisement" as

> any sexually oriented advertisement, as defined in [39 U.S.C. § 3010(d)] consisting in whole or in part of photographs, unless the photographic material constitutes only a small and insignificant part of the whole advertisement.

The draft bill identifies a *subcategory* of sexually oriented advertisements which the drafters have determined to be "most offensive and intrusive" photographic materials and, regarding this subcategory of advertisements, the

[3] Although § 3011(a) provides for several kinds of injunctive relief, a three-judge panel of the U.S. District Court for the Central District of California held that the only constitutionally acceptable injunctive relief provided under § 3011(a) was that enjoining the defendant from mailing any sexually oriented advertisements to persons whose names are on the Postal Service list. *See United States* v. *Treatment*, 408 F. Supp. 944 (C.D. Cal. 1976). Notably, the court refused to construe the injunctive remedies set out in § 3011(a) constitutionally to enjoin mailing ads to persons who have *not* acted affirmatively either to put their names on the list or to request the advertising. *See id.* at 954.

[4] In addition to the provisions of §§ 3010 and 3011, unwilling recipients of "offensive" advertisements may avail themselves of the protective measures provided in 39 U.S.C. § 3008. Section 3008 prohibits "pandering advertisement[s] which offer[] for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." This provision authorizes the recipient, upon receipt of such matter, to request the Postal Service to issue an order to the sender directing the sender "to refrain from further mailings to the named addressee" and "to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender . . . [and to refrain] from the sale, rental, exchange or other transaction involving mailing lists bearing the names of the designated addressees." This order is enforceable through various administrative and judicial procedures.

[5] As the penalty provisions of the draft bill are primarily matters for policy consideration, on which we defer to the Criminal Division, we will confine our comments to the substantive portions of the draft bill and, as you have requested, only to those aspects which raise constitutional issues.

bill imposes an *affirmative* duty upon those who desire to receive such materials to provide the mailer with their prior written consent.[6] Thus, regarding this subcategory of advertisements, the draft bill goes considerably beyond the current requirement of § 3010 that the Postal Service maintain a list of persons desiring not to receive sexually oriented advertisements, and that mailers not send such materials to persons whose names have been on the list for more than 30 days. In effect, existing law requires unwilling recipients of unsolicited sexually oriented advertisements to "opt out" of the category of potential recipients of such materials; the draft bill would maintain this requirement, but regarding the subcategory of photographic sexually oriented ads, willing recipients would be required to "opt in" to the category of potential recipients.

The prevailing test for determining whether restrictions on commercial speech in any particular context are consistent with the First Amendment protections to which such speech is entitled was recently reiterated by the Supreme Court in *Bolger* v. *Youngs Drug Products Corp.*:

> "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. [557,] 563 [1980]. In *Central Hudson* we adopted a four-part analysis for assessing the validity of restrictions on commercial speech. First, we determine whether the expression is constitutionally protected. For commercial speech to receive such protection, "it at least must concern lawful activity and not be misleading." *Id.* at 566. Second, we ask whether the governmental interest is substantial. If so, we must then determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than necessary to serve that interest. *Ibid.*

463 U.S. at 68–69.

Applying this analysis to photographic sexually oriented advertisements, we conclude first that such expressions are constitutionally protected. Unlike obscene materials, which are not entitled to First Amendment protections, *see*

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[6] Although the determination that photographic sexually oriented advertisements are more "offensive" and "intrusive" than other sexually oriented materials may, in some circumstances, be an appropriate legislative judgment, we believe that the factual bases outlined in the Criminal Division memorandum for such a determination would, as a legal matter, be insufficient for the courts to sustain such a distinction for purposes of First Amendment analysis. *See Bolger* v. *Youngs Drug Products Corp.*, *supra*.

However, even were "offensiveness" a permissible factor upon which the suppression of protected speech could be based — a proposition recently invalidated in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. at 71–72 — a potentially more constitutionally defensible approach to dividing sexually oriented advertisements into more and less "offensive" categories would be to differentiate between pictorial materials and textual materials, rather than the approach taken in the draft bill. In attempting to distinguish, *within* the pictorial category, photographs, from graphics, cartoons, woodcuts and other pictorial media, as the most "offensive" and therefore the least protected category of sexually oriented ads, the draft bill may very well be constitutionally infirm as both overinclusive and underinclusive.

Miller v. *California*, 413 U.S. 15 (1973), sexually oriented advertisements constitute protected speech, assuming that the particular ads are neither false nor misleading, nor relate to unlawful activity.

The second prong of the *Bolger* test inquires into the substantiality of the government's interest in seeking to prohibit the mailing of photographic sexually oriented materials to all but those who have requested such materials in writing. The government's interest in prohibiting the mailings identified in the draft bill are similar, we believe,[7] to those advanced by the government, but held insufficient to justify the prohibition on mailing unsolicited contraceptive ads, in *Bolger* v. *Youngs Drug Products Corp.*[8] In *Bolger*, the government based its argument on its interest in (1) shielding recipients of mail from materials that they are likely to find offensive; and (2) aiding parents' efforts to control the manner in which their children become informed about sensitive subjects such as birth control. *See* 468 U.S. at 71.

In striking down the prohibition on unsolicited mailings of contraceptive advertisements as an unconstitutional restriction on commercial speech, the Court dismissed the government's interest in shielding recipients from unsolicited offensive materials as "carr[ying] little weight." *Id.* The Court reiterated its conclusion in *Carey* v. *Population Services International*, 431 U.S. 678, 701 (1977), that offensiveness is

> classically not a justification validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that *the fact that protected speech may be offensive to some does not justify its suppression.*

463 U.S. at 71 (emphasis added).

In response to the government's argument that the statute was intended to prohibit the mailing of such unwanted materials into the home, the Court cited its recognition in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970), of unwilling recipients' rights, under the "pandering advertisements" law, 39 U.S.C. § 3008, *see supra* note 4, to give notice to a mailer that they wish no further mailings which they believe to be "erotically arousing or sexually provocative." The Court then stated:

> But we have never held that the government itself can shut off the flow of mailings to protect those recipients who might

[7] As best we are able to determine from the Criminal Division memorandum accompanying the draft bill, the government's interests underlying this proposal are as follows: (1) to identify a sub-category of "the most offensive and intrusive" sexually oriented ads; and (2) to protect "[t]he great majority of American people, who may not even know that they can put their names on a Postal Service list to avoid receiving such mail," from such offensive material.

[8] The statute at issue in *Bolger* was 39 U.S.C. § 3001(e)(2), which provided in pertinent part:

> Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisement —
>
> (A) is mailed to a manufacturer of such matter, a dealer, therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic.

> potentially be offended. The First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. [530,] 542 [(1980)]. Recipients of objectionable mailings, however, may "'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'" *Ibid.*, quoting *Cohen* v. *California*, 403 U.S. 15, 21 (1971). Consequently, the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968).

463 U.S at 72. Justice Rehnquist reiterated these views in his concurring opinion in *Bolger*, *id.* at 78:

> [T]he recipient of [unsolicited] advertising "may escape exposure to objectionable material simply by transferring [it] from envelope to wastebasket." [*Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 542 (1980)]. Therefore a mailed advertisement is significantly less intrusive than the daytime broadcast at issue in [*FCC* v.] *Pacifica Foundation*, 438 U.S. 726 (1978) . . . . Where the recipients can "'effectively avoid further bombardment of their sensibilities simply by averting their eyes,'" [*Consolidated Edison*, 447 U.S. at 542, quoting *Cohen* v. *California*, 403 U.S. 15, 21 (1971)], a more substantial government interest is necessary to justify restrictions on speech.

Thus, while we recognize that the government's interest in shielding unwilling recipients of "offensive" photographs of sexual objects or activities may be stronger than that associated with the contraceptive advertisements at issue in *Bolger*, the *Bolger* Court made clear that "offensiveness" is not a sufficient justification for restricting protected speech. The mere fact that the legislature may determine that one form or medium of protected speech is more offensive than another form of such speech would not entitle that speech to any less protection under the First Amendment. Moreover, we believe that as a general matter, the courts will not distinguish between various media through which protected speech is conveyed, for purposes of First Amendment analysis, absent a compelling reason to do so (*e.g.*, the broadcast media, which is "uniquely persuasive" and "uniquely accessible to children, even those too young to read," *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978)). We know of no compelling reason cognizable by the courts which would support the Criminal Division's proffered distinction between the advertisements in *Bolger* as "pamphlets containing 'truthful information relevant to important social issues'" (citing 463 U.S. at 69) and the photographic sexually oriented materials to which the bill is addressed.

The second interest asserted by the government in *Bolger*, a variation of which is also cited in the Criminal Division's memorandum accompanying the draft bill, was the government's interest in aiding parents in controlling the flow of information to their children regarding birth control. Although the Court found that this interest met the requirement that the government's interest be "substantial" in order to restrict commercial speech, 463 U.S. at 73, the Court held that prohibiting the unsolicited mailings of contraceptive advertisements, "as a means of effectuating this interest . . . fail[ed] to withstand scrutiny." *Id.* The government's interest in assisting parents to protect their children from exposure to unsolicited photographic sexually oriented advertisements is, we believe, similarly substantial.

In addition to meeting the "substantial governmental interest" prong of the *Bolger* test for restricting commercial speech, the draft bill, in order to withstand constitutional scrutiny, also must be shown to directly advance the government's interest and to be no more extensive than necessary to serve that interest. Although the draft bill appears to meet the third requirement under the *Bolger* test of directly advancing this government interest, we must conclude that it fails the fourth requirement of the *Bolger* test, *i.e.*, that it not be more extensive than necessary to serve that interest.

As noted above, although the *Bolger* court recognized the "substantiality" of the government's interest in protecting children from exposure to such materials, it dismissed the government's means of effecting this interest as "fail[ing] to withstand constitutional scrutiny." *Id.* at 73. In support of its conclusion, the Court noted that, in view of existing alternative means available for shielding children and other unwilling recipients from such materials, the regulation "provided only the most limited incremental support for the interest asserted." *Id.*[9] The Court's opinion, as well as Justice Rehnquist's concurring opinion, identified several means by which unwilling recipients could avoid the objectionable mailings. Each of these means may be utilized by parents seeking to protect their children from mailings containing the photographic sexually oriented advertisements sought to be restricted by the draft bill.

First, an individual who does not desire to receive commercial mailings which he, "in his sole discretion believes to be erotically arousing or sexually provocative" pursuant to 39 U.S.C. § 3008, may request the Postal Service, on his own behalf or that of his minor children under 19 years of age who reside with him, to issue an order to the mailer to refrain from further mailings to his address, and to delete his name "from all mailing lists owned or controlled by the sender . . . ." The restrictions contained in § 3008 were upheld by the Supreme Court in *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970), as consistent with the First Amendment. The Court stated: "Weighing the highly

[9] The Court also noted that the regulation was "defective because it denies to parents truthful information bearing on their ability to discuss birth control and to make informed decisions in this area." *Id.* at 74. The Court concluded that "the restriction of 'the free flow of truthful information' constitutes a 'basic' constitutional defect regardless of the strength of the government's interest." *Id.* at 75 (quoting *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 95–96 (1977)).

important right to communicate . . . against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 737.

The second means by which a parent may insulate himself and his children from offensive mailings is by exercising his right under § 3010 to notify the Postal Service to add his family members' names to the list which the Postal Service is required to maintain of individuals who desire to receive no sexually oriented advertisements through the mails. Section 3010 prohibits mailers of such materials from sending mail to individuals whose names are on the list, under threat of civil and criminal penalties. Under the procedures outlined in both §§ 3008 and 3010, "individuals are able to avoid the information in advertisements after one exposure." *Bolger*, 463 U.S. at 78 (Rehnquist, J. concurring).

The third and fourth mechanisms available to parents to protect the sensibilities of themselves and their children from offensive material, should they not utilize the protective measures outlined in §§ 3008 and 3010, require the parent to recognize the nature of the material, either prior to opening or after, and take the "'short, though regular, journey from mailbox to trash can . . . .'" *Bolger*, 463 U.S. at 72 (quoting *Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968)). Because the recipients of such advertisements "'may escape exposure to objectionable material simply by transferring [it] from envelope to wastebasket,'" Justice Rehnquist concluded in his concurring opinion that mailed advertisements are "significantly less intrusive than the daytime broadcast at issue in [*FCC* v.] *Pacifica [Foundation*, 438 U.S. 726 (1978)]." 463 U.S. at 78 (quoting *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 542 (1980)).

As noted above, Postal Service regulations require mailers of sexually oriented advertisements to mark clearly either the outer envelope or the exterior of an inner sealed envelope with the legend, "Sexually Oriented Ad," so that recipients may be put on notice that the mail's contents may be offensive, prior to opening. The fact that an over-zealous mail opener fails to heed the notice describing the mail's content, and subsequently is offended, is insufficient to burden the mailer's right to send his message through the mails. In short, "[w]here the recipients can 'effectively avoid further bombardment of their sensibilities simply by averting their eyes' . . . a more substantial government interest is necessary to justify restrictions on speech." 463 U.S. at 78 (Rehnquist, J., concurring) (quoting *Cohen* v. *California*, 403 U.S. 15, 21 (1971)).

Regarding children's access to the mail, the *Bolger* Court, noting that it is "reasonabl[e to] assume that parents already exercise substantial control over the disposition of mail once it enters their mailboxes," stated that to the extent that parents lose such control but nevertheless desire to protect their children from exposure to such mailings, protection could be achieved by "purging all mailboxes of unsolicited material that is entirely suitable for adults." 463 U.S at 73. The Court stated:

> We have previously made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.

Id. at 73–74. *See also* 463 U.S. at 79 (Rehnquist, J., concurring) (noting that the regulation at issue in *Bolger* is "broader than is necessary because it completely bans from the mail unsolicited materials that are suitable for adults"). Indeed, Justice Rehnquist found the "[n]arrower restrictions, such as the provisions of 39 U.S.C. § 3008 . . . to be fully [capable of] serv[ing] the Government's interests." *Id.*[10]

For these reasons, we believe that the draft bill's prohibition on mailing photographic sexually oriented materials except to those persons who have consented in writing to receiving such materials, while implicating a substantial government interest, falls far short of the constitutional requirement that the regulation be no more extensive than necessary to serve that interest.[11]

Our conclusion is strongly supported by the Supreme Court's decision in *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), striking down an act requiring the Postmaster General to detain and deliver only upon the addressee's request unsealed foreign mailings of "communist political propaganda" as an unconstitutional limitation of an addressee's rights under the First Amendment. The Court stated that to require "the addressee[,] in order to receive his mail[,] to request in writing that it be delivered . . . amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose upon him." *Id.* at 307.[12]

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[10] The Criminal Division has argued that, unlike the contraceptive materials in *Bolger*, the subcategory of photographic sexually oriented advertisements is "*uniquely* pervasive" or "*uniquely* accessible to children, even those too young to read," as was the offensive mid-afternoon broadcast in *FCC* v. *Pacifica*, 438 U.S. 726, 748 (1978) (emphasis added). However, we believe that the force of such an argument is severely undermined by the Court's recognition in *Bolger*, without regard to the content of the mails, that "[t]he receipt of mail is far less intrusive and uncontrollable [than the broadcast media;] . . the special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication " 463 U.S at 74 Justice Rehnquist, in his concurring opinion, similarly rejected the proffered analogy between the broadcast media and the mails *Id.* at 78–79.

[11] The argument that the burden imposed by the restriction could be mitigated by the mailer conducting a "pre-mailing" to determine which potential addressees would be willing recipients of the materials, was soundly rejected by Justice Rehnquist in his concurring opinion in *Bolger*:

> [The pre-mailing argument] fall[s] wide of the mark. A prohibition on the use of the mails is a significant restriction of First Amendment rights. We have noted that "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . " *Blount* v. *Rizzi*, 400 U.S 410. And First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints.

463 U.S. at 79–80 (citations omitted).

[12] *See also* 381 U.S at 309 (Brennan, J. concurring) (citations omitted):

> [T]he Government argues that, since an addressee taking the trouble to return the card can

Continued

Consistent with the Supreme Court's decision in *Lamont* is an opinion by a three-judge court in California, *United States* v. *Treatment*, 408 F. Supp. 944 (C.D. Cal. 1976), holding that enjoining a mailer from sending sexually oriented advertisements to anyone who has not affirmatively requested the material as a remedy under 39 U.S.C. § 3011 would be unconstitutional. In reaching this conclusion, the court observed that the mailer's right to communicate and the addressee's right to receive the mailing "are of such importance that the government has a very great burden to show a compelling interest for their curtailment." 408 F. Supp. 954. The court stated:

> The mailer's "right to communicate" as recognized in *Rowan* [v. *Post Office Department*, 397 U.S. 728 (1970)], is not overcome in this context because the addressees have not asserted a countervailing right of privacy. As to an addressee's right to receive a mailing, we do not think it can constitutionally be conditioned upon the requirement that the addressee request the material in advance. We believe this follows from *Lamont* [v. *Postmaster General*, 381 U.S. 301 (1965)] . . . .
>
> It is suggested that the statutory authorization of injunction against mailing to persons who have taken no affirmative action of their own should be validated on an agency theory. This theory is that the government may assert, as their agent, the right of privacy of those persons who have not affirmatively asked for the material. The asserted agency arises from the government's belief that sexually oriented material would be offensive to all recipients except those who have specifically asked for it and the government is merely asserting their right not to receive it. We reject the suggestion. As we read the decisions of the Supreme Court in the First Amendment area, *the government has no right to substitute its judgment for the judgment of the individual in deciding what materials he shall receive through the mails*. Such censorship cannot be exercised for the individual as purported agent, as *parens patriae* or otherwise . . . . And when the government can prohibit the people from receiving material through the mail which the government thinks should not be sent, and which the recipients have not asked to be protected from, the entire concept of free speech and free communication is dealt a devastating blow.

[12] (. . . continued)
receive the publication named in it, only inconvenience and not an abridgment is involved. But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government . . . . Moreover, the addressee's failure to return this form results in nondelivery not only of the particular publication but also of all similar publications or material. Thus, although the addressee may be content not to receive the particular publication, and hence does not return the card, the consequence is a denial of access to like publications which he may desire to receive. In any event, we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one.

Id. (emphasis added). The court concluded that such an affirmative requirement, similar to that contained in the draft bill, goes beyond what is necessary to afford a person whose name is not on the Postal Service list an opportunity to protect himself and his family from being forced to view offensive material when it reaches his mailbox. The court noted that Postal Service regulations promulgated pursuant to § 3010 require sexually oriented advertisements to be conspicuously so labeled, so that the person "who does not wish to see the material is forewarned and may chuck it in the wastebasket unopened," *id.* at 955, and that "once having received a single piece of sexually oriented advertising, he may have his name placed on the Postal Service list and be protected forever from receiving such material from the original or any other mailer." *Id.*

B. Strict Liability for Mailing Sexually Oriented Ads to Minors

The draft bill also would impose a strict criminal liability upon those who mail any sexually oriented advertisements, whether or not of a photographic nature, to persons under the age of 18. An affirmative defense is provided if the minor solicited the mailing from the defendant and the defendant had substantial reason to believe that the minor was 18 years of age or older. The commentary accompanying the draft bill asserts an "undeniable government interest" in preventing the mailing of such matter directly to children.

As we noted above, the government interest in safeguarding the physical and psychological well-being of minors has been recognized by the courts as substantial. *See generally Bolger* v. *Youngs Drug Products Corp.*, *supra.* However, the decisions cited by the Criminal Division as support for the absolute prohibition on mailing to minors are inapposite. In *Ferber* v. *United States*, 458 U.S. 747 (1982), the Court upheld a criminal statute prohibiting the knowing promotion and distribution of child pornography, expressing a concern for the damage sustained by children who are used as subjects of pornographic materials to their physiological, emotional and mental health. The *Ferber* Court viewed the restrictions on the dissemination of materials depicting child pornography as a means of facilitating the enforcement of existing laws prohibiting the employment of children for pornographic purposes, and justified by the need to eradicate child pornography, illegal conduct in the State of New York. The case did not involve a restriction on mailing or distribution to minors alone. The Criminal Division's reliance upon *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978), is similarly misguided. The *Pacifica* Court upheld the Commission's determination that a monologue broadcast in mid-afternoon was "indecent" and therefore prohibited by the Communications Act, because of the "uniquely pervasive presence [of the broadcast media] in the lives of all Americans" and its unique accessibility to children. However, the *Bolger* Court dismissed the holding of *Pacifica* as inapplicable to unsolicited mailings, holding that "[t]he receipt of mail is far less intrusive and uncontrollable." 463 U.S. at 74.[13]

[13] The Court stated:

Our decisions have recognized that the special interest of the federal government in regulation of

Continued

See also id. at 78 (Rehnquist, J., concurring) (noting that mailed advertisements are "less intrusive than the daytime broadcast at issue in *Pacifica*, . . . [and, therefore,] a more substantial government interest is necessary to justify restrictions on speech").

Thus, recognizing that the government's interest in shielding minors from exposure to sexually oriented ads is a substantial one, we must determine, applying the *Bolger* test, whether the absolute restriction on the mailing of such materials to minors directly advances the government interest and whether it is not more extensive than necessary to serve that interest. *See* 463 U.S. at 69.

Although we acknowledge that the strict liability provision for mailings to minors directly advances the government's interest in shielding minors from such materials, we strongly believe that a court passing upon the constitutionality of the restriction would find it far more extensive than necessary to serve the government's interest. First, the existing provisions for protecting unwilling recipients from such mailings found at 39 U.S.C. §§ 3008 and 3010, when combined with appropriate parental supervision of children and of the mailbox, are sufficient, we believe, for the reasons stated in *Bolger*, to serve the government's asserted interest. *See Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. at 79 (Rehnquist, J., concurring). As discussed above, these statutes provide the minor addressee and his or her parents with a variety of measures by which they may effectively avoid exposure to objectionable materials, *e.g.*, placing the minor's name on the Postal Service list to preclude receipt of such materials, or, upon receipt, observing the warnings which Postal Service regulations require to be placed on such materials.

Moreover, much of the material that is embraced by this amendment, the *general* category of sexually oriented ads described in § 3010(d), may very well be materials similar to the ads at issue in *Bolger*, or other sexually oriented materials that are equally prevalent among youths in our society today. Regarding such materials, the *Bolger* court observed that "parents must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects," and found that an outright prohibition on such materials achieved only a "marginal degree of protection." 463 U.S. at 73.[14] In such circumstances, the Court held, an outright restriction is "more extensive than the Constitution permits." *Id.*

Although the *Bolger* opinion did not address an outright restriction on unsolicited mailings which is limited to minors, we believe that because of the

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[13] (. . . continued)

the broadcast media does not readily translate into a justification for regulation of other means of communication. *See Consolidated Edison Co.* v. *Public Service Comm'n* 447 U.S. at 542–543; *FCC* v. *Pacifica Foundation*, 438 U.S. at 748 (broadcasting has received the most limited First Amendment protection).

Id. (footnote omitted).

[14] The Court explained:

Under [today's] circumstances, a ban on unsolicited advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so, and whose children have remained relatively free from such stimuli.

463 U.S. at 73.

near impossibility of mailers being able to determine the ages of potential recipients — without conducting a verifiable "pre-mailing" survey of the addressees — the practical effect of the restriction's limitation to minors is virtually nonexistent. In other words, the mailer, in order to avoid the strict liability imposed by the statute, must: (1) send his ads only to those who affirmatively request them and attest to being at least 18 years of age, and whom the mailer has substantial reason to believe are 18 years of age or older; (2) conduct a "pre-mailing" survey to determine the ages of potential recipients; or (3) continue to conduct mailings as he has in the past, but at the risk that some addressees might be minors. We believe that the practical effect of this amendment would be to impose such a substantial burden on mailers as to raise serious constitutional difficulties.

The burden imposed by such legislation, to ascertain the ages (or at least the majority or minority status) of all addressees, would, in our opinion preclude the use of the mails by forcing all but the most determined and enterprising mailers out of business. Because this amendment includes *all* sexually oriented advertisement materials, whether photographic or not, the draft bill would force the mailers of such materials, presently prohibited by § 3010(d) from sending their material *only* to those on the Postal Service list, to send their materials at the risk that any potential addressee may be under 18. As noted above, the practical effect of this amendment would be to require the prudent mailer to send his sexually oriented advertisements, whether photographic or not, only to those persons who have affirmatively requested his materials and only those whom he reasonably believes to be at least 18 years of age, or, to conduct a pre-mailing survey. This restriction, as applied to the subcategory of "the most offensive" and intrusive ads — photographic sexually oriented ads — fails, as we indicated in Part II.A above, to properly balance the advertiser's right to communicate through the mails, the addressee's right to receive his or her mail, and the individual's right to privacy in his home. *A fortiori*, this conclusion would apply to the general category of sexually oriented ads. Regarding pre-mailing surveys, as noted above, Justice Rehnquist, in his concurring opinion in *Bolger*, found such a requirement to be a "prohibition on the use of the mails [and therefore] a significant restriction of First Amendment rights." 463 U.S. at 79–80. Thus, we believe the courts would find such a burden on the mailers to be constitutionality unacceptable.

Conclusion

Although we recognize that the government has a strong interest in protecting recipients of unsolicited sexually oriented advertisements of any kind from being unwillingly subjected to materials which they may find offensive, such an interest has been held not to be substantial, for purposes of restricting commercial speech. Moreover, notwithstanding that the courts have found the government's interest in protecting parents' ability to control their children's exposure to potentially offensive, or otherwise sensitive, materials to be sub-

stantial, we conclude, applying the principles set forth in *Bolger*, that, in view of the adequacy of existing statutory and regulatory provisions designed to foster that interest, and the "prior restraining" effect that the absolute prohibition on mailing to minors would have on the mailers' constitutional right to communicate through the mails, the strict liability provisions of the draft bill would be unable to withstand constitutional scrutiny. In short, it is our conclusion that the statutory prohibitions envisioned by both provisions of the draft bill would be found by courts to be more extensive than necessary to support the interests asserted by the government, and therefore inconsistent with the protections accorded to commercial speech under the First Amendment.

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

Authority of the State Department Office of Security to Investigate Passport and Visa Fraud

Section 209 of the Foreign Service Act of 1980 did not confer on the Inspector General of the Department of State the authority to investigate passport and visa fraud by persons unconnected with the Department of State, and, accordingly, did not limit any inherent or derivative authority the Secretary of State might have to investigate such fraud.

Special Agents assigned to the Office of Security of the Department of State may conduct consensual questioning of individuals and may request that an individual consent to being questioned elsewhere, provided that a reasonable person would understand that compliance with such a request is voluntary.

August 17, 1984

MEMORANDUM OPINION FOR THE DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

This responds to your request for our opinion on the following questions:

1. Whether the Secretary's derivative authority to conduct investigations which might lead to criminal prosecution (using Special Agents not assigned to the Inspector General's Office) is in any way limited by the express statutory authority of the Inspector General of the Department of State to conduct similar investigations.

2. If any such limitations are present, what restrictions apply to the Secretary's independent authority to investigate visa and passport fraud through the Office of Security?

3. Whether, and subject to what limitations, if any, Special Agents assigned to the Office of Security have legal authority to approach an individual suspected of engaging in visa or passport fraud and, after presenting their credentials, either request that the individual answer questions on the spot or accompany them to another location for questioning.

I. Background

The first question poses a very broad issue regarding congressional intent in passing the Foreign Service Act of 1980, 22 U.S.C. § 3929 (FSA). Rather than

address in a factual vacuum the many hypothetical instances in which the relationship of the Inspector General's authority to that of the Secretary might be examined, we believe that it is more appropriate to confine our examination to the specific factual situation described in your letter. Viewed in this light, your first and second questions merge into a single question: whether the powers conferred upon the Inspector General by § 209 of the FSA in any way limit whatever "inherent authority" the Secretary may have to investigate passport and visa fraud. We understand the term "passport and visa fraud" to refer to criminal deceit in passport or visa acquisition by persons other than Department of State employees. In contrast, the term "passport and visa malfeasance" describes malfeasance or criminal activity on the part of Department of State employees in obtaining passports or visas for themselves or others. The relevant criminal prohibitions appear to reflect a similar distinction. *Compare* 18 U.S.C. §§ 1542–1546 (fraud and misuse of passports and visas) *with id.* § 1541 (unauthorized issuance). In addressing your question, we have not attempted to analyze the source, validity, or independent scope of the Secretary's asserted authority to investigate passport and visa fraud. Rather, in accord with your request, we have focused our inquiry upon the effect that § 209 has on whatever authority the Secretary may possess in this area.[1]

II. Analysis

A. The Foreign Service Act of 1980

We begin our analysis of the question whether the Inspector General possesses investigative authority in the area of passport and visa fraud by examining the FSA itself. Section 209 of the FSA, which established the Office of Inspector General of the Foreign Service, centralized primary responsibility in the Department of State's Inspector General for "audit" and "investigative" activities of the Department. *E.g.*, H.R. Rep. No. 992, 96th Cong., 2d Sess. (Part 1) 23 (1980). The FSA charged the Inspector General with responsibility for examining:

> (1) whether financial transactions and accounts are properly conducted, maintained, and reported;
>
> (2) whether resources are being used and managed with the maximum degree of efficiency, effectiveness, and economy;

[1] As a general rule, of course, violations of Title 18 of the United States Code are statutorily committed to the investigative jurisdiction of the Attorney General. *See* 28 U.S.C § 533(1) (Attorney General may appoint officials to detect crimes against United States); *id.* § 533(3) (other investigations regarding official matters under the control of Department of Justice and Department of State as may be directed by the Attorney General). Other departments and agencies may investigate federal crimes only "when investigative jurisdiction has been assigned by law to such departments and agencies." *Id.* § 533. In our view, 28 U.S.C. § 533 establishes that Congress cannot be deemed to have intended to confer investigative authority other than by an express provision to that effect in a statute. We examine the FSA, therefore, in order to determine whether Congress therein conferred authority upon the Inspector General to investigate the federal crimes of passport and visa fraud.

(3) whether the administration of activities and operations meets the requirements of applicable laws and regulations and, specifically, whether such administration is consistent with the requirements of section 3905 of this title [the provision governing personnel practices];

(4) *whether there exist instances of fraud* or other serious problems, abuses, or deficiencies and whether adequate steps for detection, correction, and prevention have been taken; and

(5) whether policy goals and objectives are being effectively achieved and whether the interests of the United States are being accurately and effectively represented.

22 U.S.C. § 3929(b) (emphasis added).

The FSA explicitly incorporated that portion of the Inspector General Act of 1978, Pub. L. No. 95–452, 92 Stat. 1101 (1978 Act), which grants Inspectors General of various agencies certain powers to carry out their statutory duties: (1) to have access to records, reports and other materials; (2) to make investigations and reports; (3) to request assistance from other government agencies; (4) to subpoena documents, except from Federal agencies; (5) to have access to the agency head; (6) to appoint employees; (7) to obtain expert and consultant services; and (8) to enter into contracts. 22 U.S.C. § 3929(e)(1); *see* 5 U.S.C. app. § 6(a) (Inspector General Act of 1978). In addition to those powers, the Inspector General of the Foreign Service also has authority to request that Department of State employees be assigned to him, provided that all individuals so assigned, as well as those appointed under item (6) above, "be responsible solely to the Inspector General." 22 U.S.C. § 3929(e)(2).

B. Inspector General's Authority to Investigate Passport and Visa Fraud

On its face, the FSA confers some type of investigative authority on the Inspector General of the Foreign Service. What remains to be determined is whether that authority encompasses the investigation of passport and visa fraud. Although one of the Inspector General's primary responsibilities is to conduct "investigations," that term is not defined in the FSA. Most significantly for our purposes, the language of the FSA does not expressly indicate whether the investigative authority which it conferred was limited to cases of malfeasance committed by Department employees or whether that authority also extended to crimes committed by non-employees. In seeking to resolve this issue, we have identified several passages from the legislative history of the FSA which are of assistance in determining Congress' intent. In addition, we have examined the legislative history of the 1978 Act, after which the office of Inspector General of the Foreign Service was "patterned." *See* H.R. Rep. No. 992 (Part 2), 96th Cong., 2d Sess. 22 (1980). The incorporation of part of the 1978 Act into the FSA renders that part of the 1978 Act and its history an

appropriate source of further guidance in interpreting the FSA. *See Engel* v. *Davenport*, 271 U.S. 33, 38 (1926) (adoption of earlier statute by reference makes it fully a part of later statute); 2A Sutherland Statutory Construction § 51.08 (Sands 4th ed. 1973).

The bill considered by the Senate Committee that reported the 1978 Act defined "investigation" to include "inquiries and examinations made to detect, or in response to allegations of, irregularities or violations of law, including misconduct, malfeasance, misfeasance, nonfeasance, fraud, or criminal activity on the part of any employee, person, or firm directly or indirectly connected with the establishment, or operations financed by the establishment." *E.g.*, H.R. 8588, § 11, 95th Cong., 2d Sess. (1978). This definition was later deleted from the bill before passage, not because it was inaccurate, but because "'investigation' is a term with a generally well understood meaning." 124 Cong. Rec. 30954 (1978) (statement of Sen. Eagleton). It is apparent that the deletion was effected solely to remove surplus language, so that the deleted definition can be appropriately used as a guide to determine the scope of the authority that Congress intended to confer upon Inspectors General in the 1978 Act, and, by incorporation, upon the Inspector General of the Foreign Service in the FSA. *See Diamond Crystal Salt Co.* v. *P. J. Ritter Co.*, 419 F.2d 147, 148 (1st Cir. 1969) (rule inferring legislature's disapproval of provision deleted from bill does not apply when omitted provision would have been surplusage). Although the language of the definition is ambiguous in some respects, to the extent that it requires a connection between the person committing the misconduct and the Department, it strongly suggests that Congress intended that the focus of the Inspector General's authority be on the conduct of Department employees or contractors as opposed to the conduct of outside persons who may have occasion to deal with the Department. Thus, this definition suggests that Congress intended to authorize the Inspector General to investigate only passport and visa "malfeasance," as opposed to passport and visa "fraud."

This suggestion is borne out by several aspects of the legislative history of the FSA. Although none alone is dispositive, the several statements in combination provide a persuasive indication that the Inspector General's powers were directed at the internal conduct of the Department and the Foreign Service. First, the House Committee on Post Office and Civil Service explained that Chapter 2, in which § 209 is found, "deals with the management of the Foreign Service generally . . . ." *E.g.*, H.R. Rep. No. 992, 96th Cong., 2d Sess. (Part 2) 22 (1980). That report further declared that a purpose of establishing the office of Inspector General would be to "provide leadership and coordination and recommend policies for activities designed to promote efficiency and to prevent and detect fraud and abuse *in such programs and operations*." *Id.* (emphasis added). That Committee, therefore, also appears to have contemplated that the Inspector General would confine his investigative activities to the administration of operations as conducted by the Department of State.

The House Committee on Foreign Affairs reported that the objectives to be met by the Inspector General "include systematic examinations of whether

financial transactions are properly conducted, whether resources are being used efficiently, whether requirements of law are being met (including the antidiscrimination and antireprisal provisions of section 105 of this bill), and whether there are instances of fraud or other irregularities." *E.g.*, H.R. Rep. No. 992, 96th Cong., 2d Sess. (Part 1) 23 (1980). The phrasing of this list of objectives places an emphasis on employee behavior. For example, the Committee's parenthetical elaboration of its term "requirements of law," which refers to § 105 of the bill, specifies laws applicable solely to Department employees. Further, the reference to "fraud or *other* irregularities" suggests that the fraud mentioned is a species of a broader class of "irregularities" — a term which, by referring to departure from established norms, connotes derelictions of official duty, rather than deceit worked upon Department officials by non-employees. This Committee, therefore, evidently understood the grant of authority to apply to the investigation of acts committed by employees of the Department of State.

Finally, § 209 empowers the Inspector General to "receive and investigate complaints or information *from a member of the Service or employee of the Department* concerning the possible existence of an activity constituting a violation of laws or regulations, constituting mismanagement, gross waste of funds, or abuse of authority, or constituting a substantial and specific danger to public health or safety." 22 U.S.C. § 3929(f) (emphasis added). Of the enumerated derelictions, only the first is capable of general applicability outside the Department. Its context, however, suggests that its purpose, once again, was to facilitate investigations of employees. The articulation of this complementary power in terms of complaints of employees is further evidence that Congress was conferring authority over intra-departmental malfeasance, to which employees would be the most likely witnesses.

In light of these considerations and evaluated against the general rule that the Attorney General will investigate violations of Title 18 in the absence of a statute expressly delegating authority to another department, *see supra* note 1, we believe that Congress should not be regarded as having conferred on the Inspector General, in the FSA, the authority to investigate passport and visa fraud that is, fraud committed in passport application or use by persons not connected with the Department of State. Far from constituting an express delegation of such investigative authority, § 209 and its legislative history persuasively suggest that the power to investigate passport and visa fraud was not embraced at all by the statutory grant. It follows that if the Secretary has some derivative source of authority to investigate passport and visa fraud, then that authority was not supplanted, transferred, or limited by the FSA.[2]

[2] We have examined only the statutory grant of investigative authority to the Inspector General and, therefore, express no view on the existence or scope of independent investigative authority in the Secretary with regard to either "fraud" or "malfeasance." We do note, however, that if there were some overlap of authority between the Inspector General and the Secretary in the area of passport or visa malfeasance, the Secretary would not necessarily be ousted of all such power by the FSA. As this Office previously stated generally with respect to the 1978 Inspector General Act, "there is no indication in the Act that Congress intended the agency head to perform [his supervisory] functions at all times through the Inspector General."

Continued

C. Authority of Special Agents

Your inquiry whether Special Agents may conduct questioning and request that an individual accompany them to another spot raises two issues: whether the Office of Security has any authority to investigate passport and visa fraud and whether the type of confrontation described in your letter falls within the scope of that authority. Any authority possessed by the Office of Security is derived either from the Inspector General or from the Secretary, as there does not, to our knowledge, exist any independent grant to that Office concerning passport and visa fraud. We have concluded above that the Inspector General does not have authority under the FSA to conduct investigations of passport and visa fraud. Thus, any investigative authority possessed by the Office of Security in this area must flow from the Secretary. Further, the FSA prohibits the Inspector General's subordinates from serving two masters by providing that *both* the employees appointed by the Inspector General *and* the employees of the Department of State assigned to the Inspector General are to be responsible "solely" to the Inspector General. 22 U.S.C. § 3929(e)(2). This requirement was intentionally imposed to establish an Inspector General staff independent of the Secretary. *See* S. Rep. No. 913, 96th Cong., 2d Sess. 26 (1980). Consequently, Special Agents of the Office of Security assigned to the Inspector General, like the Inspector General himself, would possess no authority to investigate passport and visa fraud. Special Agents not so assigned, and thus responsible to the Secretary, would be able to implement whatever investigative authority the Secretary possesses.

The second issue raised by this particular inquiry involves the contours of permissible investigative activities. We address this question on the assumption that some derivative authority to investigate passport and visa fraud resides in the Secretary and is validly delegated to the Office of Security. Authority to investigate, however, even if granted expressly by statute, would not automatically confer other specific law enforcement powers. Postal inspectors, for example, were held not to derive powers of arrest from the Post Office Department's general statutory authority to investigate postal offenses. *Alexander v. United States*, 390 F.2d 101, 105 (5th Cir. 1968). Similarly, the Attorney General's authority to appoint "investigative officials" under 28 U.S.C. § 533 was understood by the Attorney General and the Congress as not sufficient to give FBI agents the power to make arrests or carry firearms, prompting Congress to provide for such powers explicitly fifteen years later. *E.g.*, H.R. Rep. No. 1824, 73d Cong., 2d Sess. 1–2 (1934); *see* Act of June 18, 1934, Pub. L. No. 73–402, 48 Stat. 1008.

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[2] (. . . continued)
Letter to General Counsel, General Services Administration from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 24, 1983). Any limits on the Secretary's existing power to investigate malfeasance that might be inferred from the FSA would have to be determined on the facts and circumstances involved in a particular class of investigations. The questions raised in your letter do not appear to us to require an analysis of the Secretary's investigative jurisdiction over employee malfeasance.

It is well established that the authority to exercise law enforcement powers must be conferred expressly by statute. In the absence of a federal statute, federal officers have the powers of arrest conferred by the law of the State in which the arrest occurs. *Miller* v. *United States*, 357 U.S. 301, 305 (1958); *United States* v. *Di Re*, 332 U.S. 581, 589 (1948). If state law makes no provision for arrests by federal officers, they have only the authority of a private citizen. *Coplon* v. *United States*, 191 F.2d 749, 753 (D.C. Cir. 1951); *accord United States* v. *Chapman*, 420 F.2d 925, 926 (5th Cir. 1969). It is clear that the Special Agents of the Office of Security have the statutory power to arrest only in their capacity as protectors of certain statutorily specified persons. 22 U.S.C. §§ 2666–2667 (heads of foreign states, official representatives of foreign governments, the Secretary of State, the Deputy Secretary of State, official representatives of the U.S. Government, and families thereof). If an interrogation such as you have described, not involving this protective role, constitutes an arrest, therefore, a Special Agent would not have the authority to conduct it under a general grant of investigative jurisdiction.

There are limits that an investigation may not exceed without acquiring the attributes of an arrest. "In the name of investigating a person who is no more than suspected of criminal activity, the police may not . . . seek to verify their suspicions by means that approach the conditions of arrest." *Florida* v. *Royer*, 460 U.S. 497, 499 (1983) (plurality opinion). In attempting to determine whether particular conduct crosses the line between investigative questioning and arrest, courts generally look at all of the circumstances and the context in which the issue has arisen. *See United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). Addressing a tort claim of false imprisonment, for example, one court found that no arrest had occurred when an agent touched the plaintiff's arm and encouraged him to head toward an office for questioning. The court reasoned that the plaintiff was subject neither to custody nor to control, nor was he constrained by the authority or official capacity of the agents. *Belcher* v. *United States*, 511 F. Supp. 476, 483 (E.D. Pa. 1981).

Cases decided on the basis of the Fourth Amendment to the Constitution provide the richest source of judicial analysis of the point at which an arrest occurs. "A person is not arrested or seized under the Fourth Amendment if he is free to choose whether to enter or continue an encounter with police and elects to do so." *United States* v. *Brunson*, 549 F.2d 348, 357 (5th Cir.), *cert. denied*, 434 U.S. 842 (1977). Generally, the inquiry involves an objective test of whether the average, reasonable person would have thought that he had been arrested. *United States* v. *Scheiblauer*, 472 F.2d 297, 301 (9th Cir. 1973); *Coates* v. *United States*, 413 F.2d 371, 373 (D.C. Cir. 1969). Thus, if Special Agents ask an individual to accompany them for the purpose of answering some questions and tell the subject that he is not under arrest and that he is free to leave, he will be deemed to have consented to the questioning and not arrested. *United States* v. *Vita*, 294 F.2d 524, 528 (2d Cir. 1961).

Although the above principles have been developed for purposes of determining such matters as the legality of detention, searches, and seizure of

evidence, they also furnish a benchmark from which to measure the limits of activities that fall within the general purview of "investigation." On the basis of our research, we believe that consensual questioning is within a grant of investigative authority. Whether such questioning is consensual will depend upon whether the subject believes that he is free to refuse to answer questions in any location and, therefore, that he is not in custody. It would be helpful in this regard if the credentials that Special Agents display before initiating questioning were revised to reveal these limitations on the authority of the investigating officers and if the agents informed their subjects of these limitations.

Conclusion

Without analyzing the source, validity, or scope of the authority of the Secretary of State to conduct investigations of passport and visa fraud, we have concluded that the FSA does not change the scope of that claimed authority. The FSA does not confer upon the Inspector General of the Foreign Service express power to investigate passport and visa fraud, and consequently does not withdraw from the Secretary any residual powers he may have over such investigations. We have not attempted to resolve what those residual powers may include. When acting under investigative authority delegated by the Secretary, Special Agents may conduct consensual questioning of individuals and may request that an individual consent to being questioned elsewhere, provided that a reasonable person would understand that compliance with such a request is voluntary.[3]

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

[3] NOTE: After this opinion was issued by the Office of Legal Counsel, (1) the Inspector General Act of 1978 was amended to include the Inspector General of the Department of State, *see* Pub. L. No. 99–93, § 150(a), 99 Stat. 405, 427 (1985), and (2) Special Agents of the Department of State were granted specific statutory authority to investigate and make arrests with respect to illegal visa and passport issuance, *see id.* § 125(a), 99 Stat. at 415–16 (codified at 22 U.S.C. § 2709(a)(1)).

Recommendation that the Department of Justice not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984

Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 that retroactively extend the appointments of bankruptcy judges who were in office at the time of the expiration of the transition provisions of the Bankruptcy Reform Act of 1978, as amended, violate the Appointments Clause of the United States Constitution.

The Justice Department should not defend the constitutionality of the reinstatements under the Bankruptcy Amendments and Federal Judgeship Act of 1984, because its general obligation to defend the constitutionality of laws enacted by Congress does not extend to defending laws that unconstitutionally infringe upon the powers of the President.

August 27, 1984

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum supplements our previous memoranda of June 29, 1984 (to Assistant Attorney General McConnell, from Acting Assistant Attorney General Tarr) and July 6, 1984 (to Deputy Attorney General Dinkins, from Acting Assistant Attorney General Tarr) concerning the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act). As we indicated in our previous memoranda, and as we set forth in greater detail below, we believe that the provisions (Grandfather Provisions) of the 1984 Act that purport to reinstate all bankruptcy judges who were in office at the time of the expiration on June 27, 1984 of the transition provisions of the Bankruptcy Reform Act of 1978, as amended (1978 Act), are constitutionally defective. We further believe that the constitutional defects are sufficiently serious and would have such a significant impact on the appointment (and, potentially, the removal) power of the Executive that the Department should refrain from defending their constitutionality. The Department, however, should be prepared to defend the other provisions of the 1984 Act if they are challenged in court. We specifically recommend that the Department set forth its position regarding the Grandfather Provisions in the case of *In re Benny*, Civ. No. 84120 MISC RHS BKY (N.D. Cal.), as generally articulated in a draft brief prepared by the Civil Division and transmitted to this Office on August 23, 1984.[1]

[1] NOTE: After this opinion was issued by the Office of Legal Counsel, the United States Court of Appeals for the Ninth Circuit refused to hold the reinstatement of bankruptcy judges unconstitutional. *See In re Benny*, 812 F.2d 1133 (9th Cir. 1987). The Court of Appeals did not address the issue considered by the Office of Legal Counsel — whether Congress may retroactively extend Presidential appointments under the Grandfather Provisions of the 1984 Act — because it construed the transition provisions of the 1978 Act as prospective extensions of the appointments. The Court of Appeals held that the prospective extension of the appointments was constitutional.

Under § 205 of Public Law No. 98–166, which continues the authorities contained in § 21 of Public Law No. 96–132, 93 Stat. 1049–50, the Attorney General is required to "transmit a report to each House of the Congress" in any case in which he determines that the Department of Justice "will refrain from defending . . . any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional." Thus, if you concur that the Department should not defend the constitutionality of the Grandfather Provisions and should, as we recommend, participate in the *Benny* litigation consistent with our views and those of the Civil Division, Congress must be notified of that decision. If you concur, we will, with the participation of the Civil Division, draft a proposed letter to Congress. We have set forth below the reasons why we believe the Department should affirmatively contest, rather than defend, the constitutionality of the Grandfather Provisions.

II.

The 1978 Act was a comprehensive revision of the bankruptcy laws in which Congress made significant changes to both the substantive and procedural law of bankruptcy. *See generally* Pub. L. No. 95–598, 92 Stat. 2549 (1978). The procedural changes included modifications to the jurisdiction and the method of appointment of bankruptcy judges (previously referees in bankruptcy) to preside over bankruptcy proceedings. Section 201(a) of the 1978 Act provided for Presidential appointment of bankruptcy judges, who were to serve for a term of 14 years. *See* 92 Stat. at 2657. These judges were made subject to removal by the judicial council on account of "incompetency, misconduct, neglect of duty, or physical or mental disability." *Id.* Because of their removability and the fixed term of their appointments, it was clear that these bankruptcy judges were not intended by Congress to be judges in the sense envisioned by Article III of the Constitution.

The 1978 Act provided for a transition period before the new appointment procedures would take full effect on April 1, 1984. *See* 92 Stat. at 2682–88. The transition provisions provided that the previously existing bankruptcy courts would continue in existence and that incumbent bankruptcy referees (who had been and would continue to be during this transition period appointed by the district courts to serve 6 year terms) would continue after the expiration of their terms with no fresh appointment to be bankruptcy judges until the expiration of the transition provisions. A bankruptcy referee would not be continued only if the chief judge of the circuit court, after consultation with a merit screening committee, found the referee to be not qualified.

The 1978 Act granted broad jurisdiction to bankruptcy courts over bankruptcy and related matters. Although the Act initially vested this jurisdiction in the district courts, the bankruptcy courts (and the bankruptcy judges) were empowered to exercise all of the jurisdiction conferred upon the district courts

with respect to bankruptcy matters. *See* 92 Stat. at 2668. This jurisdiction included not only civil proceedings arising under the Bankruptcy Act, but also a wide variety of cases that might affect the property of an estate once a bankruptcy petition had been filed. Thus, included within the bankruptcy courts' jurisdiction were various types of contract actions, including claims based on state law.

The constitutionality of this broad grant of jurisdiction to the bankruptcy judges was challenged in a case that was decided by the Supreme Court as *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In *Northern Pipeline*, the Court declared that the broad grant of jurisdiction to bankruptcy courts, at least insofar as it included contract actions arising under state law, was inconsistent with the requirements of the Constitution that such actions, if heard in federal court, must be heard by judges with the protections and independence provided by Article III. The Court did not, however, apply its decision retroactively. In fact, the Court stayed the effect of its decision for three months in order to give Congress a chance to reconstitute the bankruptcy court system. The Court subsequently extended the stay, at the Solicitor General's request, for an additional three months until December 24, 1982, 459 U.S. 813, but it denied the Solicitor General's request for a further extension thereafter. 459 U.S. 1094 (1982).

Although Congress failed to act by the deadline imposed by the Court, the bankruptcy court system continued to operate through various ad hoc arrangements. Because the 1978 Act had initially granted jurisdiction of all bankruptcy proceedings to the district courts, the district courts resumed jurisdiction over all cases with respect to which bankruptcy court jurisdiction had been held unconstitutional under *Northern Pipeline*.

Thus, although the bankruptcy judges were disabled under *Northern Pipeline* from exercising the broad jurisdiction conferred by the 1978 Act, the district courts were able to utilize these courts for the resolution of certain bankruptcy matters under a temporary delegation of authority. The constitutionality of this interim arrangement was upheld by several courts of appeals. *See, e.g., In Re Kaiser*, 722 F.2d 1574 (2d Cir. 1983); *White Motor Corp.* v. *Citibank, N.A.*, 704 F.2d 254 (6th Cir. 1983); *In Re Hansen*, 702 F.2d 728 (8th Cir.), *cert. denied sub nom. First Nat'l Bank* v. *Hansen*, 463 U.S. 1208 (1983).

After *Northern Pipeline*, Congress labored for almost two years to adopt corrective legislation. Under the 1978 Act, the transition provisions were to expire at midnight on March 31, 1984. Congress passed four consecutive eleventh hour extensions of the transition provisions in order to delay the demise of the bankruptcy courts and the terms of the bankruptcy judges. Each such extension was passed by Congress and signed into law by the President before the expiration of the prior period. Ultimately, however, both the courts and the appointments expired on June 27, 1984, without Congress' passing either a new bankruptcy act or another temporary extension.[2] The 1984 Act was

[2] The original transition provisions provided that the term of a bankruptcy judge serving as a referee in bankruptcy when the 1978 Act was enacted would expire "on March 31, 1984 or *when his successor takes*

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not passed by both Houses of Congress until June 29; it was not presented to the President until July 6, 1984; and it was not signed by the President until July 10, 1984. Thus, at the time the transition provisions expired, there were no bankruptcy courts and no bankruptcy judges. When the transition provisions expired, the Administrative Office of the U.S. Courts implemented a system under which the district courts handled bankruptcy matters with the assistance of the former bankruptcy judges, who performed their duties either as magistrates or consultants.

The 1984 Act, however, purported to continue in the new offices created by that Act the judges whose positions and terms had gone out of existence on June 27, 1984. Section 121(e) states that the term of any bankruptcy judge who was serving on that date is extended to the day of enactment of the 1984 Act (July 10, 1984). Section 106 purports to extend the retroactive appointments so that they will expire on the date "four years after the date such bankruptcy judge was last appointed to such office or on October 1, 1986, whichever is later."

Although the President decided to sign the bankruptcy bill, he included the following language in his signing statement:

> I sign this bill with the following additional reservations. I have been informed by the Department of Justice that the provisions in the bill seeking to continue in office all existing bankruptcy judges are inconsistent with the Appointments Clause of the Constitution. I am also advised that Administrative Office of the U.S. Courts has reached the same conclusion. Therefore, I sign this bill after having received assurances from the Administrative Office that bankruptcy cases may be handled in the courts without reliance on those invalid provisions. At the same time, however, I urge Congress immediately to repeal the unconstitutional provisions in order to eliminate any confusion that might remain with respect to the operation of the new bankruptcy system.

On July 27, 1984, the Director of the Administrative Office of the United States Courts issued a memorandum to all courts of appeals, district courts, and former bankruptcy judges in which he stated that the 1984 Act "may not be constitutionally valid." Because of the "inherent risk of the invalidation of judicial actions taken by bankruptcy judges," the Director concluded:

> I have therefore decided, upon advice of my General Counsel, and in accordance with my responsibilities under section 604 of

[2] (. . . continued)
office." Pub. L. No. 95–598, § 404(b), 92 Stat. 2549, 2683 (1982) (emphasis added). Thus, it is arguable that under these original provisions the appointments of the "transition" bankruptcy judges would have continued on even after the expiration of the transition provisions. All four of the extension acts, however, contained specific provisions that declared that the term of office of the transition bankruptcy judges would expire at the conclusion of the extension period. *See, e.g.*, Pub. L. No. 98–249, § 2, 98 Stat. 116, 116 (1984). Thus we believe these actions by Congress made clear that the offices of bankruptcy judges expired at the end of the extension period.

> title 28 of the United States Code, that I will not approve payment of salary to any former bankruptcy judge purporting to exercise judicial authority under the provisions contained in section 121.

Although the Administrative Office subsequently decided not to withhold the pay of the former bankruptcy judges, its position on the constitutionality of the provision has not been altered. It was the apparent intent of the Administrative Office that the bankruptcy system continue to operate with the prior bankruptcy judges' functioning in the manner of magistrates or consultants to assist the district courts until remedial legislation could be obtained when Congress returned from its recess, or until the courts of appeals could exercise their authority under the 1984 Act to appoint new bankruptcy judges to 14 year terms. The latter process, because of the appointment procedures imposed upon the courts, was expected to take at least two months.

II.

It is beyond dispute that Congress could not constitutionally appoint bankruptcy judges. The Appointments Clause of the Constitution, art. II, § 2, cl. 2, 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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court held 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 accordance with the Appointments Clause. *Id.* at 126. The Court also explicitly held that neither Congress nor its officers may appoint officers of the United States. *Id.* at 127.

This prohibition is not altered by Congress' plenary power to establish "uniform laws on the subject of Bankruptcies throughout the United States" under Article 1, § 8 of the Constitution. Thus, the Court in *Buckley* held:

> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the Clause.

Id. at 132. Likewise, the Court ruled that the Necessary and Proper Clause of the Constitution cannot authorize Congress to do what the Appointments Clause forbids. *Id.* at 134–35.

However, Congress did not purport in the Grandfather Provisions to make appointments, but rather only to extend the terms of persons previously appointed in accordance with the Constitution. Had Congress extended the terms before they expired on June 27, 1984, a different and more difficult issue would be presented. *See Myers* v. *United States*, 272 U.S. 52, 128–29 (1926) (Congress may prescribe duties, terms and compensation for public offices); *Shoemaker* v. *United States*, 147 U.S. 282 (1893) (Congress may add new duties that are germane to the functions already performed by a current officer of the United States). Thus, while a congressional extension of the term of an appointment could well raise constitutional questions, it would be qualitatively different than what Congress did in the 1984 Act. Here it is clear that both the terms of bankruptcy judges and their offices expired on June 27, 1984, two days before Congress enacted the Grandfather Provisions and nearly two weeks before the President signed them into law. Thus, the effect of Congress' action was to reinstate and recreate officers of the United States whose status as such had terminated, albeit only for a short period. The critical issue, therefore, is whether Congress may constitutionally achieve this result by purporting to extend retroactively the offices and terms of the bankruptcy judges who were sitting on June 27. While credible arguments can be made in favor of the validity of Congress' action, we conclude that this aspect of the 1984 Act violates the Appointments Clause.

The Supreme Court has recognized that the Appointments Clause is a direct limitation on Congress' power and essential to the operation of the separation of powers established by the Framers of the Constitution. *Buckley* v. *Valeo*, 424 U.S. at 118–19. Thus, the Court has held that the limitations imposed by the Appointments Clause must be strictly construed, stating:

> that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices . . . and that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, Senate advice and consent in the work of the executive, are limitations to be strictly construed and not to be extended by implication . . . .

Myers v. *United States*, 272 U.S. at 164.

The Court's decisions concerning efforts to reinstate former officers of the United States reflect this strict construction. In *Mimmack* v. *United States*, 97 U.S. 426 (1878), for example, the President accepted the resignation of an army captain on November 8, 1868, but attempted to revoke his acceptance about one month later, on December 11, 1868. The Court held that the attempted revocation was invalid, stating:

> Officers of this kind are nominated by the President and confirmed by the Senate; and if the petitioner ceased to be such an officer when notified that his resignation had been accepted, it requires no argument to show that nothing could reinstate him in the office short of a new nomination and confirmation.

Id. at 437. It is noteworthy that in this context the attempted action would have constituted a Presidential evasion of legislative prerogatives. The 1984 Act reflects an attempted Legislative Branch encroachment into authority lodged in other Branches.

The Court considered an analogous situation in *United States* v. *Corson*, 114 U.S. 619 (1885). In that case, President Lincoln dismissed a military officer from the service on March 27, 1865. Shortly thereafter, on June 9, 1865, President Johnson revoked the order of dismissal and restored the officer to his former position. The Court found that as a result of President Lincoln's order, the officer "was disconnected from that branch of the public service as completely as if he had never been an officer of the army." *Id.* at 621. Accordingly, the Court held that the Appointments Clause barred President Johnson from reinstating the officer save with the advice and consent of the Senate, stating:

> The death of the incumbent could not more certainly have made a vacancy than was created by President Lincoln's order of dismissal from the service. And such vacancy could only have been filled by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate were necessary . . . .

Id. at 622. *See also Blake* v. *United States*, 103 U.S. 227, 237 (1880) ("Having ceased to be an officer in the army, he could not again become a post chaplain, except upon a new appointment, by and with the advice and consent of the Senate.").

These precedents teach that from the moment an incumbent loses his status as an officer of the United States, he cannot be restored to office save by a new appointment in accordance with the Appointments Clause. While these particular cases protect the Senate's right under the Appointments Clause to consent to appointments, we see no principled basis for finding the President's appointment power to be entitled to less protection in the context of an attempt by Congress to exercise that power. In fact, these cases show that the Court has been sensitive to erosion of the separation of powers principles at stake, which principles act neutrally to protect the process rather than any particular office holder.

Indeed, Congress by its actions has acknowledged that it lacks power to reappoint an officer of the United States. Thus, Congress has on occasion changed the retirement pay of military officers by retroactively changing their rank as of the date of their retirement, but has recognized that it cannot place an officer who was discharged from service on the retired list without first providing for his reappointment:

> Congress has frequently exercised the power of changing the mere rank of officers without invoking the constitutional power of the Executive to appoint the incumbents to new offices. But when it has been the purpose to place on the retired list one who has been discharged from service, who no longer holds any office in the Army, Congress has provided for his restoration or reappointment in the manner pointed out by the Constitution, generally by the President alone, and then has authorized his retirement.

Wood v. *United States*, 15 Ct. Cl. 151, 161 (1879), *aff'd*, 107 U.S. 414 (1882). *See, e.g.*, *Collins* v. *United States*, 14 Ct. Cl. 568, 15 Ct. Cl. 22 (1879).

A much more recent case, *United States* v. *Will*, 449 U.S. 200 (1980), also supports the conclusion that direct constitutional limitations on congressional power will be strictly enforced. In that case, the Court considered a statute repealing a scheduled cost of living salary increase for judges. One of the four separate measures under consideration in *Will* became law when signed by the President on October 1, 1976, hours after the increase took effect. Although no judge ever received the increased salary, and although the statute would have been constitutional if it had been signed by the President a few hours earlier, the Court held that the statute violated the Compensation Clause because it purported to repeal a salary increase technically already in force. 449 U.S. at 225. In reaching this result, the Court noted, """[w]henever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily as into fractions of any other unit of time."" *Id.* at 225 n.29 (quoting *Louisville* v. *Savings Bank*, 104 U.S. 469, 474–75 (1881) (quoting *Grosvenor* v. *Magill*, 37 Ill. 239, 240 41 (1865))).

This principle that direct constitutional limitations on the powers of a Branch of Government, here Congress, must be strictly enforced distinguishes the cases in which the Court has upheld retroactive statutes. *E.g.*, *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984); *United States* v. *Darusmont*, 449 U.S. 293 (1981). These cases concern the limits on retroactive economic legislation imposed by the Due Process Clause, not an explicit constitutional limitation on congressional power central to the separation of powers. We are not aware of any case in which the Court has allowed Congress to accomplish by indirection, through the guise of retroactive legislation, what it could not do directly under the Constitution.

While the conclusion that the moment an officer of the United States loses his status as such he cannot be reinstated except in accordance with the Appointments Clause is admittedly a technical one, it is no more technical than the *Will* Court's holding that a judicial salary increase is fully protected by the Compensation Clause the moment it takes effect. Moreover, the Court embraced precisely this construction of the Appointments Clause with respect to limitations on Presidential power in *Mimmack*, *Corson* and *Blake*. The Supreme Court has not hesitated to enforce structural provisions of the Constitution in their technical sense, undoubtedly because it is extremely difficult to locate a stopping

point once the initial erosion is permitted. Here, if a two-week hiatus were to be tolerated, where would the line be drawn? A great deal of uncertainty and litigation would undoubtedly follow. On the other hand, requiring Congress to act, if it wishes to do so, before legislation expires, is not unduly burdensome. Here, for example, Congress extended the terms of the bankruptcy judges four times before it finally failed to meet its own deadline.

One could argue against this reading of the Appointments Clause that the values protected by that provision are not implicated by Congress' action at issue here. In this regard, it is significant that the persons whose terms were extended were initially appointed in accordance with the Appointments Clause, and that Congress extended the terms of all sitting bankruptcy judges without attempting to evaluate the wisdom of retaining any particular individual. Moreover, Congress acted on an emergency basis in the face of perceived potential disruption of the bankruptcy system. However, the fact that the initial appointments were made in accordance with the Constitution does not distinguish *Mimmack*, *Corson* and *Blake*. Furthermore, an emergency cannot create powers not afforded a particular branch of Government under the Constitution. *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (President's seizure of steel mills during Korean War held unconstitutional as violation of separation of powers).

For these reasons, we conclude that once the terms and offices of the bankruptcy judges expired on June 27, 1984, those officers could not be reinstated except by a new appointment made in accordance with the Appointments Clause. Congress could not evade this requirement through the fiction of retroactively extending the terms of the judges who were sitting on that date. While this conclusion may appear to some to be technical and restricts a convenient and efficient mechanism for dealing with an emergency, we believe that it is correct in light of the language and intent of the Constitution as interpreted by the Supreme Court. As the Court stated in *INS* v. *Chadha*, 462 U.S. 919 (1983):

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President.

Id. at 959.

III.

The Supreme Court has consistently held that whether an unconstitutional provision may be severed from a statutory scheme is a matter of congressional

intent, and that the invalid portions of a statute should be severed "unless it is evident that the legislature would not have enacted those provisions that are within its power, independently of that which is not." *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). *See, e.g., Buckley* v. *Valeo*, 424 U.S. at 108. In reaffirming these principles in *INS* v. *Chadha*, the Court identified three basic principles with respect to severability. First, the Court reiterated the basic rule, stating:

> Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "'unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), (quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

462 U.S. at 931–32. Second, the Court stated that a severability clause is strong evidence that Congress did not intend for the entire statute to fall when one of its provisions is held to be unconstitutional. Accordingly, the presence of such a clause in the statutory scheme reinforces the presumption of severability. *Id.* Finally, the Court held that "a provision is further presumed severable if what remains after severance is 'fully operative as a law.' *Champlin Refining Co.* v. *Corporation Comm'n, supra*, 286 U.S. at 234." 462 U.S. at 934.

Applying these principles, we conclude that the Grandfather Provisions of the 1984 Act are severable. We have been unable to locate anything in the language of the 1984 Act or its legislative history tending to rebut the usual presumption of severability. To the contrary, § 119 provides:

> If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby.

This severability clause is, as noted above, persuasive evidence of congressional intent.

Finally, the remaining provisions of the 1984 Act would be "fully operative as a law" in the absence of the Grandfather Provisions. Under § 104 of the 1984 Act, bankruptcy judges are to be appointed by the courts of appeals for the circuits in which the judgeships are located. The Grandfather Provisions are designed to facilitate the transition to appointments by the court of appeals by providing a temporary starting corps of judges. If the Grandfather Provisions are invalidated, the courts of appeals could appoint bankruptcy judges in accordance with the appointment scheme created by the 1984 Act. The courts of appeals would determine whether to reappoint some or all of the bankruptcy judges who were sitting on June 27, 1984. But whatever the courts' decisions in this regard, the bankruptcy court structure and the substantive provisions of bankruptcy law established by the 1984 Act would remain in place. Moreover,

because § 101 of the 1984 Act assigns plenary jurisdiction over bankruptcy matters to the federal district courts, they will be able to establish suitable arrangements for handling bankruptcy cases pending appointment of bankruptcy judges by the courts of appeals. Thus, the 1984 Act could operate fully without the Grandfather Provisions. For these reasons, we conclude that the Grandfather Provisions are severable.

IV.

The President and his subordinates have a constitutionally imposed duty "to take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Attorneys General have generally construed this obligation to include the enforcement and the defense in court of laws enacted by Congress irrespective of questions that have been or might be raised regarding their constitutionality:

> [I]t is not within the province of the Attorney General to declare an Act of Congress unconstitutional at least, where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department and that when an act like this, of general application, is passed it is the duty of the executive department to administer it until it is declared unconstitutional by the courts.

31 Op. Att'y Gen. 475, 476 (1919). *See also, e.g.*, 40 Op. Att'y Gen. 158 (1942); 39 Op. Att'y Gen. 11 (1937); 38 Op. Att'y Gen. 252 (1935); *id.* at 136 (1934); 36 Op. Att'y Gen. 21 (1929).

Like the courts, the Executive should (and does) apply a presumption in favor of the constitutionality of a federal statute. *E.g.*, *INS* v. *Chadha*, 462 U.S. 919, 944 (1983). Members of Congress take an oath to uphold the Constitution, and the Executive should presume that, in passing legislation, Members of Congress have acted with due regard for their responsibilities to the Constitution. *See Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981).

The Executive's duty faithfully to execute the law and recognition of the presumption of constitutionality generally accorded duly enacted statutes result in all but the rarest of situations in the Executive's enforcing and defending laws enacted by Congress. *United States* v. *Lee*, 106 U.S. 196, 220 (1882) ("No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.").

There are sound reasons of policy for this general practice. Our constitutional system is delicately balanced by the division of power among the three Branches of the Government. Although each Branch is not "hermetically" sealed from the others, *Buckley* v. *Valeo*, 424 U.S. at 121, and certain areas of overlapping responsibility may be identified, the quintessential functions of each Branch may be easily stated. It is axiomatic that the Legislature passes the laws, the Executive executes the laws, and the Judiciary interprets the laws. Any decision

by the Executive that a law is not constitutional and that it will not be enforced or defended tends on the one hand to undermine the function of the Legislature and, on the other, to usurp the function of the Judiciary. It is generally inconsistent with the Executive's duty, and contrary to the allocation of legislative power to Congress, for the Executive to take actions that have the practical effect of nullifying an Act of Congress. It is also generally for the courts, and not the Executive, finally to decide whether a law is constitutional. Any action of the President that precludes, or substitutes for, a judicial test and determination would at the very least appear to be inconsistent with the allocation of judicial power by the Constitution to the courts.

Exceptions to this general rule, however rare, do and must exist. These arise whenever the role of enforcing and defending a federal statute may not sufficiently discharge the Executive's constitutional duty. The President's veto power will usually be adequate to express and implement the President's judgement that an act of Congress is unconstitutional. By exercising his veto power, the President may fulfill his responsibility under the Constitution and also impose a check on the power of Congress to enact statutes that violate the Constitution. On some occasions, however, the exercise by the President of his veto power may not be feasible. For example, an unconstitutional provision may be a part of a larger and vitally necessary piece of legislation. The Supreme Court has held that the President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does Presidential approval of an enactment cure constitutional defects. *National League of Cities* v. *Usery*, 426 U.S. 833, 841 n.12 (1976); *Myers* v. *United States*, 272 U.S. 52 (1926).

Cases in which the Executive has chosen not to defend an Act of Congress may be placed in one of two categories. One category of cases involves statutes believed by the Executive to be so clearly unconstitutional as to be indefensible but which do not trench on separation of powers. Refusals to execute or defend statutes based upon a determination that they meet these criteria are exceedingly rare.[3]

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[3] Our research has uncovered only three documented situations of this nature, although we cannot be sure there are not others, because informal (or even formal) decisions not to execute statutes would not necessarily be recorded in such a way as to make them accessible to us. And, if the Executive refused to enforce or defend the statute, the matter may never have come to the courts, or if it did, would have been unlikely to leave a prominent mark.

The first instance of refusal to defend such a statute that we have located occurred in 1962 in the context of a private civil rights action contesting the constitutionality of a federal law that provided federal funds for hospitals having "separate but equal facilities." In that case, *Simpkins* v. *Moses H. Cone Memorial Hospital*, 211 F. Supp. 628, 640 (M.D.N.C. 1962), *rev'd*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), the United States intervened and took the position that the statute in question, then 42 U.S.C. § 299e(f), was unconstitutional.

On October 11, 1979, former Attorney General Civiletti, over the strong objection of this Office, notified Congress by identical letters to the Speaker of the House and the President *pro tempore* of the Senate that the Department would not defend § 399(a) of the Public Broadcasting Act of 1967, 47 U.S.C. § 399(a). That decision was reversed by you in your letter to Chairman Thurmond and Senator Biden of the Senate Committee on the Judiciary of April 6, 1981. The Supreme Court subsequently struck down, by a narrow 5–

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The other category involves statutes that the Executive believes are unconstitutional (although not necessarily so clearly unconstitutional as statutes falling in the first category) and that usurp executive authority and therefore weaken the President's constitutional role. The following statement of President Andrew Johnson's counsel in an early recorded statement addresses the President's responsibilities with respect to the second of these categories:

> If the law be upon its very face in flat contradiction of plain expressed provisions of the Constitution, as if a law should forbid the President to grant a pardon in any case, or if the law should declare that he should not be Commander-in-Chief, or if the law should declare that he should take no part in the making of a treaty, I say the President, without going to the Supreme Court of the United States, maintaining the integrity of his department, which for the time being is entrusted to him, is bound to execute no such legislation; and he is cowardly and untrue to the responsibility of his position if he should execute it.

2 *Trial of Andrew Johnson* 200 (Washington 1868). This statement, of course, was made in the context of the attempt to impeach President Johnson for, *inter alia*, having refused to obey the Tenure in Office Act, an act "which he believed with good reason . . . to be unconstitutional." 38 Op. Att'y Gen. 252, 255 (1935).

This early statement anticipated a practice that has subsequently been followed by the Executive under which the President need not blindly execute or defend laws enacted by Congress if such laws trench on his constitutional power and responsibility. Of course, under that practice the President is obligated to respect and follow the decisions of the courts as the ultimate arbiters of the Constitution.

This category of cases exists because, in addition to the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress, the President also has a constitutional duty to protect the Presidency from encroachment by the other Branches. He takes an oath to "preserve, protect and defend" the Constitution. An obligation to take action to resist encroachments on his institutional authority by the Legislature may be implied from that oath, especially where he may determine it prudent to present his point of view in court. In this regard, we believe that the President must, in appropriate circumstances, resist measures which would impermissibly weaken the Presidency: "The hydraulic pressure inherent within each of the separate Branches to

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[3] (. . . continued)

4 vote, that aspect of § 399(a) which had been viewed by this Office in 1979 as least susceptible to a credible defense, in contrast to the other provisions which we believed to be clearly defensible. *See FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984).

Finally, on January 13, 1981 former Attorney General Civiletti, with the concurrence of this Office, informed Congress by identical letters to the Speaker of the House and the President *pro tempore* of the Senate that the Department would not prosecute, under 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e), the mailing of truthful, non-deceptive advertising regarding legal abortions.

exceed the outer limits of its power, even to accomplish desirable objectives, *must* be resisted." *INS* v. *Chadha*, 462 U.S. at 951 (emphasis added).

This duty to preserve the institution of the Presidency, captured above in the words of President Andrew Johnson's counsel, was articulated eloquently and somewhat more authoritatively by Chief Justice Chase, who presided over the trial in the Senate of President Johnson. Chief Justice Chase declared that the President had a duty to execute a statute passed by Congress which he believed to be unconstitutional "precisely as if he held it to be constitutional." However, he added, the President's duty changed in the case of a statute which

> directly attacks and impairs the executive power confided to him by [the Constitution]. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.
>
> * * *
>
> How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no *right* to *defend* it against an act of Congress, sincerely believed by him to have passed in violation of it?

R. Warden, *An Account of the Private Life and Public Services of Salmon Portland Chase* 685 (1874) (emphasis in original).[4] If the President does not resist intrusions by Congress into his sphere of power, Congress may not only successfully shift the balance of power in the particular case but may succeed in destroying the Presidential authority and effectiveness that would otherwise act as a check on Congress' exercise of power in other circumstances.

The major historical examples of refusal by the Executive to enforce or defend an Act of Congress have been precipitated by Congress' attempt to alter the distribution of constitutional power by arrogating to itself a power that the Constitution does not confer on Congress but, instead, reposes in the Executive. In such situations, a fundamental conflict arises between the two Branches, and this conflict has generally resulted in Attorneys General presenting to the courts the Executive's view of what the Constitution requires. The potential for such a conflict's arising was expressly recognized by Attorney General Palmer in 1919 when he issued the opinion, quoted above, that the general duty of the Attorney General to enforce a statute did not apply in the case of a conflict between the Executive and the Legislature. *See* 31 Op. Att'y Gen. 475, 476 (1919).

Seven years later, this caveat to the general rule was applied when the President acted contrary to a statute prohibiting the removal of a postmaster. That act led to litigation in which the Executive challenged, successfully, the

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[4] Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that the Tenure of Office Act was unconstitutional. *Id. See* M. Benedict, *The Impeachment and Trial of Andrew Johnson* 154–55 (1973). Ultimately, the Senate did admit evidence that the President had desired to initiate a court test of the law. *Id.* at 156.

constitutionality of that statute in litigation brought by the removed postmaster. *Myers* v. *United States*, 272 U.S. 52 (1926). *Myers* appears to be the first case in which the Executive acted contrary to and then directly challenged the constitutionality of a federal statute in court:

> In the 136 years that have passed since the Constitution was adopted, there has come before this Court for the first time, so far as I am able to determine, a case in which the government, through the Department of Justice, questions the constitutionality of its own act.

Id. at 57 (summary of oral argument of counsel for appellant *Myers*).[5]

Almost a decade later, the Executive argued, unsuccessfully, that § 1 of the Federal Trade Commission Act would be unconstitutional if interpreted to prohibit the President's removal of a member of the Federal Trade Commission. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). A similar argument was advanced, again unsuccessfully, by the Executive with respect to an analogous removal issue in the case of *Wiener* v. *United States*, 357 U.S. 349 (1958). Between these two cases, the Executive carried out, but then refused to defend when sued, and indeed successfully challenged the constitutionality of, a statute that directed that the salaries of certain federal employees not be paid. *United States* v. *Lovett*, 328 U.S. 303 (1946).[6] In 1976, the Appointments Clause was once again at issue when the Executive challenged, successfully, the appointment of members of the Federal Election Commission by officers of Congress. *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

In addition to these examples, there have been and continue to be a number of cases involving the constitutionality of so called legislative veto devices in which the Executive has successfully challenged the constitutionality of legislative vetoes. Representative of this class of cases is, of course, *INS* v. *Chadha*, 462 U.S. 919 (1983). As is true of the other cases discussed above, the Court has never suggested that there has been any impropriety in the Executive's conduct.[7]

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[5] It is perhaps noteworthy that this summary of the argument of appellant Myers' counsel goes on to record counsel's view that as to the appearance of the Department of Justice in opposition to the statute, "I have no criticism to offer; I think it is but proper." Further, that summary of the oral argument does not record any observations whatsoever on this point by Senator George Wharton Pepper, who appeared as counsel for the Senate and House of Representatives as *amicus curiae See* 272 U.S. at 65–77.

[6] The Supreme Court decided that the statute in question was unconstitutional as a bill of attainder, a constitutional defect not necessarily suggesting a clash between legislative and executive power. Because the statute was directed at subordinates of the President, however, the case took on that characteristic both as regards the bill of attainder issue and, more specifically, with respect to the argument advanced by the employees and joined in by the Solicitor General that the statute at issue constituted an unconstitutional attempt by Congress to exercise the power to remove Executive Branch employees See Brief for the United States at 10, 56, *United States* v. *Lovett*, 328 U.S. 303 (1946) (No. 809). Thus, *Lovett* falls squarely within the second category of cases as representing a clash between legislative and executive power.

[7] On July 30, 1980 Attorney General Civiletti transmitted to Chairman Baucus of the Subcommittee on Limitations of Contracted and Delegated Authority of the Senate Committee on the Judiciary a detailed explanation of this Department's policy with regard to defending federal statutes against constitutional challenges. It is perhaps noteworthy that in his letter to the Attorney General, as observed by the Attorney General in his response, Chairman Baucus had excluded from his broad inquiry "those situations where the

Continued

The general policy outlined above was rearticulated during this Administration in your letter of April 6, 1981, to Chairman Thurmond and Senator Biden of the Senate Committee on the Judiciary in response to their request that the Department reconsider its decision not to defend a provision of the Federal Communications Act being challenged in a case brought by the League of Women Voters in 1979. *See supra* note 2. That letter stated your view that the Executive "appropriately refuses to defend an Act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid."

As indicated by our discussion of the merits of the constitutionality of §§ 106 and 121 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 in part II above, the practical and legal effect of those provisions is to grant Congress the power to appoint officers of the United States. It is true that under the 1984 Act the power to make fresh appointments is vested in the courts rather than in the President or a head of a department. It is also true that bankruptcy referees whose terms were purportedly retroactively extended by the 1984 Act were themselves appointed by the district courts both prior to 1978 and under the transition provision of the 1978 Act. Thus, an argument could be made that the action of Congress in this situation does not infringe so directly on the power of the President as to place this particular enactment in the category of statutes thought to invade the prerogatives of the Executive. That argument is, however, untenable.

There can be no doubt that in the 1984 Act Congress could have placed the appointment power in the President, with or without the advice and consent of the Senate, the Heads of Departments, or the Courts pursuant to the Appointments Clause. If it were established that Congress could indeed make appointments in the manner they are made by the 1984 Act, there surely would be no principled basis upon which that power could be limited under the Appointments Clause to the appointment of officers whose appointments were generally assigned to the courts as opposed to the President or Heads of Departments. Thus, the principle of constitutional law involved squarely implicates the constitutional prerogatives of the Executive and warrants a challenge to the 1984 Act on this point by the Executive under the precedent discussed with respect to the second category of situations in which the Executive has historically refrained from defending the constitutionality of an Act of Congress. The inescapable fact is that if Congress may, as Congress would have it, retroactively extend the term of an officer of the United States whose term has expired, Congress presumptively could do so as regards any officer, thereby depriving

[7] (. . . continued
Acts themselves touch on constitutional separation of powers between Executive and Legislative Branches." Given the otherwise broad nature of Chairman Baucus' inquiry and the pendency of *Chadha* in the United States Court of Appeals for the Ninth Circuit, it would be reasonable to infer from his request an absence of concern as regards the Attorney General's challenge to the constitutionality of such devices

the President or his subordinates of the important control they exercise through the appointment process.[8]

We would add that this is not a case in which the Department's refusal to enforce or defend might produce a nullification of the Act of Congress which no private person could prevent nor Congress effectively challenge. Although it is not necessary to conclude that the obligation to defend the statute would be different in the absence of a lawsuit previously filed by private persons, given the fact that such a lawsuit has been filed, and that the courts will determine the constitutional issue, we believe that the constitutional system will be better served by early rather than delayed resolution of the issue.

Therefore, we believe that this is a case in which the Department, amply supported by prior precedent, should depart from its usual practice of defending the constitutionality of federal statutes. We recommend that an appropriate letter be sent to the President of the Senate and the Speaker of the House to inform them of the Department's decision to defend the constitutionality of the 1984 Act as a whole, but to refrain from defending the constitutionality of the Grandfather Provisions.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[8] Indeed, if Congress could retroactively extend the terms of officers whose terms have expired, Congress could arguably not only arrogate to itself, as it does here, the power to appoint, but could exercise that power even in the context of an office's having been filled in the interim by the President pursuant to his authority to make recess appointments; on such a hypothetical set of facts, Congress would not only have purported to appoint one officer but would, in doing so, have purported to remove another.

Appointments to the Commission on the Bicentennial of the Constitution

Presidential appointment of the Chief Justice of the United States to the Commission on the Bicentennial of the Constitution is consistent with the Appointments Clause, art. II, § 2, cl. 2, and, as applied to the unique circumstances of this Commission, with general separation of powers principles.

In addition, participation of the Chief Justice on the Commission would appear to be permissible under the Code of Judicial Conduct.

Members of Congress may participate on the Commission without violating the Appointments Clause or the Incompatibility Clause, art. I, § 6, cl. 2, if the Commission creates an executive committee to discharge the purely executive functions of the Commission, or if the non-congressional members determine that the Commission will not act unless a full majority, including the congressional members, approve.

August 31, 1984

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Some time ago we discussed whether there was some practical means for resolving the legal disputes that have arisen concerning the Commission on the Bicentennial of the Constitution. You suggested that we consider the matter and put any thoughts we might have in a memorandum to you. This follows through on that discussion.

I. Introduction

On September 29, 1983, the President signed S. 118, a bill that established the Commission on the Bicentennial of the Constitution (Commission). The statute authorized the Commission to plan and coordinate activities to celebrate the bicentennial of the Constitution and specifically included within the Commission's powers, in addition to the generally advisory functions, certain clearly executive functions, such as carrying out a limited number of commemorative events and projects and the adoption of binding regulations governing use of the Commission's logo. The statute vests the appointment of most of the members of the Commission in the President, but it also specifically designates as members, the Chief Justice of the Supreme Court, the President *pro tempore* of the Senate, and the Speaker of the House of Representatives. Because the members of the Commission are authorized to perform executive duties that may be performed only by Officers of the United States, this Office

concluded that the statutory designations were improper under the Incompatibility and Appointments Clauses of the Constitution. This position is one that has been taken by President Reagan and many of his predecessors on innumerable occasions under similar circumstances. Moreover, in an analogous context, the Senate Judiciary Committee recently expressed its appreciation for, and agreement with, our Appointments Clause objections to legislation that purports to vest in Congress the power to designate persons to serve on a commission that is given Executive functions:

> The Appointments Clause requires that individuals with executive responsibilities must be appointed by the President with the advice and consent of the Senate, or if authorized by Congress, by the President alone, the courts or the heads of departments. *Buckley* v. *Valeo*, 424 U.S. 1, 124–41 (1976). Inasmuch as the Committee intended the Commission to initiate and conduct commemorative activities, and to avoid any constitutional questions, the Committee has amended S. 500 to give the President full authority over all appointments. This will ensure that the Commissioners will be appointed in accordance with the Constitution and remove any doubt about the Commission's ability to plan, sponsor, and conduct such activities as it deems appropriate.

S. Rep. No. 194, 98th Cong., 1st Sess. 2 (1983) (referring to the Commission charged with planning, encouraging, coordinating, and conducting the Christopher Columbus Quincentenary Jubilee).

In a statement he issued at the time he signed S. 118, the President articulated the constitutional conclusions that had been raised by this Office:

> I welcome the participation of the Chief Justice, the President Pro Tempore of the Senate, and the Speaker of the House of Representatives in the activities of the Commission. However, because of the constitutional impediments contained in the Doctrine of the Separation of Powers, I understand that they will be able to participate only in ceremonial or advisory functions of the Commission, and not in matters involving the administration of the Act. Also, in view of the Incompatibility Clause of the Constitution, any Member of Congress appointed by me pursuant to Section 4(a)(1) of this Act may serve only in a ceremonial or advisory capacity.
>
> I also understand that this Act does not purport to restrict my ultimate responsibility as President for the selection and appointment of Members of the Commission, under Article 2, Section 2, Clause 2, of the Constitution.

Senator Hatch apparently disagreed with the legal conclusions contained in the President's signing statement and asked the Congressional Research Service

(CRS) to review the President's objections to the structure of the Commission. The CRS memorandum supported, to a certain extent, the viewpoint of Senator Hatch. Senator Hatch forwarded that memorandum both to Edwin Meese, III, Counselor to the President, and to the Attorney General. This Office prepared a response to the CRS memorandum (which we have previously sent to you) in which we reviewed the issues raised by the CRS and concluded that our original opinion with respect to the Commission was correct and that the CRS memorandum was in error.

The establishment of the Commission has remained a controversial issue, and the President has not yet appointed the members of the Commission. A conflict continues to persist between what we believe to be the clear requirements of the Constitution and the understandable desires of certain members of the Legislative and Judicial Branches to participate in the commemoration of the document that created all three branches of government.

This memorandum suggests some potential practical means for resolving the conflict. First, the memorandum considers the legality of the President appointing the Chief Justice as a member of the Commission. If such an appointment were permissible, the Appointments Clause problems arising from Congress' attempt to make the appointment might be avoided, and the Chief Justice might then be eligible to participate in all aspects of the Commission's activities, including those of an executive nature. Second, we make some suggestions concerning how the Commission might be structured in order to avoid the Incompatibility and Appointments Clause problems with respect to potential congressional members of the Commission.

II. Presidential Appointment of the Chief Justice to the Commission

A. Constitutional Considerations

1. The Appointments Clause

It seems apparent that there would be no Appointments Clause problems if the President himself appointed the Chief Justice as one of the regular members of the Commission. Even if, as we have concluded, members of the Commission are Officers of the United States who must be appointed pursuant to the Appointments Clause, a direct Presidential appointment would satisfy the requirements of that Clause. The Appointments Clause contains no direct prohibitions against the appointment of any particular individuals to serve as Officers of the United States; it simply requires a certain procedure for appointing such Officers. *See* U.S. Const. art. II, § 2, cl. 2. Presidential appointment of the Chief Justice would satisfy this procedure.[1]

[1] The Incompatibility Clause would present no problem with respect to Presidential appointment of the Chief Justice. By its express terms, the Incompatibility Clause applies only to Members of Congress. *See* U.S. Const. art. I, § 6, cl. 2. Thus, under the principle that *expressio unius est exclusio alterius*, the absence of any reference to the judiciary in the Incompatibility Clause suggests that there is no absolute constitutional bar to the appointment of judges to positions that may be filled only by Officers of the United States.

2. The Separation of Powers

Although the Appointments Clause would not bar appointment of the Chief Justice in this instance, the more general principles of the separation of powers may have more relevance to this issue. In this context, the basic separation of powers issue is whether appointment of the Chief Justice to an Executive Branch position would disrupt the separation of functions that the Framers intended to build into the structure of the federal government. The separation of powers doctrine generally requires a careful balancing of the potential impact of a given action on the constitutional powers of each branch. *See, e.g., Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977).

With respect to the issue of performance of executive functions by a judge, the Supreme Court has made it clear that Congress may not require a court to perform nonjudicial functions. In *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), the Supreme Court appended to its decision an opinion of Chief Justice Jay, Justice Cushing, and a district judge sitting as a circuit court, in which they made the following findings in ruling that Congress could not assign nonjudicial duties to courts:

> That by the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.
>
> That neither the *Legislative* nor the *Executive* branches, can constitutionally assign to the *Judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner.

2 U.S. (2 Dall.) at 410 n.*. This decision has subsequently been recognized by the Supreme Court as establishing the principle that courts could not be required to perform nonjudicial functions that would then be subject to review and revision by the Executive or Legislative Branches. *See Muskrat* v. *United States*, 219 U.S. 346, 352 (1911); *United States* v. *Ferreira*, 54 U.S. 40, 50–51 (1851).

This principle is not implicated in this matter, however, because the Chief Justice would not be required to perform nonjudicial functions, but rather would voluntarily accept an appointment to a nonjudicial office. Moreover, the Chief Justice would not be performing executive functions in his role as a judge, but rather would be holding two separate appointments, one of which was judicial, the other, executive. Thus, the issue is whether the Chief Justice may voluntarily accept this additional appointment.

Although, as far as we know, no court has ever ruled on this question, the Attorney General has on several occasions issued opinions upholding the right of the President to appoint members of the judicial branch to other government positions. *See* 40 Op. Att'y Gen. 423 (1945); 22 Op. Att'y Gen. 184 (1898). In the former instance, Attorney General Clark concluded that a judge of the

United States Court of Appeals could continue in that position while serving at the request of the President, and without compensation, as an alternate judicial member of the International Military Tribunal established for the trial of persons charged with war crimes. Attorney General Clark concluded:

> There is no express prohibition against Federal judges performing other services of a general character for the Federal Government. On the contrary, it is a well established practice for the President to secure the services of Federal judges in connection with various matters. The practice arose along ago. Chief Justice Jay served as special envoy to England at the request of the President . . . and Chief Justice Fuller twice acted as an arbitrator of international disputes . . . .

40 Op. Att'y Gen. at 424. Although none of the examples cited and approved by the Attorney General involved the performance by judges of executive duties that may be performed only by an Officer of the United States, there are examples of such appointments, particularly during World War II when, for example, Judge John C. Collet served as Director of Economic Stabilization. *See* 32 A.B.A. J. 682 (1946). In addition, judges have frequently undertaken diplomatic missions, and during this Administration, Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit was appointed to serve as Chairman of the President's Commission on Organized Crime.

Such actions have not, however, gone uncriticized. In 1947, the Senate Judiciary Committee issued a report that questioned the propriety of appointing members of the judiciary to nonjudicial posts. S. Exec. Rep. No. 7, 80th Cong., 1st Sess. (1947) (*reprinted in* 33 A.B.A. J. 792 (1947)). The Committee raised the following general objection:

> If it becomes common to expect Executive appointments, judges may slip into that frame of mind which seeks promotional opportunity at the hand of the Executive and the quality of the judicial character may be impaired. This could take on an ugly political tinge if judges came to see in the Executive appointment a chance to advance themselves politically or a chance to aid the Chief Executive politically.

33 A.B.A. J. at 793. The Committee went on to list a series of specific problems that might result from appointment of judges to executive positions:

> 1. Reward may be conferred or expected in the form of elevation to a higher judicial post.
>
> 2. The judicial and Executive functions may be improperly merged.
>
> 3. The absence of the judge from his regular duties increases the workload of the other judges of the Court, if any, and may result in an impairment of judicial efficiency in the disposition of cases.

4. Nonjudicial activities may produce dissension or criticism and may be destructive of the prestige and respect of the federal judiciary.

5. A judge, upon resumption of his regular duties, may be called upon to justify or defend his activity under an Executive commission.

Id. at 795. We believe that these are appropriate factors to be evaluated in assessing the impact of an appointment on the constitutionally prescribed separation of powers.

In this particular case, consideration of these factors supports the conclusion that appointment of the Chief Justice (or other members of the judiciary) to the Commission on the Bicentennial of the Constitution would not be inconsistent with separation of powers principles. First, given the position of the Chief Justice and the nature of this particular Commission, the appointment would not generally be regarded as a reward or, conversely, further reward would not be expected as a result of service on the Commission. Second, because the executive functions of the Commission are relatively insubstantial, there seems little danger of improperly merging the judicial and executive functions. Third, the work of the Commission is unlikely to draw the Chief Justice's attention away from the duties of his work on the Court to any material extent. Fourth, the relatively noncontroversial responsibilities of the Commission are unlikely to create dissension or criticism that would affect the prestige of the Court or the federal judiciary. Fifth, the Commission's activities are unlikely to result in actions that would later be subject to review by the Court. Finally, a Commission to plan the celebration of the two- hundredth anniversary of the Constitution is an entity that seems peculiarly suited to some participation by representatives of all three branches of government and is less likely than other types of entities to be considered a broad precedent.

An analysis of these factors therefore suggests that the appointment would not be inconsistent with the Constitution. Nevertheless, the general concerns that underlie the constitutional issue are significant enough to raise serious policy questions concerning the appropriateness of judicial appointments to executive positions in other circumstances. The considerations suggested by the Senate report are legitimate; the appointment of judges to Executive Branch positions is generally not a prudent policy. Thus, even though this particular appointment may be entirely appropriate, there is some risk that this appointment would be cited in some quarters as a precedent for future appointments with respect to which the problems may be greater.

B. Statutory Questions

The only statutory issue that might be raised by the appointment of a judge to an additional position in the federal government would involve the Dual Compensation Act, 5 U.S.C. § 5533, which prohibits a person from receiving

compensation for more than one position with the federal government. In this case, however, because membership on the Commission involves no remuneration, no problem exists under this particular statute.

C. The Code of Judicial Conduct

Canon 5(G) of the Code of Judicial Conduct for United States Judges is also relevant to the issue discussed in this memorandum. The Canon states:

> *Extra-judicial Appointments.* A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. A judge should not, in any event, accept such an appointment if his governmental duties would interfere with the performance of his judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

The Code was adopted by the Judicial Conference of the United States in 1973. It is interpreted for the judiciary by the Advisory Committee on Judicial Activities. As we have stated before, in view of the existence of this Committee, and in view of the autonomy of the judiciary in matters concerning the propriety of judicial conduct, this Office cannot issue authoritative pronouncements concerning the applicability of the Code in the circumstances presented by this case. Nevertheless, we can offer our views with respect to what we perceive to be the apparent meaning of this provision.

We believe that participation of the Chief Justice on the Commission of the Bicentennial of the Constitution would not be inconsistent with Canon 5(G). First, it seems clear that the Commission's activities, because they involve celebration of, and education regarding, our fundamental legal charter, relate to a certain extent to "the legal system" and the "administration of justice." Moreover, participation on the Commission also seems to involve representation of the country "in connection with historical, educational, and cultural activities." In addition, participation on the Commission is unlikely to impose significant time demands on the Chief Justice or to involve the Court in an "extra-judicial matter that may prove to be controversial," which are the principal concerns underlying the Canon. *See* Commentary to Canon 5(G). Finally, full participation in the executive functions of the Commission would pose no greater problems with respect to Canon 5(G) than would participation as an advisory member, which the President interpreted the statute to mandate. Therefore, we believe that the President's appointment of the Chief Justice to the Commission would not pose a problem under Canon 5(G).

D. Conclusion

In sum, we believe that there are no legal obstacles to Presidential appointment of the Chief Justice to the Commission. Such an appointment would be permissible under the Constitution, current statutory law, and, at least as we read it, the Code of Judicial Conduct.

III. Practical Solutions to the Incompatibility Clause Problem

We have also explored the possibility of various structural arrangements within the Commission that might be designed to respect the Incompatibility Clause requirements of the Constitution,[2] but at the same time enable congressional members of the Commission to play a significant role in the Commission's work. We have two general suggestions, both of which involve significant and meaningful participation by congressional members, but in a technical advisory capacity.

A. Establishment of an Executive Committee to Handle Executive Duties

The Commission might wish to create an executive committee composed of all non-advisory members of the Commission that would be legally responsible for discharging the purely executive functions of the Commission. These functions would include official approval of any binding regulations, signing legal instruments, and the technical responsibility for implementation of the commemorative events that the Commission is authorized to undertake itself. The full Commission would conduct meetings and do all the other things contemplated for the Commission, and the executive committee could finally approve all executive actions. This approach would separate the purely executive functions from the advisory functions that the Commission will perform and would allow all members of the Commission to participate in nearly all of the Commission's activities, including the formulation of programs that would be technically approved and executed by non-congressional members.

B. Establishment of a Special Advisory Committee to the Commission

The Commission, without the congressional members voting, could decide that it would not act unless a full majority of the Commission, including the congressional members, approved. Technically the non-congressional members, *i.e.*, those who were "officers" of the United States, could also reverse a Commission decision reached in this way, but we suspect such a contingency would be extremely unlikely.

[2] A similar problem is raised by the Ineligibility Clause, which provides in part that no "Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." U.S. Const. art. I, § 6, cl. 2.

Both of these concepts are quite general and the details would have to be more fully developed. There may be problems that we have not anticipated, but we think that both of the above proposals could be implemented in such a way so as to resolve the technical legal problems with respect to establishment of the Commission. In fact, some combination of the alternatives could be considered which would accommodate the interests, enthusiasm, expertise, and support from the congressional members without contravening the Incompatibility Clause.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Overview of the Neutrality Act

Overview of the Neutrality Act, focusing on explanations of certain key provisions, and summarizing various judicial and Attorney General opinions interpreting those provisions.

September 20, 1984

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum is intended to provide you with a broad overview of the Neutrality Act, 18 U.S.C. §§ 956 *et seq.*, its scope and applicability, and previous constructions of the various provisions of the Act by the courts, Attorneys General, and this Office.

Earlier this year, we provided you with our views regarding the applicability of the Act to official Government activities. "Application of the Neutrality Act to Official Government Activities," 8 Op. O.L.C. 58 (1984). That memorandum contains an extensive analysis of the legislative history of the various provisions of the Act, from 1794 when it was first enacted, through the several amendments to the Act, particularly those enacted in the nineteenth century. It also examines in significant detail several major judicial decisions construing the Act, as well as the opinions of various Attorneys General regarding the Act. In our earlier memorandum, we concluded that "the Act does not proscribe activities conducted by Government officials acting within the course and scope of their duties as officers of the United States but, rather, was intended solely to prohibit actions by individuals acting in a private capacity that might interfere with the foreign policy and relations of the United States." 8 Op. O.L.C. at 58.[1]

[1] However, as you are aware, the United States District Court for the Northern District of California recently held that the CIA's alleged covert "aid[ing], fund[ing] and participa[tion] in a military expedition and enterprises utilizing Nicaraguan exiles for the purpose of attacking and overthrowing the government of Nicaragua" could constitute a violation of 18 U.S C. §§ 956 and 960, for purposes of triggering the investigation provisions of the Ethics in Government Act, 28 U.S.C. §§ 591, *et seq. See Dellums* v. *Smith*, 573 F. Supp. 1489, 1492 (N.D. Cal. 1983); *see also* 577 F. Supp. 1449 (N.D. Cal. 1984); 577 F. Supp. 1456 (N D. Cal. 1984). The Department appealed the district court's decision earlier this year, and is presently awaiting a decision by the United States Court of Appeals for the Ninth Circuit.

The only other current litigation of which we are aware in which the issue of the applicability of the Neutrality Act to Government officials is raised is in *Sanchez Espinoza* v *Reagan*, 568 F Supp. 596 (D.D C. 1983), *appeal pending*, No 83–1997 (D.C. Cir argued May 24, 1984). However, the District Court dismissed the plaintiffs' claims that the President, through his officers and appointees, had violated, *inter alia*, the Neutrality Act, the War Powers Resolution, 50 U.S.C. §§ 1541–1548, and the Boland Amendment to the Department of Defense Appropriations Act, 1983, Pub L. No. 97–377, § 793, 96 Stat. 1830, 1865 (1982), by waging an undeclared war against the Nicaraguan Government, on the ground that plaintiffs' claims presented nonjusticiable political questions.

* NOTE: After this opinion was issued by the Office of Legal Counsel, the United States Court of Appeals for the Ninth Circuit reversed the district court's decision in *Dellums* v. *Smith* on the ground that the plaintiffs lacked standing to bring the action. *See Dellums* v. *Smith*, 797 F.2d 817 (9th Cir 1986).

I. The Neutrality Act

The provisions of the Neutrality Act, presently codified at 18 U.S.C. §§ 956 *et seq.*, remain substantially similar to the provisions originally enacted in 1794. *See* 1 Stat. 381.[2]

Section 958 makes it unlawful for any United States citizen to accept, within the jurisdiction of the United States, a commission to serve a foreign nation in a war against a country with which the United States is at peace.[3]

Section 959 prohibits anyone within the United States from enlisting or paying someone else to enlist him in the military service of a foreign state.[4]

Section 960 prohibits the knowing participation in, preparation for, or financing of a hostile expedition from within the United States against a nation with which the United States is at peace.[5]

Section 961 prohibits the outfitting of military vessels within the United States which are in the naval service of a foreign country engaged in war with a country with which the United States is at peace.[6] Finally, § 962 prohibits the

[2] There are several additional provisions of the neutrality laws which were not enacted until 1917. One provision, presently codified at 18 U.S.C. § 956, prohibits conspiring to injure the property of a foreign government with which the United States is at peace Section 956 provides in pertinent part:

> If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, or other public utility so situated, and if one or more such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than $5,000 or imprisoned not more than three years, or both.

The other provisions, enacted in 1917, codified at 18 U.S.C. §§ 963–967, deal with the detention in United States ports of armed vessels or vessels bound for belligerent nations until the owners certify to United States customs officials that the vessels will not be used in the military service of belligerent nations after departure from the United States.

[3] Section 958 provides:

> Any citizen of the United States who, within the jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, against any prince, state, colony, district, or people, with whom the United States is at peace, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

[4] Section 959 provides in pertinent part:

> Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

[5] Section 960 provides:

> Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both.

[6] Section 961 provides in pertinent part:

> Whoever, within the United States, increases or augments the force of any ship of war . . . which, at the time of her arrival within the United States, was a ship of war . . . in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States is at peace, by adding to the number of the guns of such vessel . . . or by adding thereto any equipment solely applicable to war, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

outfitting or furnishing of any vessel within the United States with the intent that such vessel be used in the service of a foreign nation against a country with which the United States is at peace.[7]

II. Judicial Decisions

The earliest judicial decisions construing the Neutrality Act involved the predecessors to §§ 961 and 962, which generally prohibit the arming of vessels in United States ports to be used in the service of foreign nations against nations with which the United States is at peace. The earliest cases generally were brought against private individuals who "outfitted" French ships engaged in hostilities with the British Navy. *See, e.g., United States* v. *Peters*, 3 U.S. (3 Dall.) 121 (1795); *United States* v. *Guinet*, 2 U.S. (2 Dall.) 321 (1795). *See also United States* v. *Skinner*, 27 F. Cas. 1123 (C.C.D.N.Y. 1818) (No. 16309); *The Betty Carthcart*, 17 F. Cas. 651 (D.S.C. 1795) (No. 9742); *The Nancy*, 4 F. Cas. 171 (D.S.C. 1795) (No. 1898). These early cases focused on what constituted the "arming" of a vessel, the distinction between "commercial" and "hostile" intent, and upheld the authority of the United States Government to define, as a matter of national policy, the political bodies in whose service, and against which, the prohibited acts had been committed. *See generally United States* v. *The Three Friends*, 166 U.S. 1 (1897). Moreover, these cases established that §§ 961 and 962 of the Act do not prohibit armed vessels belonging to citizens of the United States from sailing out of United States ports; rather the provisions require only that the owners of such vessels certify that the vessels will not be used to commit hostilities against foreign nations at peace with the United States. *See United States* v. *Quincy*, 31 U.S. (6 Pet.) 445 (1832). Finally, these cases recognized, with regard to §§ 961 and 962, the principle generally applicable to all of the neutrality provisions, that the preparations prohibited by the Act must have been made within the United States, and that the intention with respect to the hostile deployment of the vessel must have been formed before leaving the United States. *Id.*

The early decisions construing the Act, as well as subsequent judicial decisions, make clear that, in view of its purpose to prevent private citizens from interfering with the conduct of foreign policy by duly authorized Government officials, the Neutrality Act, particularly § 960, prohibits only "the use of the soil or waters of the United States as a base from which unauthorized military expeditions or military enterprises shall be carried on against foreign powers

[7] Section 962 provides in pertinent part:

> Whoever, within the United States, furnishes, fits out, arms, or attempts to furnish, fit out or arm, any vessel, with intent that such vessel shall be employed in the service of any foreign prince, or state, or of any colony, district, or people, to cruise, or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace; or
>
> Whoever issues or delivers a commission within the United States for any vessel, to the intent that she may be so employed shall be fined not more than $10,000 or imprisoned not more than three years, or both.

with which the United States is at peace." *United States* v. *Murphy*, 84 F. 609, 612 (D. Del. 1898). *See also Wiborg* v. *United States*, 163 U.S. 632 (1896); *United States* v. *O'Sullivan*, 27 F. Cas. 367 (S.D.N.Y. 1851) (No. 15974); *United States* v. *Smith*, 27 F. Cas. 1192 (C.C.S.D.N.Y. 1806) (No. 16342). The jury instructions in the *Murphy* case, which provide an extensive discussion of the elements of the "military expedition" offense under § 960, are illustrative of this point:

> Providing the means of transportation for a military enterprise to be carried on from the United States against Spanish rule in Cuba is, within the meaning of [§ 960], . . . preparing the means for such military enterprise to be so carried on, and, if done with knowledge, on the part of the person so providing the means of transportation, of the character and purpose of such enterprise, is denounced by the statute. . . . The broad purpose of [§ 960] is to prevent complications between this government and foreign powers. . . . What it prohibits is a military expedition or a military enterprise from this country against any foreign power at peace with the United States.
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> Where a number of men, whether few or many, combine and band themselves together, and thereby organize themselves into a body, within the limits of the United States, with a common intent or purpose on their part at the time to proceed in a body to foreign territory, there to engage in carrying on armed hostilities, either by themselves or in co operation with other forces, against the territory or dominions of any foreign power with which the United States is at peace, and with such intent or purpose proceed from the limits of the United States on their way to such territory, either provided with arms or implements of war, or intending and expecting . . . to secure them during transit, . . . in such case all the essential elements of a military enterprise exist. . . . It is sufficient that the military enterprise shall be begun or set on foot within the United States; and it is not necessary that the organization of the body as a military enterprise shall be completed or perfected within the United States. Nor is it necessary that all the persons composing the military enterprise should be brought in personal contact with each other within the limits of the United States; nor that they should all leave those limits at the same point. It is sufficient that by previous arrangement or agreement, whether by conversation, correspondence or otherwise, they become combined and organized for the purposes mentioned, and that by concerted action, though proceeding from different portions of this country, they meet at a designated point either on the high seas or

within the limits of the United States. Under such circumstances a military enterprise to be carried on from the United States exists within the meaning of the law.

84 F. Cas. at 612–14.

III. Attorney General Opinions

As is the case with judicial decisions on the subject, the earliest opinions of Attorneys General construing the Neutrality Act distinguished between "commercial" and "hostile" intent for purposes of the prohibition, by the predecessors to §§ 961 and 962, on "outfitting vessels of war." *See, e.g.*, 2 Op. Att'y Gen. 86 (1828); 1 Op. Att'y Gen. 231 (1818); 1 Op. Att'y Gen. 190 (1816). Attorneys General have opined that the Act forbids furnishing ships of war in American ports with guns and other military equipment to be used by nations against nations with which the United States is at peace. *See, e.g.*, 5 Op. Att'y Gen. 92 (1849); 4 Op. Att'y Gen. 336 (1844); 3 Op. Att'y Gen. 739 (1841).

The predecessor to § 959 was construed by early Attorneys General to prohibit the recruitment or enlistment of persons for service on foreign vessels of war in American ports. *See* 4 Op. Att'y Gen. 336 (1844). This latter prohibition on enlistment was construed by Attorney General Cushing to prohibit the undertaking by belligerent nations to enlist troops in the United States, on the ground that such action constitutes a "gross national aggression on the United States and insults our national sovereignty," for which all, except those protected by diplomatic immunity, are punishable. 7 Op. Att'y Gen. 367, 382 (1855). Attorney General Cushing's lengthy opinion on foreign enlistment premises the statutory prohibition in § 959 on the notion that while a neutral state may permit a belligerent nation to raise troops on its soil, it should not grant such a concession to one belligerent and not to all. *Id.*

As early as 1795, Attorney General Bradford opined that the Neutrality Act did not preclude the commission of hostile acts by American citizens against Nations with which the United States is at peace as long as the potential defendants did not set foot from American soil. Regarding American citizens who, while trading on the coast of Africa, "voluntarily joined, conducted, aided, and abetted a French fleet in attacking" a British settlement on that coast, the Attorney General stated:

> [A]cts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty, and against the public peace, are offences against the United States, so far as they were committed within the territory or jurisdiction thereof; and, as such, are punishable by indictment in the district or circuit courts.
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> So far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of

> our courts; nor can the actors be legally prosecuted or punished for them by the United States.

1 Op. Att'y Gen. 57, 58 (1794). Pointing out that the Government's inability to prosecute under the Act resulted solely from § 960's requirement that the defendant have "set foot" from "within the United States," Attorney General Bradford noted that those "who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States." *Id.* at 59.

In 1856, Attorney General Cushing distinguished between the mere "organization, in one country or state, of combinations to aid or abet rebellion in another, or in any other way to act on its political institutions," which is *not* prohibited by the Act, from overt "attempts to interfere in the affairs of foreign countries by force," which *is* unlawful. 8 Op. Att'y Gen. 216 (1856). *See also* 8 Op. Att'y Gen. 472 (1855). The activities of the former, which the Attorney General referred to as "Revolutionary Aid Societies," while "a violation of national amity and comity," are limited to "inflammatory agitation" and discussion, falling short of the unlawful enlistment and military expeditions prohibited by the Act. *Id.*

In 1869, Attorney General Hoar opined that the Neutrality Act was properly applicable only with respect to political entities recognized by the United States as an "independent government, entitled to admission into the family of nations":

> The statute of 1818 is sometimes spoken of as the *Neutrality Act*; and undoubtedly its principal object is to secure the performance of the duty of the United States, under the law of nations, as a neutral nation in respect to foreign powers . . . . The United States have not recognized the independent national existence of the island of Cuba, or any part thereof, and no sufficient reason has yet been shown to justify such a recognition. In the view of the Government of the United States, as a matter of fact, which must govern our conduct as a nation, the island of Cuba is territory under the government of Spain, and belonging to that nation.
>
> If ever the time shall come when it shall seem fitting to the political department of the Government of the United States to recognize Cuba as an independent government, entitled to admission into the family of nations, or, without recognizing its independence, to find that an organized government capable of carrying on war, and to be held responsible to other nations for the manner in which it carries it on, exists in that island, it will be the duty of that department to declare and act upon those facts.
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> But, on the other hand, when a nation with which we are at peace, or the recognized government thereof, undertakes to

> procure armed vessels for the purpose of enforcing its own recognized authority within its own dominions, although there may be evidence satisfactory to show that they will aid the government in the suppression of insurrection or rebellion, in a legal view this does not involve a design to commit hostilities against anybody.
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> * * *
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> The concession of belligerent rights to a "colony, district, or people" in a state of insurrection or revolution, necessarily involves serious restrictions upon the ordinary rights of the people of this country to carry on branches of manufacture and trade which are unrestricted in time of peace. To prevent our mechanics and merchants from building ships of war and selling them in the markets of the world, is an interference with their private rights which can only be justified on the ground of a paramount duty in our international relations; and however much we may sympathize with the efforts of any portion of the people of another country to resist what they consider oppression or to achieve independence, our duties are necessarily dependent upon the actual progress which they have made in reaching these objects.

13 Op. Att'y Gen. 177, 178, 180 (1869). Thus, he concluded, the Act did not prohibit the building of gunboats in New York to be sold to the Spanish government for possible use by that Government against the Cuban insurrectionists. Nor would § 962 of the Act prohibit the supplying of Cuban insurgents with men, arms and munitions of war. 13 Op. Att'y Gen. 541 (1841).[8] In 1895, Attorney General Harmon, having declared that "neither Spain nor any other country had recognized the Cuban insurgents as belligerents," 21 Op. Att'y Gen. 267, 269, opined:

> The mere sale or shipment of arms and munitions of war by persons in the United States to persons in Cuba is not a violation of international law [nor of the neutrality laws], however strong a *suspicion* there may be that they are to be used in an insurrection against the Spanish government. The right of individuals in the United States to sell such articles and ship them to whoever may choose to buy has always been maintained.

[8] In a very succinct opinion, Attorney General Akerman emphasized that his opinion addressed *only* the predecessor to § 962, adding that the allegations "might be material in connection with other proof." 13 Op. Att'y Gen. 541. Depending upon the allegations, and whether the United States Government recognized the Cuban insurrectionists as a sufficiently distinct political body to constitute more than a domestic irritant to Spain's internal affairs, a colorable claim under § 960 could be made. *See, e.g.*, 21 Op. Att'y Gen. 267, 269 (1896) ("International law takes no account of a mere insurrection, confined within the limits of a country, which has not been protracted or successful enough to secure for those engaged in it recognition as belligerents by their own government or by foreign governments.").

* * *

> If, however, the persons supplying or carrying arms and munitions from a place in the United States are in any wise parties to a design that force shall be employed against the Spanish authorities, or that, either in the United Sates or elsewhere, before final delivery of such arms and munitions, men with hostile purposes toward the Spanish Government shall also be taken on board and transported in furtherance of such purposes, the enterprise is not commercial, but military, and is in violation of international law and of our own statutes.

Id. at 270, 271 (emphasis added).

Further attempts to distinguish between "commercial" and "hostile" intent in trading with belligerents were made by Attorney General Knox in 1902. Responding to the Secretary of State's inquiry regarding the legality of shipping horses from New Orleans to South Africa, a belligerent, Attorney General Knox opined that although a neutral nation is prohibited by the general principles of international law from giving aid to one of the belligerents during a war, "carrying on commerce with the belligerent nation in the manner usual before the war is . . . agreed not to be in itself giving such aid." 24 Op. Att'y Gen. 15, 18 (1902). He added, however, that "the fact that neutral *individuals* instead of their government give aid to the belligerent does not relieve the neutral government from guilt," unless the acts are, by their nature, "impracticable or excessively burdensome for the government to watch or prevent." *Id.* Several days later, Attorney General Knox referred to this opinion and that of his predecessor, Attorney General Harmon, 21 Op. Att'y Gen. 267 (1895), in advising the Secretary of State that the shipping of arms to China, notwithstanding the presence of insurrectionary movements, would constitute a commercial venture and therefore not a violation of the Neutrality Act. 24 Op. Att'y Gen. 25 (1902).

Prior to the United State's engagement in World War II, Attorney General Murphy construed the Act to prohibit the transporting of any articles or materials from a United States port to a port of a belligerent nation, until all goods of United States citizens on board had been transferred to foreign ownership. *See* 39 Op. Att'y Gen. 391 (1939). Later that year, Attorney General Murphy opined that American trawlers and tugs which had been sold to French concerns could lawfully depart United States ports after assurances by the French government that the vessels were not intended to be employed to commit hostilities against another belligerent. 39 Op. Att'y Gen. 403 (1939).

Finally, Attorney General Jackson opined in 1940 that, while the United States Government could sell certain outdated American destroyers to the British Government during World War II, it was precluded by the predecessor to § 964 from selling to the British Government "mosquito boats" which were under construction by the United States Navy, "since . . . [the latter] would have been built, armed or equipped with the intent, or with reasonable cause to

believe, that they would enter the service of a belligerent after being sent out of the jurisdiction of the United States." 39 Op. Att'y Gen. 484, 496 (1940).[9] In distinguishing between the over age destroyers and the "mosquito boats" which were, at that time, under construction, Attorney General Jackson referred to the "traditional" rules of international law," which distinguish between the selling of previously armed and outfitted vessels to a belligerent, and the building of armed vessels "'*to the order of a belligerent.*'" *Id.* at 495 (quoting 2 Oppenheim, *International Law* 574–76).

This distinction, regarding which Jackson cites Oppenheim's characterization as "'hair splitting,'" although "'logically correct,'" is premised upon the view that by "carrying out the order of a belligerent, [a neutral nation permits its] territory [to be] made the base of naval operations," in violation of a neutral's "duty of impartiality." *Id.* Because of the potential importance of this distinction and its subtleties, we set out below the text of Attorney General Jackson's lengthy quote from Oppenheim's treatise which explains the rationale of this view in greater detail.[10]

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[9] We noted in our earlier memorandum that §§ 963 and 964, first enacted as part of the Espionage Act of 1917, 40 Stat. 221 22, codified the substantive rules of international law forbidding the delivery of armed vessels to belligerent powers by neutral nations. Regarding these provisions and Attorney General Jackson's opinion, we concluded that:

> Although some commentators have suggested that Attorney General Jackson's opinion supports the view that all of the Neutrality Act provisions were intended to apply to Government activities, we believe that § 964 by its terms is limited to circumstances involving a declared war, unlike the other neutrality laws, and was proposed to Congress by Attorney General Gregory in 1917 for the purpose of providing "for the observance of obligations imperatively imposed by international law upon the United States." H R Rep. No. 30, 65th Cong., 1st Sess. 9 (1917).

8 Op. O.L.C. at 77 n.21. In 1941, however, Congress enacted the Lend Lease Act, 55 Stat. 31, which authorized the President to supply, with certain limitations, military equipment to the government of any nation the defense of which he deems vital to the defense of the United States. This Act, which granted temporary emergency powers to the President, effectively suspended the operation of the predecessor to § 964 until June 30, 1943 *See* S. Rep. No. 45, 77th Cong., 1st Sess. (1941); H.R. Rep. No 18, 77th Cong., 1st Sess. (1941). *See generally* 40 Op. Att'y Gen. 58 (1941).

[10] Attorney General Jackson quoted the following from 2 Oppenheim, *International Law* 574–76:

> Whereas a neutral is in no wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, a neutral is bound to employ the means at his disposal to prevent his subjects from building, fitting out, or arming, to the order of either belligerent, vessels intended to be used as men of war, and to prevent the departure from his jurisdiction of any vessel which, by order of either belligerent, has been adopted to warlike use. The difference between selling armed vessels to belligerents and building them to order is usually defined in the following way.
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> An armed ship, being contraband of war, is in no wise different from other kinds of contraband, provided that she is not manned in a neutral port, so that she can commit hostilities at once after having reached the open sea. A subject of a neutral who builds an armed ship, or arms a merchantmen, not to the order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms who intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a belligerent port.
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> On the other hand, if a subject of a neutral builds armed ships to the order of a belligerent, he prepares the means of naval operations, since the ships, on sailing outside the neutral territorial waters and taking in a crew and ammunition, can at once commit hostilities. Thus, through the carrying out of the order of the belligerent, the neutral territory has been made the base of naval operations; and as the duty of impartiality includes an obligation to prevent either belligerent

Continued

A more recent statement by an Attorney General construing the Neutrality Act is found in a press conference held on April 20, 1961, by Attorney General Kennedy, following the Bay of Pigs invasion. Although Attorney General Kennedy did not formally opine on this matter, the views presented in this press conference have been widely quoted as the views of the Kennedy Administration on the Act:

> First . . . the neutrality laws are among the oldest laws in our statute books. Most of the provisions date from the first years of our independence and, with only minor revisions, have continued in force since the 18th Century. Clearly they were not designed for the kind of situation which exists in the world today.
>
> Second, the neutrality laws were never designed to prevent individuals from leaving the United States to fight for a cause in which they believed. There is nothing in the neutrality laws which prevents refugees from Cuba from returning to that country to engage in the fight for freedom. Nor is an individual prohibited from departing from the United States, with others of like belief, to join still others in a second country for an expedition against a third country.
>
> There is nothing criminal in an individual leaving the United States with the intent of joining an insurgent group. There is nothing criminal in his urging others to do so. There is nothing criminal in several persons departing at the same time. What the law does prohibit is a group organized as a military expedition from departing from the United States to take action as a military force against a nation with whom the United States is at peace.
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> There are also provisions of early origin forbidding foreign states to recruit mercenaries in this country. It is doubtful whether any of the activities presently engaged in by Cuban patriots would fall within the provisions of this law.

11 M. Whiteman, *Digest of International Law* 231 (1968). *See also* Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 Harv. Int. L.J. 1, 4 & n.16 (1983); N.Y. Times, Apr. 21, 1961, § 1 at 6.

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[10] (. . . continued)
from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men of war. This distinction, although of course logically correct, is hair splitting. But as, according to the present law, neutral States need not prevent their subjects

Conclusion

We have attempted to provide a broad overview of the Neutrality Act, its various provisions, their scope, and their application, by courts and Attorneys General throughout their history since their original enactment in 1794. Together with our recent memorandum to you, this memorandum should provide you with a survey of the most prominent authorities relative to these provisions of criminal law. However, herein we have not attempted to provide a definitive analysis of the applicability of these provisions to any specific set of facts, and this memorandum should not be construed as such.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Voluntariness of Renunciations of Citizenship Under 8 U.S.C. § 1481(a)(6)

A renunciation of citizenship would likely not be held involuntary by a court solely because it was undertaken as part of an agreement whereby federal prosecutors agreed not to proceed with denaturalization and deportation proceedings if the subjects of the investigation agreed to renounce their U.S. citizenship. In the analogous context of plea bargaining in criminal cases, courts have consistently held that the threat of greater punishment by prosecutors does not by itself deprive the defendant of the ability to voluntarily choose to plea bargain, absent other indicia of improper coercion. In the absence of facts indicating further government coercion, a court would likely look to principles applicable to the determination of voluntariness in criminal plea bargains and conclude that renunciation of citizenship pursuant to the agreements at issue did not violate the constitutional requirement of voluntariness *per se*.

September 27, 1984

MEMORANDUM OPINION FOR THE ACTING LEGAL ADVISOR
DEPARTMENT OF STATE

This responds to your request for our opinion whether renunciations of United States citizenship under 8 U.S.C. § 1481(a)(6)[1] by two naturalized United States citizens who are alleged to have been involved in Nazi persecution are voluntary. These individuals, Mr. A and Mr. B, have formally renounced their United States citizenship pursuant to agreements negotiated with the Office of Special Investigations of the Department of Justice (OSI), whose mission is to identify, denaturalize, and deport persons who entered the United States subsequent to World War II and who obtained United States citizenship by concealing their involvement in Nazi persecution. Under those agreements, OSI agreed not to institute denaturalization and deportation proceedings if those individuals left the United States and formally renounced their citizenship.[2]

[1] Section 1481(a)(6) provides in part that a national of the United States may file a "formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State."

[2] Your memorandum also mentioned a third individual, Mr. C, who formally renounced his United States citizenship after OSI instituted denaturalization proceedings. His renunciation does not present the same underlying issue that is common to the renunciations by Mr. A and Mr. B, because OSI did not negotiate or enter into any agreement in connection Mr. C's departure from the United States and his subsequent renunciation of citizenship. You have since informed us that the denaturalization proceedings against Mr C have been dismissed, and that OSI made representations to the court in connection with that dismissal, with your agreement, that Mr. C's renunciation was considered to be voluntary. We therefore do not address Mr. C's case here.

You are concerned that the formal renunciations of citizenship made by Mr. A and Mr. B may not meet the constitutional requirement that expatriation be a voluntary act,[3] because of the direct and substantial involvement of the United States Government in encouraging and facilitating the renunciations. Accordingly, you have asked this Office to review the background of these cases and to advise you whether the renunciations would be considered voluntary under applicable law. We understand that OSI and the Criminal Division of this Department have agreed to our consideration of these cases.

We believe it would be inappropriate, and indeed impossible, for this Office to provide you with a definitive answer as to whether these particular renunciations were *in fact* voluntary. We obviously cannot undertake any independent investigation of the underlying facts, and are not competent to resolve any factual disputes or contradictions that could conceivably arise in the course of such an investigation. Accordingly, our advice here focuses on the underlying legal standards and precedents that we believe should be applied to determine whether these renunciations were voluntary, and how we believe a court would apply those standards, based on the facts presented to us.

The question we address is whether, under applicable precedent, a court would find that the renunciations of citizenship pursuant to agreements with United States prosecutors are voluntary, in light of the influence brought to bear upon those individuals by the United States Government and the arguably coercive effect of the threatened denaturalization and deportation proceedings. For the reasons set forth below, we believe that a court would not conclude that a formal renunciation of citizenship is involuntary solely because it was undertaken pursuant to such an agreement. We do not believe that the involvement of United States prosecutors in influencing and facilitating such decisions necessarily amounts to duress or coercion that would vitiate the voluntariness of the choice faced by those individuals, *i.e.*, whether to renounce citizenship or to face the denaturalization and deportation proceedings. In reaching this conclusion, we find highly relevant judicial consideration in the criminal context of similar voluntariness questions raised by plea bargaining. The analogy is not exact, but we believe it is apt, and the reasoning used by the courts in evaluating the voluntariness of plea bargains is quite similar to that used in determining the voluntariness of expatriating acts under 8 U.S.C. § 1481.

We believe that circumstances could arise in which a renunciation of citizenship pursuant to an agreement by the United States Government not to institute denaturalization and deportation proceedings could be considered involuntary by the courts. If, for example, the prosecutors used threats of physical or mental intimidation, materially misrepresented the basis for and consequences of the agreement, withheld material evidence, or refused to allow the individual the assistance of counsel in meetings with prosecutors, the resulting renunciation of citizenship might well be considered by the courts to be involuntary. Similarly, if the individual was not competent to understand the terms of the

[3] *See Afroyim* v. *Rusk*, 387 U.S. 253 (1967); *Perkins* v. *Elg*, 307 U S. 325 (1939).

agreement and the consequences of his actions, or was not informed of the nature of the charges against him and of the consequences of his actions, his renunciation could well be considered to be involuntary. As far as we are aware, the Mr. A and Mr. B cases present none of these particular circumstances, and therefore we believe a court would find the renunciations to be voluntary.

II.

OSI was created by Attorney General Civiletti in 1979 to consolidate enforcement of immigration statutes and policy against suspected Nazi persecutors.[4] The usual practice of OSI has been to institute denaturalization proceedings under 8 U.S.C. § 1451(a)[5] if an investigation reveals that a Nazi persecutor obtained United States citizenship fraudulently or illegally, and then to institute deportation proceedings under 8 U.S.C. § 1251(a)(19) upon successful completion of denaturalization proceedings.[6] This process inevitably takes substantial time, effort, and resources, and its success depends in general on finding another country that is willing to accept the deported individual.[7]

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[4] The Attorney General assigned to OSI "the primary responsibility for detecting, investigating, and, where appropriate, taking legal action to deport, denaturalize, or prosecute any individual who was admitted as an alien into or became a naturalized citizen of the United States and who had assisted the Nazis by persecuting any person because of race, religion, national origin, or political opinion." *See* Order of the Attorney General, Transfer of Functions of the Special Litigation Unit Within the Immigration and Naturalization Service of the Department of Justice to the Criminal Division of the Department of Justice, No. 851–79 (Sept. 4, 1979).

[5] Under 8 U.S.C. § 1451(a), a certificate of naturalization may be cancelled if it was "illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation." Cases against alleged Nazi persecutors have been brought both on the basis that citizenship was procured "illegally," *see Fedorenko* v. *United States*, 449 U.S. 490 (1981), and on the basis that the individual made material misrepresentations or concealed facts about his association and involvement with Nazi activities, *see, e.g.*, *Artukovic* v. *INS*, 693 F.2d 894 (9th Cir. 1982); *United States* v. *Ryan*, 360 F. Supp. 265 (E.D.N.Y. 1973). In denaturalization cases the government bears the burden of proof to establish by "clear and convincing" evidence that "citizenship was not conferred in accordance with strict legal requirements." *Schneiderman* v. *United States*, 320 U.S. 118, 123 (1943).

[6] That section, added by Pub. L. No. 95–549, § 103, 92 Stat. 2065, 2065–66 (1978), authorizes the deportation of any alien who,

> during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with —
>
> (A) the Nazi government in Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

8 U.S.C. § 1251(a)(19).

[7] Under 8 U.S.C. § 1253, "[t]he deportation of an alien in the United States . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory." If the designated country does not agree to accept the individual into its territory, deportation of the alien "shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory." Only if that government also fails to advise the Attorney General or the alien whether it will accept the alien (or advises that it will not), may the Attorney General exercise discretion to deport the alien elsewhere, in accordance with a specified list of countries (country from which alien entered the United States, country in which he was born, any country in which he resided prior to entering the country from which he entered the United States, etc.). *Id.* § 1253(a).

OSI has informed us that, in accordance with its standard practice, it conducted investigations of Mr. A and Mr. B that included questioning of those individuals under oath by OSI attorneys. After OSI completed its investigations, it contacted lawyers for Mr. A and Mr. B and advised them that their respective clients were serious targets for denaturalization and deportation because of their wartime activities on behalf of the Nazi regime. According to OSI, after reviewing the evidence against their clients the lawyers for those individuals asked OSI how potential litigation could be avoided. They were advised that OSI would refrain from litigating only if it could secure all the relief to which it would be entitled through denaturalization and deportation proceedings.

After further discussions between OSI and counsel for Mr. A and Mr. B, separate agreements were reached and executed by Mr. A and by Mr. B. Each agreement was also executed by their respective counsel, and by representatives of OSI and the Criminal Division.

The two agreements differ slightly in their terms, but their essential elements are the same. In the agreements, Mr. A and Mr. B recited that they are familiar with the allegations made against them by OSI, that they are subject to denaturalization and deportation, and that they were involved in Nazi activities. Both agreed permanently to depart the United States, and to renounce formally their United States citizenship before an appropriate United States official abroad. They further consented to the entry of orders of denaturalization and deportation if they failed to comply with the terms of the agreement, and waived any right to apply for discretionary relief, appeal, or any other procedure that would have the effect of reviewing or contesting either the agreement itself or any order of denaturalization or deportation entered pursuant to the agreement. Each agreement recites expressly that it is entered into "freely and voluntarily upon consultation with counsel," that the agreement had been personally reviewed and discussed with counsel, and that the signatory is not, and has not been, "under duress or compulsion of any kind." OSI has informed us that both Mr. A and Mr. B acknowledged in the presence of OSI representatives that they understood the terms of the agreements and the consequences of their actions.

For its part, OSI agreed not to commence any litigation seeking denaturalization or deportation against Mr. A and Mr. B and, in accordance with its existing policy, not to commence litigation seeking the revocation of United States citizenship of any family member whose citizenship was derived from the subject. The agreements further recite that "[t]he United States recognizes that" if the subject complies fully with the terms of the agreement, "there is no basis under U.S. law for limiting in any way [the] receipt of Social Security benefits."[8]

[8] The agreement reached with Mr. A recites only that there would be "no basis" for limiting receipt of Social Security benefits; the agreement reached with Mr. B recites that there would be no basis for limiting the receipt of "federal retirement, health care, and/or Social Security benefits." We do not read these provisions of the agreements to constitute a representation by OSI, on behalf of the United States Government, that no proceedings would be instituted against Mr. A and Mr. B to limit the receipt of such benefits. In fact, we would have some question about OSI's authority to make such promises. We interpret the provision

Continued

In accordance with these agreements, Mr. A and Mr. B have executed formal oaths of renunciation, coincidentally both before United States consular officers in the Federal Republic of Germany. In both cases, they were counseled by those officers as to the seriousness and significance of a renunciation of citizenship, and were given the opportunity to reconsider their decisions, as required by applicable State Department procedures.[9] Each also executed a "Statement of Understanding," reciting that he was exercising his rights of renunciation voluntarily.[10] In addition, Mr. B submitted a separate written "Declaration" stating that he was renouncing pursuant to an agreement with OSI.

In each case, the responsible consular officer raised questions with the State Department as to whether the renunciations may be considered voluntary, although they understood that under State Department regulations they were required to allow Mr. A and Mr. B to execute the oaths of renunciation. *See supra* note 9. The consular officer who accepted Mr. A's renunciation reported that Mr. A informed him he was renouncing his citizenship because of the agreement with OSI, and that Mr. A offered a statement that "[b]ecause I did not fully disclose the circumstances of my previous activities that would have affected my naturalization, I signed an agreement to avoid a hearing and

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[8] (. . . continued)
rather to reflect OSI's understanding that under applicable federal laws and regulations a renunciation of citizenship would not affect entitlement to receipt of federal benefits accrued prior to that renunciation. We express no view as to the correctness of that legal conclusion.

[9] The State Department's Foreign Affairs Manual (FAM) sets forth the following procedure for acceptance of formal oaths of renunciation:

> After the officer has verified that a would-be renunciant does possess the United States nationality which he seeks to surrender, he shall have the would-be renunciant read or have read to him, in the language he understands best and in the presence of the consular officer and two witnesses thoroughly conversant in that language, the Statement of Understanding set forth [elsewhere in the FAM]. The consular officer, in the presence of the witnesses, should explain in detail all of the consequences flowing from the intended renunciation. This must be done in every case.
>
> The would-be renunciant should execute and sign the Statement in duplicate, under oath, in the language he understands best in the presence of the consular officer and two witnesses.
>
> * * *
>
> In every case, the officer should suggest to the person that he defer the act of renunciation for a period to permit further reflection on the gravity and consequence of his contemplated act . . . . In no case, however, shall a United States citizen be denied the right to take the oath of renunciation.

8 FAM 225.6(g) & (h).

[10] For reasons that are not explained in the material we have been provided, the form of the statement of understanding and the oath of renunciation executed by Mr. A differs somewhat from the forms executed by Mr. B. The oath of renunciation executed by Mr. A recites that "I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity therefore pertaining," and the statement of understanding recites his understanding that "I have a right to renounce my United States citizenship and I have decided voluntarily to exercise that right . . . The extremely serious nature of my contemplated act of renunciation has been fully explained to me . . and I fully understand the consequences of my intended action." The oath executed by Mr. B states that "I hereby absolutely and entirely, without mental reservation, coercion or duress renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining." His statement of understanding recites that "I am exercising my right of renunciation freely and voluntarily without any force, compulsion, or under influence placed upon me by any person . . . The extremely serious and irrevocable nature of the act of renunciation has been explained to me . . . and I fully understand its consequences."

possible deportation, and I voluntarily renounced U.S. citizenship." Because of these statements, the consular officer declined to make a specific recommendation to the State Department concerning voluntariness, and left for "Departmental determination whether in view of this agreement Mr. A's renunciation should be considered voluntary." The consular officer who accepted Mr. B's renunciation was also unwilling to attest to its voluntariness, in light of a written statement filed by Mr. B stating that he was renouncing pursuant to an agreement with OSI, and oral statements made by Mr. B that he had "no choice" but to renounce in the face of threatened legal proceedings.

The execution of the oath of renunciation does not end the State Department's administrative role in renunciations of citizenship. Under current regulations, the consular officer must prepare a certificate of loss of nationality and submit it to the State Department for review and approval. 22 C.F.R. § 50.50, 8 FAM 224.1. That certificate must be approved and returned to the consular official for submission to the individual. 8 FAM 224.9. We understand that in most cases involving formal renunciations of citizenship the State Department routinely approves the certificate of loss of nationality. The State Department has informed us orally, however, that it interprets its responsibility under 8 U.S.C. § 1481 to encompass discretion to determine whether a particular renunciation meets the requirements of the statute and of the Constitution when information available to the Department suggests that the renunciation may be defective.[11]

Neither Mr. A nor Mr. B has indicated to the State Department that he will challenge the loss of his citizenship, although such a challenge would generally not be raised until the certificate of loss of nationality has been issued.[12] Under current State Department practice, individuals may challenge any holding by the State Department of loss of United States nationality by an appeal to a Board of Appellate Review established in the State Department. *See* 22 C.F.R. §§ 7.3, 50.52. If the Board of Appellate Review upholds the loss of nationality, the individual may institute an action in federal district court for a judgment declaring him to be a national of the United States. 8 U.S.C. § 1503; 28 U.S.C. § 2201.

II.

A. Constitutional and Statutory Framework

The Fourteenth Amendment guarantees that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." The Supreme Court has interpreted this guarantee to preclude Congress from stripping a citizen of citizenship without his assent. *Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967); *see also Perkins* v. *Elg*, 307 U.S.

[11] This administrative construction appears consistent with the role given the State Department under § 1481 We do not, however, find it necessary to address the validity or weight of that interpretation here.

[12] State Department regulations provide that the time for filing an appeal to the Board of Appellate Review runs from the time of approval by the Department of the certificate of loss of nationality. 22 C.F.R. § 7.5.

325, 334 (1939); *Nishikawa* v. *Dulles*, 356 U.S. 129, 133 (1958). The importance of citizenship and the severe consequences of a loss of that citizenship have heavily influenced the Court's reading of the language of the Fourteenth Amendment:

> Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world — as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

Afroyim v. *Rusk*, 387 U.S. at 267–68.[13] *See also Trop* v. *Dulles*, 356 U.S. 86, 92 (1958); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160–61 (1963).

Thus, with the exception of formal denaturalization,[14] a United States citizen can lose his citizenship only if he voluntarily performs an act that is "in derogation of allegiance to the United States," 42 Op. Att'y Gen. 397, 400 (1969), and that was committed with the intent to relinquish United States citizenship. *See Vance* v. *Terrazas*, 444 U.S. 252, 261 (1980). "[A]n act which

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[13] In *Afroyim* v. *Rusk*, the Court expressly rejected the argument it had previously upheld in *Perez* v. *Brownell*, 356 U.S. 44 (1958), that Congress' implied power to deal with foreign affairs as an indispensable attribute of sovereignty, plus the Necessary and Proper Clause, empower Congress to withdraw citizenship without the assent of the citizen. Relying substantially on consideration by various Congresses of bills that would have provided for some form of expatriation, the Court concluded in *Afroyim* that the framers of the Fourteenth Amendment intended clearly "to put citizenship beyond the power of any governmental unit to destroy," 387 U.S. at 263, and that Congress therefore lacks the constitutional authority to strip a citizen of citizenship without his consent.

[14] Denaturalization can apply only to citizens who acquired their citizenship by naturalization, because it is premised on impropriety in the naturalization proceedings. *See* 3 Gordon & Rosenfield, *Immigration Law & Procedure*, § 20.1 (1983) (Gordon & Rosenfield) Expatriation, on the other hand, applies to any citizen, whether he acquired his citizenship through birth or through naturalization, and does not involve any challenge to the lawfulness of the individual's acquisition of citizenship. *Id.* The power of Congress to provide for denaturalization of naturalized citizens has long been viewed as an incident of its authority "[t]o establish a uniform Rule of Naturalization," U.S. Const art. I, § 8, cl. 4, and necessary to protect the integrity of the naturalization process. *See Johannessen* v. *United States*, 225 U.S. 227 (1912), *Luria* v. *United States*, 231 U.S. 9 (1913); *Knauer* v. *United States*, 328 U.S. 654, 673 (1946) Conceptually, denaturalization does not fall within the general rule that citizenship can only be lost by voluntary action, because denaturalization is intended to redress errors in the naturalization process that would disentitle the individual to United States citizenship *ab initio*. *See* 3 Gordon & Rosenfield § 20.2C.

does not reasonably manifest an individual's transfer or abandonment of allegiance to the United States cannot be made a basis for expatriation." 42 Op. Att'y. Gen. at 400.

Although the Supreme Court has definitively held that Congress cannot provide by statute for involuntary expatriations, it has upheld Congress' authority to prescribe by statute the types of acts that Congress considers to be generally "highly persuasive evidence . . . of a purpose to abandon citizenship." *See Nishikawa* v. *Dulles*, 356 U.S. at 139; *Vance* v. *Terrazas*, 444 U.S. at 261, 265. These acts are set forth in § 349 of the Immigration and Nationality Act, 8 U.S.C. § 1481. One of these specified acts is a "formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state." 8 U.S.C. § 1481(a)(6). Other specified acts include: obtaining naturalization in a foreign state; taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; serving in the armed forces of a foreign state; serving in an office or employment under the government of a foreign state that requires assumption of the nationality of that state or a declaration of allegiance to that state; or committing an act of treason against the United States. *Id.* § 1481(a)(1)-(4), (7). The statute places the burden of proof on the party asserting that nationality has been lost, but establishes a rebuttable presumption that the act was committed voluntarily:

> Whenever the loss of United States nationality is put in issue in any action or proceeding . . . the burden shall be upon the person or party claiming that such loss occurred, to establish such claims by a preponderance of evidence. Except as otherwise provided . . . any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

Id. § 1481(c). This presumption and the "preponderance of the evidence" standard have been upheld by the Supreme Court as within the constitutional authority of Congress. *Vance* v. *Terrazas*, 444 U.S. at 264–67. The statutory presumption does not apply, however, to intent; the party asserting the loss of nationality bears the burden of proof, by a preponderance of the evidence, that the act was committed with the intent to relinquish United States citizenship. *See id.* at 268.

Thus, the analysis the courts have determined is required by the Constitution and by statute in any case in which a loss of nationality is alleged is three-fold:

> (1) Has the individual committed one of the acts set out in § 1481?
>
> (2) If so, can the individual overcome the statutory presumption that the expatriating act was performed voluntarily?

(3) Can the party claiming that citizenship was lost establish by a preponderance of the evidence that the act was committed with the intent to relinquish citizenship?

Here, our analysis focuses on the second question — that of the voluntariness of the renunciations in light of the threat that OSI would institute denaturalization and deportation proceedings.[15] Obviously, judicial decisions construing the voluntariness requirement of § 1481 are relevant precedent, and provide the basic framework for that analysis. In addition, we believe that decisions involving the voluntariness of guilty pleas entered pursuant to criminal plea bargains are highly relevant. The agreements negotiated between OSI and Mr. A and Mr. B are analogous in many respects to plea bargains, albeit in a civil, rather than a criminal, context. As in criminal plea bargains, Mr. A and Mr. B have agreed to waive or relinquish important constitutional rights in exchange for an agreement by United States prosecutors not to press forward with judicial proceedings that they otherwise could properly institute. As we discuss further below, the plea bargain analogy must be applied with care, because plea bargains, unlike the agreements negotiated with OSI at issue here, are subject to scrutiny by the courts before they become final. Nonetheless, we believe the analysis of the voluntariness issue by the courts in plea bargain cases is instructive, particularly because we have found no cases under § 1481 that raise precisely the factual situation raised by your request.

We will outline first the relevant precedents under § 1481, and then discuss the relevant cases involving the voluntariness of plea bargains. Finally, we will apply those precedents to the cases of Mr. A and Mr. B.

B. Judicial Decisions Construing "Voluntariness" Requirement of 8 U.S.C. § 1481

The courts have consistently recognized that an expatriating act cannot be considered to be voluntary if the circumstances demonstrate that the individual was coerced or compelled to commit the expatriating act:

> There is no dispute that citizenship will not be relinquished when the citizen performs an act of expatriation with a gun at his head, or under threat of jail, or under other circumstances involving duress, mistake, or incapacity negating a free choice.

3 Gordon & Rosenfield § 20.9b. If a citizen is forced into an expatriating act by circumstances essentially beyond his control, the *sine qua non* of expatriation

[15] There is no question that Mr A and Mr. B executed formal oaths of renunciation in accordance with the forms and procedures established by the Secretary of State under § 1481(a)(6). With respect to the question of intent, it seems unlikely that any successful challenge could be raised by either of those individuals on the ground that he did not intend, by execution of that oath, to relinquish United States citizenship. *See, e.g., Davis* v. *District Director, INS*, 481 F. Supp 1178, 1181 (D.D.C. 1979) (in formal renunciation cases, question of intent would normally not arise). The State Department Board of Appellate Review has taken the position that a formal renunciation of United States citizenship in the manner prescribed by law *ipso facto* demonstrates an intent on the part of renunciant to relinquish citizenship. *See, e.g., Case of V W v d H* (Aug. 25, 1982). In any event, we do not understand that the question raised by your request concerns the intent of Mr. A and Mr. B to relinquish United States citizenship, but rather concerns the voluntariness of their renunciations.

is lacking, and therefore no effect should be given to the expatriating act. *See Doreau* v. *Marshall*, 170 F.2d 721, 724 (3d Cir. 1948); *Stipa* v. *Dulles*, 233 F.2d 551, 555 (3d Cir. 1956).

The difficulty lies in determining what circumstances amount to duress or compulsion that would negate the voluntariness of the expatriating act. The courts have held that conscription into military service, particularly in a totalitarian country, may make such service and any attendant oath of allegiance involuntary, if the individual would otherwise face physical punishment, imprisonment, or economic deprivation.[16] Under some circumstances, the courts have concluded that familial obligations, or the need to satisfy basic subsistence needs, may rebut the presumption of voluntariness for actions such as extended residence abroad[17] or acceptance of employment by a state agency of a foreign government.[18] Evidence that the individual relied on material misrepresentations or erroneous advice by government officials has been held to satisfy the burden of rebutting the presumption of voluntariness.[19]

Although the courts have been receptive to claims of duress because of the importance of citizenship and the severe consequences of expatriation, they have also recognized that the difficulty of making a choice between alternatives and the motivation for that choice does not necessarily make the expatriating act involuntary:

> If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the *sine qua non* of expatriation is lacking . . . . On the other hand, it is just as certain that the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress.

Doreau v. *Marshall*, 170 F.2d at 724. Particularly in cases involving formal renunciations of citizenship or other written disclaimers of citizenship,[20] the

[16] *See, e.g., Nishikawa* v. *Dulles*, 356 U.S. at 139 (compulsory military service in Japanese army); *Kamada* v. *Dulles*, 145 F. Supp. 457 (N.D. Cal. 1956) (same); *see also Fukumoto* v *Dulles*, 216 F.2d 553 (9th Cir. 1954) (application for Japanese citizenship); *Kuwahara* v. *Acheson*, 96 F. Supp. 38 (S.D. Cal. 1951) (voting in post-war Japan compelled by fear of retaliation, loss of ration card, tradition of obedience to authority); *Takehara* v. *Dulles*, 205 F.2d 560 (9th Cir. 1953) (same), *Kamada* v. *Dulles*, 145 F. Supp. at 460–61 (same).

[17] *See, e.g., Mendelsohn* v *Dulles*, 207 F.2d 37 (D.C. Cir. 1953) (need to care for gravely ill wife); *Ryckman* v. *Acheson*, 106 F. Supp. 739 (S.D. Tex. 1952) (need to care for ill mother).

[18] *See, e.g., Insogna* v *Dulles*, 116 F. Supp. 473 (D.D.C. 1953) (acceptance of employment in bureau of Italian Government); *Kamada* v. *Dulles*, 145 F. Supp. at 459 (acceptance of employment as teacher in Japan).

[19] *See, e.g., Moser* v. *United States*, 341 U.S. 41 (1951) (alien not disbarred from application for citizenship because he signed waiver of eligibility for military service, where government representatives had informed him that he would not be precluded from citizenship); *Podea* v. *Acheson*, 179 F.2d 306 (2d Cir. 1950) (steps leading to conscription in Rumanian Army caused by erroneous advice of State Department); *Hong* v. *Dulles*, 214 F.2d 753 (7th Cir. 1954) (improper refusal of U.S passport).

[20] The only judicial decision we are aware of in which a court concluded that a formal renunciation of citizenship was involuntary is *Acheson* v. *Murakami*, 176 F.2d 953 (9th Cir. 1949). In that case, the court concluded that renunciations by United States citizens of Japanese descent, while they were interned during

Continued

courts have drawn a distinction between duress and motivation, and have emphasized that the critical question is whether the individual was free to choose between alternatives available to him, even if the choices might be difficult and the individual might be motivated by economic, emotional, or moral concerns. In *Jolley* v. *INS*, 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971), the court considered whether a formal renunciation of citizenship by a United States citizen was voluntary, in light of the petitioner's contention that he was compelled to renounce citizenship in order to avoid violation of the United States selective service laws. The petitioner relied primarily on cases such as *Nishikawa* v. *Dulles*, *supra*, in which the courts had been receptive to arguments that service in the Japanese armed forces was involuntary and therefore not expatriating. In *Jolley*, the court drew what we believe is a valid distinction between petitioner's claim and the claims upheld in *Nishikawa* and other similar cases:

> Nishikawa was faced with the choice of either subjecting himself to Japanese penal sanctions or relinquishing his United States citizenship. The conflicting laws of the United States and Japan created a Hobson's choice which rendered either alternative involuntary. The same dilemma did not confront Jolley. While we accept the assertion that Jolley's abhorrence of the Selective Service laws caused him to apostatize himself, he cannot equate that abhorrence with coercion sufficient to render his renunciation involuntary as a matter of law . . . . The compulsion he felt to renounce his citizenship was of his own design. But opportunity to make a decision based upon personal choice is the essence of voluntariness. Such a choice was unavailable to Nishikawa, for he was forced by Japanese penal law to engage in what was then termed an expatriating act. The duress he felt was not of his own making. Jolley's expatriating act, on the other hand, was not compelled by law. He had the alternative to obey the dictates of the Selective Service System, an alternative he found impossible solely because of his own moral code. His renunciation was therefore the product of personal choice and consequently voluntary.

441 F.2d at 1250 (footnote omitted).[21] In cases involving the execution by

[20] (. . . continued)
World War II in the Tule Lake Relocation Center, were not a result of intelligent choice, but rather of "mental fear, intimidation, and coercion" that deprived them of the free exercise of their will. 176 F 2d at 959, 960–61. The court based its decision on evidence of the coercive effect of the cruel and inhuman treatment of those citizens during their imprisonment, the shock and resentment caused by the racist attitude of the commanding general of the camp, and fear of reprisal from militant pro-Japanese groups within the camp. The extraordinary circumstances found by the court to override the free will of those renunciants bears little factual resemblance to the circumstances surrounding Mr. A's and Mr. B's renunciations, and therefore we believe the *Acheson* holding is of limited precedential value here.

[21] *Nishikawa* and most of the other cases cited above were decided prior to 1961, when Congress amended
Continued

neutral aliens of waivers of eligibility for military service, which require the alien to waive future eligibility for United States citizenship, the courts have similarly rejected claims that pressures such as fear of retaliation or financial burden were sufficient grounds to constitute duress.[22] Recent relevant decisions by the State Department Board of Appellate Review provided to OSI have applied the *Jolley* rationale to reject claims of duress and compulsion, particularly when the expatriating act was a formal renunciation of citizenship or a formal rejection of allegiance to the United States.[23]

C. Voluntariness of Guilty Pleas Accepted Pursuant to Plea Bargains

Although the reasoning of the decisions under § 1481 is instructive, none of those decisions presents a factual situation directly analogous to the renunciations by Mr. A and Mr. B. However, as we noted above, the agreements between OSI and Mr. A and Mr. B are analogous to plea bargains negotiated in the criminal context. In both, the individual gives up valuable constitutional rights — the right of citizenship, in the case of Mr. A and Mr. B, and the rights to trial by jury and to confront witnesses and the protection against compelled self-incrimination in the case of criminal defendants — in exchange for less severe treatment by government prosecutors, such as dismissal of other charges, reduction in charges, or a recommendation for a reduced sentence. The critical question is whether the individual gave up those constitutional rights voluntarily, or whether he was coerced into the waiver by the influence of the government prosecutors or by other factors. As in voluntariness cases arising under § 1481, the courts have held that the voluntariness of a guilty plea entered pursuant to a plea bargain can only be determined based on all of the relevant circumstances surrounding the waiver. *See Brady* v. *United States*, 397 U.S. 742, 749 (1970). Thus, although we recognize that there are procedural differences between the plea bargain cases and the Mr. A and Mr. B cases, we believe the analysis by the courts of the substantive issues involved — *i.e.*, whether a waiver of constitutional rights as part of a bargain with government prosecutors can be considered voluntary — is highly relevant to our analysis here.

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[21] (. . continued)
§ 1481 to include the current presumption of voluntariness and the preponderance of evidence standard Prior to that amendment, the burden was on the party claiming loss of citizenship to establish by "clear and convincing" evidence that the allegedly expatriating act was committed voluntarily. *See Nishikawa* v. *Dulles*, 356 U.S. at 135; *Vance* v. *Terrazas*, 444 U.S. at 264–65. Thus, although the reasoning of the courts in those pre-1961 cases remains instructive, it is impossible to determine whether the results would have been the same under the current evidentiary standards.

[22] *See, e.g., Ceballos* v *Shaughnessy*, 352 U.S. 599 (1957); *Prieto* v. *United States*, 289 F.2d 12 (5th Cir. 1961); *Jubran* v. *United States*, 255 F 2d 81 (5th Cir. 1958); *see generally* 1 Gordon & Rosenfield § 2.49d (collecting cases) ("[I]t was concluded that the alien had a free choice, that he chose to forego military service and must endure the consequences, and that there was no coercion in contemplation of law. The mere difficulty of this choice is not deemed to constitute duress. If the alien made a free and deliberate choice to accept benefits, he will be bound by his election.").

[23] *See, e.g., Case of D R L* (July 6, 1984) (naturalization in Canada); *Case of N A McG* (Sept. 2, 1982) (formal renunciation); *Case of E M v d H* (Aug. 25, 1982) (same); *Case of V W v d H* (Aug. 25, 1982) (same).

The practice of criminal plea bargaining has been recognized by the Supreme Court as constitutional, and indeed as an important part of the criminal justice system. *See Brady* v. *United States*, 397 U.S. at 750; *Mabry* v. *Johnson* 467 U.S. 504 (1984). The Court has specifically rejected the argument that guilty pleas entered pursuant to such bargains must be considered involuntary because of the government's involvement in and responsibility for some of the circumstances motivating the plea:

> The State to some degree encourages pleas of guilty at every important step in the criminal process .... All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

Brady v. *United States*, 397 U.S. at 750. The involvement of government prosecutors and the overhanging threat of greater punishment does not necessarily deprive the defendant of free choice:

> The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice ....

North Carolina v. *Alford*, 400 U.S. 25, 31 (1970) (citations omitted). The courts have emphasized that plea bargaining rests on a mutuality of advantage; the government perceives an advantage in avoiding a trial that would consume scarce resources and in which it might not prevail, while the defendant avoids the burdens of trial and limits his exposure to penalties. *See Brady* v. *United States*, 397 U.S. at 752.

Because of the importance of the constitutional rights at stake and the risk of abuse by government prosecutors, courts have been extraordinarily careful in reviewing plea bargains, and have required that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. at 742; *see also North Carolina* v. *Alford*, 400 U.S. at 31; *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). In reviewing the constitutional sufficiency of plea bargains, the courts have generally required proof of a number of factors, including: (1) that the defendant has real notice of the charges against him;[24] (2) that he is aware of the evidence, both inculpatory and exculpatory, available to the prosecutors;[25] (3)

[24] *See Marshall* v. *Lonberger*, 459 U.S. 422, 436 (1983); *Henderson* v. *Morgan*, 426 U.S. 637, 638 (1976).
[25] *See Fambo* v. *Smith*, 433 F. Supp. 590, 598–99 (W.D.N.Y.), *aff'd*, 565 F.2d 233 (1977).

that he has been fully informed of the consequences of the plea;[26] (4) that he is competent to understand the plea and its consequences;[27] and (5) that he has had the effective assistance of counsel.[28] In addition, the courts have recognized that government misconduct or overreaching such as physical abuse or threats, extensive interrogation of the defendant without assistance of counsel, or material misrepresentation by prosecutors can amount to duress that undercuts the voluntariness of a plea.[29]

However, a threat to prosecute where the facts warrant prosecution is generally not considered to be coercion or intimidation. "To establish fear and coercion on a plea an individual must show he was subjected to threats or promises of illegitimate action." *O'Neill* v. *United States*, 315 F. Supp. 1352, 1354 (D. Minn. 1970), *aff'd*, 438 F.2d 1236 (1971); *see also Ford* v. *United States*, 418 F.2d 855, 858 (8th Cir. 1969). Moreover, while the defendant's admission that he committed the acts charged in the indictment may be highly significant evidence of the voluntariness of his act and an important protection against abuse, such an admission is not a constitutional prerequisite to acceptance of the plea, provided the defendant "intelligently concludes that his interests required entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *North Carolina* v. *Alford*, 400 U.S. at 37.

Of course, the process of plea bargaining and the entering of guilty pleas is subject to stringent procedural requirements that provide the court with an opportunity to assess the circumstances of the bargain and the defendant's understanding and acceptance of the bargain before the plea is accepted. In the federal courts, plea bargaining is governed by Rule 11 of the Federal Rules of Criminal Procedure, which requires the court to address the defendant personally in open court in order to determine "that the plea is voluntary and not the result of force or threats or promises apart from a plea agreement." Fed. R. Crim. P. 11(d). The rule requires disclosure of a plea agreement in open court, and directs the court, if it accepts the agreement, to inform the defendant that it will embody in the judgment and sentence the disposition provided for by the agreement. Fed. R. Crim. P. 11(e). Finally, the court is required to make "such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f). Most, if not all, state courts have similar procedural requirements. *See, e.g.*, 21 Am. Jur. 2d *Criminal Law* ll 470–85; Uniform R. Crim. P. 443 & 444.

We understand concern has been raised that the lack of any comparable procedures or requirements applicable to the negotiation of agreements between OSI and alleged Nazi persecutors could potentially lead to abuses of the process. Procedural rules such as Rule 11 or comparable rules in state courts provide a mechanism to ensure that the plea bargaining process meets constitutional standards, and to provide a complete record at the time the plea was

[26] *See Brady* v. *United States*, 397 U.S. at 755–56.

[27] *See Smith* v. *O'Grady*, 321 U.S. at 334.

[28] *See Brady* v. *United States*, 397 U.S. at 750; *Fontaine* v. *United States*, 411 U.S. 213, 214–15 (1973); *Sanders* v. *United States*, 373 U S. 1, 19–20 (1963); *Machibroda* v. *United States*, 368 U.S. 487, 489–90 (1962); *United States* v. *Briscoe*, 432 F.2d 1351, 1353 (D.C. Cir. 1970).

[29] *See Henderson* v. *Morgan*, 426 U.S. 637, 638 (1976).

entered of the factors relevant to the voluntariness determination. *See Halliday* v. *United States*, 394 U.S. 831, 832 (1969). However, the particular procedures embodied in those rules are not constitutionally mandated, *see McCarthy* v. *United States*, 394 U.S. 459, 465 (1969); *Waddy* v. *Heer*, 383 F.2d 789, 794 (6th Cir. 1967), *cert. denied*, 392 U.S. 911 (1968), and they do not address the substantive determination that must be made as to the voluntariness of a guilty plea. Further, expatriation in general does not necessarily require judicial proceedings, but rather entails an administrative finding that loss of citizenship has occurred. *See* 3 Gordon & Rosenfield § 20.1. Congress has by statute provided for judicial review of that administrative determination in 8 U.S.C. § 1503, but the process does not, unlike the acceptance of guilty pleas in criminal cases, necessarily require a judicial determination at the time the expatriating act is committed that the act was committed voluntarily.

Therefore, we do not believe that the lack of any specific procedural safeguards renders the agreements reached between OSI and Mr. A and Mr. B invalid or undercuts the relevance of the substantive analysis by the courts of the voluntariness of criminal plea bargains. We would be somewhat more concerned about the lack of procedural safeguards if the individuals could not obtain judicial review at some point of the voluntariness of their renunciations. As we pointed out above, however, current State Department regulations provide for administrative review of any determination of loss of citizenship, and an opportunity for judicial review is provided by statute.

In that regard, we are unsure as to the effect of the undertaking in Mr. A's and Mr. B's agreements that they would not institute any actions to challenge the basis for the agreements or their renunciations. Given the importance of the constitutional right at stake, and the absence of particular procedural safeguards applicable to negotiation of the agreements, we are not certain that such an undertaking would be held enforceable in court.[30] Because a resolution of that question is not necessary to this opinion, we do not attempt to resolve it here.

D. Voluntariness of Renunciations by Mr. A and Mr. B

We believe that the analysis of the voluntariness issue in the plea bargain cases is substantively consistent with the voluntariness standard articulated in *Afroyim* v. *Rusk*, particularly as that standard was interpreted in *Jolley* v. *Immigration & Naturalization Service*. The emphasis in both instances is on whether the individual could reasonably choose between alternatives, however difficult that choice might be and whatever the individual's motivation might be for making the choice. The plea bargain cases establish that a choice such as that faced by Mr. A and Mr. B — between waiver of constitutional rights and prosecution — can be voluntary, if intelligently made by a competent individual. Here, both men had substantial interests in avoiding the expense, strain, and publicity of deportation and denaturalization proceedings. In addition, they

[30] *See, e.g., Halliday* v. *United States*, 394 U.S at 833 (noting importance of availability of post-conviction remedy to challenge voluntariness of plea bargain); *see also Fontaine* v. *United States*, 411 U.S. at 215 (coerced guilty plea is open to collateral attack)

had an interest in avoiding other consequences or sanctions that might flow from denaturalization and deportation, such as the possible loss of federal benefits accrued while they were citizens. The facts available to us indicate that counsel for Mr. A and Mr. B reviewed the evidence and were involved in the discussions, that Mr. A and Mr. B were informed, either by OSI or through counsel, of the charges and evidence against them, that they were informed of the consequences of their action both at the time they signed the agreements and at the time they executed the oaths of renunciation, that both admitted in the agreements that they had been involved in Nazi activities and that they were subject to denaturalization and deportation, and that both repeatedly acknowledged the voluntariness of their acts.

Although Mr. B has since professed his innocence of the charges against him, OSI has informed us that it has substantial evidence supporting those charges, much of it from statements made under oath by Mr. B. Under *North Carolina* v. *Alford*, 400 U.S. at 37, therefore, it would not appear that his later self- serving statements undercut the voluntariness of his renunciation. In addition, as far as we know the only threat made by OSI prosecutors in the bargaining process was the threat to institute denaturalization and deportation proceedings, with whatever consequences might flow from those proceedings. Because OSI believed it had developed facts that would warrant such proceedings, that threat cannot be viewed as illegitimate or overreaching.

At least in the absence of other facts indicating that government prosecutors engaged in misrepresentation or illegitimate threats, or that Mr. A and Mr. B were not fully informed of the nature of the charges against them or the consequences of their plea — none of which is suggested in the material we have reviewed — and based on the facts as they have been presented to us, we are confident that a court would find that both renunciations were voluntary. In reaching that conclusion, we believe that the courts would find relevant, as we have, the clear analogy between these agreements and plea bargains, and therefore apply the well-established principles applicable to the determination of voluntariness in that context. *See generally United States* v. *Ryan*, 360 F. Supp. 265, 270 (E.D.N.Y. 1973) (noting analogy between plea bargains and consent judgment entered in denaturalization case requiring renunciation of citizenship by subject of proceedings).[31]

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Office of Legal Counsel

[31] Although we believe the courts would certainly find the plea bargain analogy relevant, they might not feel bound by the strict scrutiny generally given to criminal pleas Denaturalization and deportation proceedings are civil rather than criminal in nature, *see, e.g., Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Bugajewitz* v. *Adams*, 228 U.S 585 (1913); *United States* v. *Stromberg*, 227 F 2d 903 (11th Cir. 1955), and proceedings relating to expatriation are clearly civil in nature, *see* 8 U.S C. § 1503. Although the consequences of denaturalization and deportation or voluntary expatriation are severe, they do not involve a loss of liberty or criminal punishment. In addition, in any challenge to the loss of citizenship the burden would be on Mr. A or Mr. B to rebut the presumption of voluntariness that flows from § 1481(c). Therefore, it may be that courts would not scrutinize bargains struck in the context of expatriations by renunciation of citizenship as closely as they generally scrutinize criminal plea bargains.

Implementation of the Bid Protest Provisions of the Competition in Contracting Act

Certain provisions concerning bid protest procedures in the Competition in Contracting Act of 1984 (CICA) purport to authorize the Comptroller General (1) to require a procuring agency to stay a procurement until such stay is lifted by the Comptroller General; and (2) to require an agency to pay certain costs of a bid protest, including attorneys' fees and bid preparation costs. Because the Comptroller General is an agent of the Legislative Branch, the provisions authorizing the Comptroller General to act in an executive capacity to bind individuals and institutions outside the Legislative Branch violate fundamental separation of powers principles.

Although the only unconstitutional aspect of the bid protest stay provision concerns the Comptroller General's authority to lift the stay, this authority is inextricably bound with the stay provision as a whole. The stay provision is not, however, inextricably bound to the remainder of the CICA, and thus may be severed. Likewise, the provision authorizing the Comptroller General to require an agency to pay certain costs of a bid protest is severable from the remainder of the CICA.

Executive Branch agencies are advised to proceed with procurement processes as though no stay provision exists in the CICA, although agencies may voluntarily agree to stay procurements pending the resolution of bid protests if such action is not based on the authority of the invalid CICA stay provisions. Agencies should not comply with the Comptroller General's awards of costs under the invalid CICA damages provision.

October 17, 1984

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to the President's request that this Department advise Executive Branch agencies regarding how they may implement the bid protest provisions of the Competition in Contracting Act of 1984 (CICA or Act), which was enacted as part of the Deficit Reduction Act of 1984. Pub. L. No. 98-369, 98 Stat. 494 (1984). In a signing statement on the Deficit Reduction Act, the President, on the advice of this Department, raised constitutional objections to certain provisions that delegate to the Comptroller General the power to perform duties that may not be carried out by the Legislative Branch. The President instructed this Department to advise Executive Branch agencies with respect to how they could comply with the Act in a manner consistent with the Constitution. This memorandum provides the advice requested by the President.

I. Background

The new bid protest provisions were enacted as Subtitle D of the CICA. These provisions expressly permit any "interested party"[1] to file "[a] protest concerning an alleged violation of a procurement statute or regulation," and authorize the Comptroller General to decide such a protest under procedures to be established by the Comptroller General. *See* 31 U.S.C. § 3552. These provisions provide the first explicit statutory authorization for the Comptroller General's review of bid protests. Previously, all bid protests were considered on the basis of regulations published under the more general statutory provision that purports to authorize the Comptroller General to settle the accounts of the United States Government. *See id.* § 3526.

The CICA requires the Comptroller General to notify the federal agency involved in the protest, which is then required to submit to the Comptroller General a complete report on the protested procurement, "including all relevant documents," within 25 working days of the agency's receipt of notice. 31 U.S.C. § 3553(b). As a general rule, the CICA requires the Comptroller General to issue a final decision on a protest within 90 working days from the date the protest is submitted to the Comptroller General. These time deadlines, however, may be altered by the Comptroller General if he determines and states in writing that the specific circumstances of the protest require a longer period. The Act also provides for a so-called "express option" for deciding protests that the "Comptroller General determines suitable for resolution within 45 calendar days from the date the protest is submitted." Finally, the Comptroller General may dismiss a protest that the "Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest." 31 U.S.C. § 3554(a).

The Act expressly requires that if a protest is filed prior to a contract award, "a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending." 31 U.S.C. § 3553(c)(1). The procuring agency may avoid this "stay" only if the "head of the procuring activity" makes a "written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General." The Comptroller General must be advised of this finding, and the finding may not be made "unless the award of the contract is otherwise likely to occur within 30 days thereafter." *See id.* § 3553(c)(3).

If a bid protest is filed within ten days after the date a contract is awarded, the procuring agency is required "upon receipt of that notice, immediately [to] direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by

[1] "Interested party" is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551. (Citations to the new bid protest provisions are to the United States Code sections, as those sections are set forth in the CICA.)

the United States under that contract. Performance of the contract may not be resumed while the protest is pending." 31 U.S.C. § 3553(d)(1). As is true with respect to a pre-award protest, the head of the procuring activity may "waive" the stay upon a written finding that "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest." The Act provides an additional ground for waiver of a post-award stay upon a written finding "that performance of the contract is in the best interests of the United States." *Id.* § 3553(d)(2).

With respect to remedies, the Act authorizes the Comptroller General to determine whether a solicitation or proposed award complies with applicable statutes and regulations and, if not, to recommend that the procuring agency take certain specified types of action. The Act does not purport to give the Comptroller General the authority to issue binding decisions on the merits of the protest. The Act does, however, state that if the Comptroller General determines that a solicitation or award does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of "filing and pursuing the protest, including reasonable attorneys' fees" and "bid and proposal preparation." 31 U.S.C. § 3554(c)(1). In addition, the Act states that these monetary awards "shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services." *Id.* § 3554(c)(2).

Finally, the Act requires the head of a procuring activity to report to the Comptroller General if the procuring agency has not fully implemented the Comptroller General's recommendations within 60 days after receipt of those recommendations. The Comptroller General is then required to submit a yearly report to Congress describing each instance in which a federal agency did not fully implement the Comptroller General's recommendations. 31 U.S.C. § 3554(e)(2).

The Department of Justice commented on similar bid protest provisions when they were under consideration by Congress as part of H.R. Rep. No. 5184. *See* Letter to Honorable Jack Brooks from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs (Apr. 20, 1984). At that time, the Department specifically objected to the stay provisions on the ground that they would unconstitutionally vest an arm of the Legislature with the power to control Executive Branch actions. The Department specifically concluded that the stay provision "must be deleted because of this constitutional infirmity." In addition, the Department objected to the provision in H.R. Rep. No. 5184 purporting to authorize the Comptroller General to enter a legally binding award of attorneys' fees and bid preparation costs. We pointed out that this provision unconstitutionally granted the Comptroller General executive or judicial authority in a manner inconsistent with the separation of powers and that, accordingly, the section "must be deleted in order to remove this substantial concern." The Department's objections went unheeded, and both provisions were enacted into law.

When the Deficit Reduction Act of 1984 was presented to the President for his signature, he specifically objected in a signing statement to the bid protest provisions upon which the Department had previously commented:

> I am today signing H.R. Rep. No. 4170. In signing this important legislation, I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch. This administration's position on the unconstitutionality of these provisions was clearly articulated to Congress by the Department of Justice on April 20, 1984. I am instructing the Attorney General to inform all executive branch agencies as soon as possible with respect to how they may comply with the provisions of this bill in a manner consistent with the Constitution.

20 Weekly Comp. Pres. Doc. 1037 (July 18, 1984).

II. The Constitutional Role of the Comptroller General

In order to analyze the constitutionality of the bid protest provisions of the CICA, it is necessary first to understand what types of functions the Comptroller General may (and may not) perform under the constitutionally prescribed separation of powers. This analysis first involves consideration of where the Comptroller General fits within the tripartite structure established by the Constitution. It is then necessary to determine, given the Comptroller General's place in that structure, what duties he may constitutionally perform.

A. The Comptroller General's Position in the Tripartite Structure of the Federal Government

The Office of Comptroller General of the United States was created by the Budget and Accounting Act of 1921. *See* 42 Stat. 23 (1921). The Budget and Accounting Act expressly stated that the Comptroller General is "independent of the executive departments." *Id.* Subsequent legislation made it clear that the Comptroller General is part of the Legislative Branch. The Reorganization Act of 1945 specified that, for purposes of that Act, the term "agency" meant any executive department, commission, independent establishment, or government corporation, but did not include "the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government." 59 Stat. 616 (1945). The same provision was included in the Reorganization Act of 1949. *See* 63 Stat. 205 (1949). The Accounting and Auditing Act of 1950 declared that the auditing for the Government would be conducted by the Comptroller General "as an agent of the Congress." 64 Stat. 835 (1950).

Although the President nominates and, with the advice and consent of the Senate, appoints the Comptroller General, the President has no statutory right to remove the Comptroller General, even for cause. *See* 31 U.S.C. § 703 (1982). The Comptroller General is appointed for a fifteen-year term, but he may be removed either by impeachment or by a joint resolution of Congress, after notice and an opportunity for hearing, for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1). Given the breadth of the grounds of removal, particularly the terms "inefficiency" and "neglect of duty," Congress enjoys a relatively unlimited power over the tenure in office of the Comptroller General.[2]

This broad power of removal was intended to give Congress the right effectively to control the Comptroller General, as the following excerpts from the legislative history of the Budget and Accounting Act demonstrate:

> MR. FESS. In other words, the man who is appointed may be independent of the appointing power, and at the same time if the legislative branch finds that he is not desirable, although he may be desirable to the appointing power, the legislative branch can remove him?
>
> MR. HAWLEY. Yes . . . .

58 Cong. Rec. 7136 (1919).

> [I]f the bill is passed this would give the legislative branch of the Government control of the audit, not through the power of appointment, but through the power of removal.

Id. at 7211 (remarks of Rep. Temple).

On the basis of these statutory provisions, it has become generally accepted that the Comptroller General is an arm of Congress and is within the Legislative Branch. The Department of Justice has consistently taken the view that the Comptroller General is a "legislative officer." *See, e.g., Testimony of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel: Hearings before the Subcomm. on Legislation and National Security, House Comm. on Government Operations*, 95th Cong., 2d Sess. (1978). The courts have also reached the conclusion that the Comptroller General is "an arm of the legislature." *See Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 201 n.1 (D.C. Cir. 1984); *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289 (D.C. Cir. 1971). In addition, scholars and commentators have recognized the position of the Comptroller General within the Legislative Branch and his direct accountability to Congress. *See The United States Government Manual* at 40

[2] The Supreme Court has recognized that the power to remove an official is necessarily linked to the power to supervise and control the actions of that official. *See Humphrey's Executor* v. *United States*, 295 U S. 602, 627 (1935).

(1984/85); F. Mosher, *The GAO: The Quest for Accountability in American Government* (1979); Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 Geo. Wash. L. Rev. 349 (1970); R. Brown, *The GAO: Untapped Source of Congressional Power* (1970); Willoughby, *The Legal Status and Functions of the General Accounting Office of the National Government* (1927).

The extent of the Comptroller General's direct accountability to Congress is perhaps best demonstrated by publications of Congress itself and of the General Accounting Office (GAO), which the Comptroller General heads.[3] In 1962, the Senate Committee on Government Operations published a report that described the GAO as

> a nonpolitical, nonpartisan agency in the legislative branch of the Government created by the Congress to act in its behalf in examining the manner in which Government agencies discharge their financial responsibilities with regard to public funds appropriated or otherwise made available to them by the Congress and to make recommendations looking to greater economy and efficiency in public expenditures.

Functions of the U.S. General Accounting Office, S. Doc. No. 96, 87th Cong., 2d Sess. 1 (1962).

A recent publication of the GAO states that although the Comptroller General is appointed by the President with the advice and consent of the Senate, the Comptroller General has "line responsibility to the Congress alone." General Accounting Office, *GAO 1966–1981, An Administrative History* 84 (1981). The same publication states that while "the Comptroller General has been established by the Congress with a great measure of discretion in independent action, he is fully accountable to the Congress. The Congress has by law and by practice exercised its accountability in several different ways." *Id.* at 258. This direct accountability undoubtedly has an impact on the positions and conclusions the Comptroller General reaches on public issues. For example, the GAO has stated that "as an agent of Congress, GAO has always considered it inappropriate to question the constitutionality of a statute enacted by the Congress." General Accounting Office, *Principles of Federal Appropriations Law* 1–7 (1982).

Thus, the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress. As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own Committees. The scope of this power is discussed below.

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[3] Because the Comptroller General and the GAO are both "a part of the legislative branch of the Government," we treat them as equivalents for the purposes of this constitutional analysis. *See* Reorganization Act of 1949, 63 Stat. 205 (1949).

B. The Duties That May Constitutionally Be Performed by an Agent of the Legislative Branch

A fundamental organizing principle of the United States Constitution is the division of federal power among three branches of government. The term "separation of powers" does not appear in the Constitution nor does that concept manifest itself in one specific provision of the Constitution. The Supreme Court has emphasized, however, that the separation of powers "is at the heart of our Constitution," and the Court has recognized "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." *Buckley* v. *Valeo*, 424 U.S. 1, 119–20 (1976). "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Id.* at 124. "The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers." *INS* v. *Chadha*, 462 U.S. 919, 946 (1983). In *The Federalist* No. 47, James Madison defended this tripartite arrangement in the Constitution by reference to Montesquieu's well-known maxim that the legislative, executive, and judicial departments should be separate and distinct:

> The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "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." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."

The Federalist No. 47, at 303 (C. Rossiter ed. 1961) (emphasis in original); *see Buckley* v. *Valeo*, 424 U.S. 1, 120–21 (1976).

The division of delegated powers was designed "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. This division obliges the branches both to confine themselves to their constitutionally prescribed roles and not to interfere with exercise by the other branches of their constitutional duties. Thus, the doctrine of separation of powers "may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." *Id.* at 963 (Powell, J. concurring) (citations omitted).

This constitutionally prescribed separation of powers is not merely a theoretical concept; it creates enforceable limits upon the powers of each branch.

The Supreme Court has emphasized that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." *Buckley* v. *Valeo*, 424 U.S. at 123. Thus, the separation of powers is a vital part of the structure of the Constitution and the federal government, and it operates as an enforceable limit on the ability of one branch to assume powers that properly belong to another.

At various times in the Nation's history, the Supreme Court has acted to restrain each of the other branches from overstepping its proper constitutional role. In particular, the Court has been sensitive to the need to limit Congress to the performance of its legislative duties and not permit it to usurp executive or judicial functions. The Court has observed that because of the Framers' specific concerns about the potential abuse of legislative power, "barriers had to be erected to ensure that the legislature would not overstep the bounds of *its* authority and perform the functions of the other departments." *United States* v. *Brown*, 381 U.S. 437, 444 (1965). In *Springer* v. *Philippine Islands*, 277 U.S. 189 (1928), the Court stated:

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

277 U.S. at 202.

In *Myers* v. *United States*, 272 U.S. 52 (1926), the Court held that Congress could not limit or interfere with the President's ability to remove executive officials:

> Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices .... [T]he provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, [Senate advice and consent] in the work of the executive, are limitations to be strictly construed and not to be extended by implication ....

272 U.S. at 164.

In *Buckley* v. *Valeo*, the Court ruled that Congress was barred by the Appointments Clause from appointing Officers of the United States, whom it defined as those "exercising significant authority pursuant to the laws of the United States." 424 U.S. at 126. In so holding, the Court expressly recognized that Congress' broad power under the Necessary and Proper Clause extends only so far as its legislative authority, and does not expand that authority to encompass the exercise of executive powers:

> The proper inquiry when considering the Necessary and Proper Clause is not the authority of Congress to create an office or a

commission, which is broad indeed, but rather its authority to provide that its own officers may make appointments to such office or commission.

> So framed, the claim that Congress may provide for this manner of appointment under the Necessary and Proper Clause of Art. 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 § 9 of Art. 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.

Id. at 134–35.

Finally, the Supreme Court has most recently and thoroughly considered the scope of Congress' authority to act other than by plenary legislation in *INS* v. *Chadha*. In *Chadha*, the Court declared unconstitutional a one-house legislative veto provision. In so doing, the Court underscored the constitutional requirement that, in order for Congress to bind or affect the legal rights of government officials or private persons outside the Legislative Branch, it must act by legislation presented to the President for his signature or veto:

> The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President.

462 U.S. at 947. When Congress takes action that has "*the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the Legislative Branch*," it must act by passing a law and submitting it to the President in accordance with the Presentment Clauses and the constitutionally prescribed separation of powers. *Id.* at 952 (emphasis added). The Court emphasized that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." *Id.* at 955.[4]

[4] As the Court noted, there are only four provisions in the Constitution by which one House may act alone with the unreviewable force of law, not subject to the President's veto: the power of the House of Representatives to initiate impeachment; the power of the Senate to try individuals who have been impeached by the House; the power of the Senate to approve or disapprove Presidential appointments; and the power of the Senate to ratify treaties negotiated by the President. *See* 462 U.S. at 955.

Finally, with respect to Congress' power over the Legislative Branch, the Court concluded:

> One might also include another "exception" to the rule that congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" *only empowers Congress to bind itself* and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Id. at 955 n.21 (emphasis added).

These principles have never been directly applied by a court to establish the constitutional limits on Congress' authority to assign duties to the Comptroller General. In particular, we are aware of no court decision that has ever held that the Comptroller General may constitutionally perform executive duties or take actions that bind individuals outside the Legislative Branch.[5] Some courts have, in *dictum*, noted that the Budget and Accounting Act purports to give the Comptroller General broad power to bind the Executive Branch. *See United States ex rel. Skinner & Eddy Corp.* v. *McCarl*, 275 U.S. 1 (1927); *United States ex rel. Brookfield Constr. Co.* v. *Stewart*, 234 F. Supp. 94, 100 (D.D.C.), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964). Other courts have stated, solely on the basis of statutory language and without considering any possible constitutional issues, that the Comptroller General's settlement of accounts is binding on the Executive Branch. *See United States* v. *Standard Oil Co.*, 545 F.2d 624, 637–38 (9th Cir. 1976); *Burkley* v. *United States*, 185 F.2d 267 (7th Cir. 1950); *Pettit* v. *United States*, 488 F.2d 1026 (Ct. Cl. 1973). In none of these cases, however, did the courts consider the scope of authority that could *constitutionally* be assigned to the Comptroller General or, specifically, whether the Constitution would permit the Comptroller General, as an agent of Congress, to take action affecting the rights or obligations of Executive Branch officials or private citizens.

Other cases have expressly recognized that, in the context of the Comptroller General's current review of bid protests, the authority of the Comptroller General is purely advisory and does not bind the Executive Branch. *See Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984); *Wheelabrator Corp.* v. *Chafee*, 455 F.2d 1306, 1313 (D.C. Cir. 1971); *Aero Corp.* v. *Department of the Navy*, 540 F. Supp. 180, 206 (D.D.C. 1982);

[5] In *Buckley* v. *Valeo*, the Court noted that the Comptroller General "is appointed by the President in conformity with the Appointments Clause." 424 U.S. at 128 n.165. This reference was not, however, an indication that the Comptroller General is authorized to perform executive responsibilities, but rather, simply responded to an argument made by Congress in *Buckley* that the Office of Comptroller General was precedent supporting Congress' asserted right to make certain types of appointments.

Simpson Electric Co. v. *Seamans*, 317 F. Supp. 684, 686 (D.D.C. 1970). Indeed, the United States Court of Appeals for the District of Columbia Circuit has recently recognized that there "might be a constitutional impediment to such a binding effect." *Delta Data Systems Corp.* v. *Webster*, 744 F.2d at 201 n.1 (citing *INS* v. *Chadha*).

We believe that if a court were to apply the separation of powers principles discussed above to establish the constitutional role of the Comptroller General, it would limit the Comptroller General to those duties that could constitutionally be performed by a congressional committee. Thus, under the above principles, the Comptroller General may not act in an executive capacity, and he may not take actions that bind individuals and institutions outside the Legislative Branch. He may advise and assist Congress in reviewing the performance of the Executive Branch in order to determine if legislative action is desirable or necessary. He may not, however, substitute himself for either the executive or the judiciary in determining the rights of others or executing the laws of the United States. Our analysis of the bid protest provisions of the CICA is based upon these conclusions.

II. The Constitutionality of the Bid Protest Provisions of the CICA

Given the foregoing constitutional principles, there are two provisions of the CICA that raise significant constitutional problems: (1) the provision requiring a procuring agency to stay a procurement pending resolution by the Comptroller General of a bid protest; and (2) the provision authorizing the Comptroller General to require a procuring agency to pay certain costs, including attorneys' fees and bid preparation costs.

A. The Stay Provision

Under the stay provision of the CICA, a procuring agency is required to suspend a procurement upon the filing of a bid protest until the Comptroller General issues his decision on the protest. Thus, the Comptroller General is given the power to determine when the stay will be lifted by the issuance of his decision on a bid protest. As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on a bid protest.

From a constitutional perspective, we find nothing improper in the requirement for a stay, in and of itself. Congress frequently requires Executive Branch agencies to notify Congress of certain actions and wait a specified period before implementing those actions. These so called "report and wait" requirements were specifically recognized by the Supreme Court in *Chadha* as a constitutionally acceptable alternative to the legislative veto. *See* 462 U.S. at 955.

The problem in this instance arises from the power granted to the Comptroller General to lift the stay. The CICA gives the Comptroller General, an agent

of Congress, the power to dictate when a procurement may proceed. This authority amounts, in *Chadha's* words, to a power that has the "effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." *See* 462 U.S. at 952. As a constitutional matter, there is very little difference between this power and the power of a legislative veto.

A similar issue was raised in *American Fed'n of Gov't Employees* v. *Pierce*, 697 F.2d 303 (D.C. Cir. 1982). In that case, the court of appeals considered the validity of a statute that required the Department of Housing and Urban Development to suspend any reorganization until it received approval from the House and Senate Committees on Appropriations. The court ruled that this provision could be interpreted simply as a form of legislative veto, but it also stated:

> The provision can also be taken as granting the Appropriations Committees the power to lift a congressionally imposed restriction on the use of appropriated funds. In this light, the directive is nothing more or less than a grant of legislative power to two congressional committees. It is plainly violative of article I, section 7, which prescribes the only method through which legislation may be enacted and which "restrict[s] the operation of the legislative power to those policies which meet the approval of three constituencies, or a super-majority of two."

Id. at 306; *see also Consumer Energy Council* v. *FERC*, 673 F.2d 425, 464 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983). Similarly, the grant to the Comptroller General of the power to lift the stay imposed under the CICA amounts to a grant of legislative power to an arm of Congress. This grant is clearly inconsistent with the principles established by the Supreme Court in *Chadha*, which were accurately anticipated by the U.S. Court of Appeals for the District of Columbia Circuit in *Pierce*.

A difficult problem is presented in this instance, however, by the question of the extent to which the unconstitutional provision is severable from the remainder of the CICA. In *Chadha*, the Court ruled that an unconstitutional provision is generally presumed to be severable. The Court outlined several guidelines with respect to evaluating this issue in a specific instance. First, the Court stated:

> Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not'" *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932).

INS v. *Chadha*, 462 U.S. at 931–32. Thus, unless there are clear indications that Congress would have intended additional parts of a statute to fall because of the invalidity of a single provision, the invalid provision will be severed. Second,

the Court stated that a severability clause is strong evidence that Congress did not intend that the entire statute or any other part of it would fall simply because another provision was unconstitutional. 462 U.S. at 934. Finally, the Court stated that "[a] provision is further presumed severable if what remains after severance is 'fully operative as a law.' *Champlin Ref. Co.* v. *Corporation Comm'n, supra*, 286 U.S. at 234." *Id.* The severability issue must be analyzed in light of these principles.

The only aspect of the stay provision that is directly unconstitutional is the provision authorizing the Comptroller General to lift the stay by issuing his decision or finding that a particular protest is frivolous. If this provision alone were severed, the stay would remain in effect indefinitely because there would be no remaining statutory basis for terminating the stay. Although the statute could technically operate this way, as a practical matter this alternative would seem quite draconian because it would permit any bid protester effectively to cancel a procurement simply by filing a protest. It is clear that Congress did not intend such a result when it adopted the CICA. *See* H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436–37 (1984).

Alternatively, the stay provisions could be interpreted to require a mandatory stay for a set period of time in order to give the Comptroller General an opportunity to reach a decision on the bid protest. This period of time might be set at 90 working days, which is the period of time established by the CICA as the standard time within which the Comptroller General should issue his decision on a bid protest.

We do not believe, however, that such a reworking of the statute would be consistent with Congress' intent. First, such a construction would involve essentially a redrafting of the stay provision rather than simple severance of the offending sections. Second, and more important, it would mean that any time a bid protest were filed, a procurement would automatically be delayed for 90 working days. Thus, any interested party who might be able to file a protest, however ill-founded, could prevent a procurement for a not insubstantial period of time.

We do not believe that Congress intended the bid protest process to be subject to such potential manipulation.[6] In fact, Congress expressly included the provision granting the Comptroller General the power to dismiss frivolous protests precisely in order to avoid this potential abuse. The conference report stated:

> The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be

[6] We are informed by representatives of the Department of Defense that there would be a significant question concerning the proper allocation of costs incurred by an otherwise successful bidder during any period in which a stay were in effect. If Congress desires to enact a bid-protest system in which frivolous protests stay the award of a contract for 90 days (or any other set period of time), thereby potentially increasing the ultimate cost to the Government of a procurement because the original, successful bidder will have to pass on to the Government the costs incurred because of the delay, Congress may do so We would not, however, assume an intent on the part of Congress to do so; if Congress intends to legislate such an arguably inefficient procurement system, we believe it should be required to do so expressly in order to provide for the political accountability that is built into our constitutional system.

> frivolous or to lack a solid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due performance of contracts from being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit.

H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1436–37 (1984). Given our conclusion that the provision permitting the Comptroller General to terminate the stay immediately in the case of a frivolous protest is unconstitutional, we do not believe that Congress would have intended for all contracts to be delayed for any set period of time simply upon the filing of a protest, regardless of the good faith of the protester or merit of the protest. Therefore, because the provisions permitting the Comptroller General to terminate the stay must be severed from the statute, we believe that the entire stay provision must be stricken as well.[7]

This result is consistent with the approach taken by the U.S. Court of Appeals for the District of Columbia Circuit in *American Federation of Government Employees* v. *Pierce*. In that case, as previously discussed, the court declared unconstitutional a provision that required a stay of any reorganization plan within HUD until two congressional committees had given specific approval. The court recognized that the only directly unconstitutional aspect of this statute was the section that gave the congressional committees the power to terminate the stay. 697 F.2d at 307. Although the court could have severed that provision alone from the statute and left the stay provision in effect, it determined that "the prohibition on HUD reorganization [was] 'inextricably bound' to the invalid committee approval device." *Id.* (citation omitted). In the present instance, the two provisions seem equally inextricably bound, and we believe that Congress would not have enacted the stay provision "in the absence of the invalidated provision." *See Consumer Energy Council* v. *FERC*, 673 F.2d at 442.

B. The Provision for Awarding Attorneys' Fees and Bid Preparation Costs

The provision permitting the Comptroller General to award costs, including attorneys' fees and bid preparation costs, to a prevailing protester, and which purports to require federal agencies to pay such awards "promptly," 31 U.S.C. § 3554(c)(2), suffers from a constitutional infirmity similar to the one that afflicts the stay provision. By purporting to vest in the Comptroller General the power to award damages against an Executive Branch agency, Congress has attempted to give its agent the authority to alter "the legal rights, duties and relations of persons . . . outside the legislative branch." 462 U.S. at 952. That this authority is in the nature of a judicial power makes it no less impermissible for Congress to vest it in one of its own agents. Congress may no more exercise

[7] We have no doubt that, under the severability principles set forth above, the stay provision may be severed. The Act may operate perfectly well without the stay provision, and there is no indication that Congress would have wished the entire Act to fall if the stay provision were invalidated.

judicial authority than it may exercise executive authority. *See INS* v. *Chadha*, 462 U.S. at 961–62 (Powell, J., concurring). Although Congress may by statute vest certain quasi-judicial authority in agencies independent of Executive Branch control, *see Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), Congress may not vest such authority in itself or one of its arms, in clear violation of the constitutionally prescribed separation of powers.

Based on our discussion of the law of severability above, we believe that the damages provision is clearly severable from the remainder of the CICA. The remainder of the Act is unrelated to the damages provision and may clearly continue to operate fully as a law without the invalid provision. Moreover, we find no evidence, either in the statute or in its legislative history, to indicate that Congress would not have enacted the remainder of the CICA without the damages provision. Therefore, only the damages provision need be stricken from the statute.

We wish to emphasize that we do not question the validity of the remainder of the CICA, and, in particular, the general grant of authority to the Comptroller General to review bid protests. Congress may, consistent with the Constitution, delegate to a legislative officer the power to review certain Executive Branch actions and issue recommendations based upon that review. Thus, the Comptroller General may continue to issue decisions with respect to bid protests. In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the Executive Branch.

Conclusion

In sum, we believe that the stay provisions of the CICA, now in 31 U.S.C. § 3553(c) and (d), are unconstitutional and should be severed in their entirety from the remainder of the Act. In addition, the damages provision contained in 31 U.S.C. § 3554(c) is similarly unconstitutional and should be severed from the rest of the CICA. Because these provisions are unconstitutional, they can neither bind the Executive Branch nor provide authority for Executive Branch actions. Thus, the Executive Branch should take no action, including the issuance of regulations, based upon these invalid provisions.

We recommend that Executive Branch agencies implement these legal conclusions in the following manner. First, with respect to the stay provisions, all executive agencies should proceed with the procurement process as though no stay provision were contained in the CICA. We recognize that, under the Federal Acquisition Regulation, executive agencies have voluntarily agreed to stay procurements pending the resolution of bid protests in certain circumstances. *See* 48 C.F.R. § 14.407 8(b)(4). Executive agencies may continue to comply with these and other applicable regulations. These regulations may not, however, be based upon the invalid authority of the stay requirements of the CICA.

With respect to the damages provision contained in 31 U.S.C. § 3554(c), executive agencies should under no circumstances comply with awards of

costs, including attorneys' fees or bid preparation costs, made by the Comptroller General. We would further recommend that executive agencies not respond to the Comptroller General on the merits of any application for a damage award except to state that the Executive Branch regards the damages provision as unconstitutional.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Congressional Subpoenas of Department of Justice Investigative Files

Congressional subpoenas seeking information from the Department of Justice concerning two closed investigations and one open investigation may be complied with only if the materials sought may be revealed consistent with Rule 6(e) of the Federal Rules of Criminal Procedure, which requires the Department to maintain the secrecy of matters occurring before the grand jury, and with the President's constitutional obligation to executive faithfully the laws of the United States.

If it is determined after review of the requested documents that compliance with the subpoena would jeopardize the ongoing criminal investigation, we would advise the President to assert executive privilege to ensure the continued confidentiality of the documents contained in the open investigative file.

Because of the importance of the process of determining whether documents may be released to Congress consistent with Rule 6(e) and the President's constitutional obligations, Congress must allow Executive Branch officials sufficient time to review the requested documents.

October 17, 1984

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

On Monday, October 1, 1984, the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary of the United States Senate issued to Assistant Attorney General Stephen S. Trott of the Criminal Division a subpoena, signed by Subcommittee Chairman Charles E. Grassley, calling for Mr. Trott to appear before the Subcommittee at 9:30 a.m. on October 4, 1984 and to produce at that time documents pertaining to three investigations of alleged false shipbuilding claims against the Navy by Company A, Company B, and Company C. Specifically, the October 1 subpoena seeks production of the following described documents:

> (1) All prosecutors' memoranda concerning the above named companies, including, but not limited to, all recommendations for or against prosecution, all reports and memoranda about the status of the investigations, all reports and memoranda concerning investigative plans, all legal analyses prepared with reference to any of the cases, and any dissenting views by one or more of the attorneys with respect to any of the reports and memoranda indicated above.
>
> (2) The report forwarded earlier this year to the Department of Justice by Elsie Munsell, U.S. Attorney for the Eastern Dis-

trict of Virginia, commenting on the 1983 report of the Office of Policy and Management Analysis, Department of Justice, entitled "Review of Navy Claims Investigations."

(3) All other reports and memoranda of the U.S. Attorney's Office for the Eastern District of Virginia dealing with the subject of Navy shipbuilding claims.

(4) A list of all documents within these three categories of documents.

The subpoena was served on Assistant Attorney General Trott on October 1, 1984, following a joint hearing of the Subcommittee on International Trade, Finance, and Security Economics of the Joint Economic Committee and Senator Grassley's Subcommittee, at which Mr. Trott appeared for two-and-one-half hours. The subpoena itself did not exclude grand jury materials from the document request. In a letter of August 9, 1984, however, Senators Proxmire and Grassley indicated that the Subcommittee was not seeking grand jury materials.

In response to the subpoena, Assistant Attorney General Trott appeared before the Subcommittee on October 4, 1984, and read a statement. In brief, Mr. Trott agreed to make available documents related to the closed Company A and Company C investigations (subject to the need to redact grand jury materials), but objected to the production of documents pertaining to the open Company B investigation. Following the hearing, Assistant Attorney General McConnell met with Chairman Grassley, Assistant Attorney General Trott, and others.

The following day, on October 5, 1984, the Subcommittee issued another subpoena, again signed by Chairman Grassley. This subpoena was issued to the Attorney General "or designated custodian of described documents" and commands him to appear before the Subcommittee at 10:00 a.m. on October 19, 1984, and to produce the following specified documents:

(1) All prosecutors' memoranda concerning [Company B], including, but not limited to, all recommendations for or against prosecution, all reports and memoranda about the status of the investigation, all reports and memoranda concerning investigative plans, all reports and memoranda from the Federal Bureau of Investigation regarding this investigation, and any dissenting views by one or more of the attorneys with respect to any of the reports and memoranda indicated above.

(2) A list of all documents described above.

* This request does not include 6(e) material.[1]

[1] The subpoena states that a personal appearance by the Attorney General or designated custodian is not necessary if the requested materials are delivered to the Subcommittee. We read this to mean that the Acting Attorney General for this matter is free to designate a custodian of the documents for the purpose of responding to this subpoena. Any assertion of executive privilege, however, must be authorized by the President and made on his behalf.

Because the October 1 subpoena appears to have been complied with except to the extent that it overlaps with the October 5 subpoena, we have focused our legal analysis upon the issues raised in the later subpoena. We have not yet been able to conduct a review of the subpoenaed documents.[2] Our legal analysis is therefore more general and less specific to the requested documents than we would prefer. However, we intend to have the opportunity to examine the documents which are identified in the October 5 subpoena before the return date of that subpoena. We have attempted below to provide you with general guidance to assist you in advising the President concerning the need to reconcile the obligation of the Executive Branch to respond to the subpoenas with its obligation to maintain the secrecy of grand jury materials and to resist improper congressional attempts to interfere with the Executive's conduct of ongoing criminal investigations.

Based upon our understanding of the facts of this dispute and upon a renewed examination of the relevant legal and historical precedents, we believe that a number of the documents covered by the subpoenas relating to all three investigations may be covered by the requirement of Rule 6(e) of the Federal Rules of Criminal Procedure, which requires the Department to maintain the secrecy of "matters occurring before the grand jury." In addition, documents in the files of the Company B investigation, an ongoing criminal investigation, may be shielded from disclosure to Congress by a claim of executive privilege. We are fully cognizant of the President's announcement 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." Memorandum from President Reagan to the Heads of all Executive Departments and Agencies (Nov. 4, 1982). Nevertheless, we believe that both Rule 6(e) and the probability that certain documents covered by the request will be privileged require that careful consideration be given to the documents and the potential effects of disclosure before documents from the Company B file are made available to the Subcommittee.

For the reasons detailed below, our recommendation at this time, based upon the conclusion of the Criminal Division that disclosure of the Company B investigative documents will substantially interfere with the Department's ongoing criminal investigation in that case, and subject to our own review of the documents, is to advise the President to assert executive privilege to ensure the continued confidentiality of the documents contained in the open investigative file. We have applied the legal authorities to general categories of docu-

[2] In a letter to the Subcommittee dated September 28, 1984, Assistant Attorney General Trott called Senator Grassley's attention to the fact that the Subcommittee's previous requests for a wide variety of documents pertaining to just one of the closed investigations covered more than 250,000 documents. We are informed that the number of documents in the Company B file that fall within the broad language of the Subcommittee's subpoena is much smaller, in the neighborhood of 55 to 60 documents.

ments as they have been described to us, and on that basis we have concluded that a claim of executive privilege very likely would be appropriate for at least some of the subpoenaed documents pertaining to the open criminal investigation. We also suggest certain alternative procedures below which should be considered before the final decision is made to assert executive privilege.[3]

I. Background

The events leading up to the issuance of the subpoena are as follows: On February 7, 1984, Vice Chairman Proxmire of the Subcommittee on International Trade, Finance and Security Economics of the Joint Economic Committee wrote to the Attorney General to inquire about the status of a Department of Justice investigation of alleged fraudulent shipbuilding claims filed with the Navy. The Vice Chairman was particularly interested in the Department's anticipated treatment of Mr. D, a former head of a division of Company B, who had offered to provide information to the Department regarding these claims. In that letter, Senator Proxmire asked five specific questions relating to the Department's earlier investigation of the shipbuilding matter, the termination of the investigation in 1981, and any current Department plans to reopen the investigation and to speak with Mr. D. In his response of February 17, 1984, Assistant Attorney General Trott explained that Mr. D was at the time a fugitive from a federal indictment, and that the Department was attempting to secure whatever information it could from Mr. D regarding the shipbuilding matter without compromising that pending prosecution. A further request on the same subject was written to the Attorney General on February 27, 1984 and answered by Assistant Attorney General Trott on March 6, 1984. In his response, Mr. Trott provided more details regarding the prior investigation and current negotiations with Mr. D. Other correspondence of little substance was exchanged.

On May 9, 1984, Senator Proxmire again wrote to the Attorney General with a list of specific requests for information. Mr. Trott responded in full to some of those questions, but declined to respond to others. In a letter of June 14, 1984, he declined to provide the names of specific career employees who had worked on the earlier investigation without some particular articulated legislative need. In addition, he asserted that it would be improper for him to provide internal Department of Justice legal memoranda on a pending matter because premature public disclosure would prejudice the interests of the investigation. He informed the Subcommittee that deletion of grand jury material was not practical because that material was so extensive that its deletion would render the documents meaningless. In an exchange of letters in late July 1984, Mr. Trott

[3] We understand that the Attorney General has recused himself from any consideration of the subjects with respect to which the subpoena has been issued and that the recusal is in writing. As a matter of practice and statutory construction, the Department has treated the Attorney General's recusal from a matter as the equivalent of a disability. Under the departmental succession statute, the Deputy Attorney General becomes Acting Attorney General with respect to the matter. *See* 28 U.S.C § 508.

and Senator Proxmire agreed to work together to resolve any outstanding disclosure issues.

On August 9, 1984, Senators Proxmire and Grassley wrote a joint letter to Mr. Trott requesting information similar to that specified in the October 1 subpoena. Mr. Trott responded on September 7, 1984. He declined to provide to Congress the prosecutors' memoranda and internal deliberative documents as well as grand jury materials. At the same time, he offered assurances that efforts were underway to comply with the request to the extent possible. On September 18, 1984, the two Senators requested that Mr. Trott appear at a joint hearing on October 1. In a letter dated September 28, 1984, Mr. Trott indicated that he had reconsidered his position to some extent. Addressing each case independently, Mr. Trott informed the Senators that the Department would seek clarification of its obligations under Rule 6(e) from the court that had supervised the investigations. He agreed that documents relating to the Company C investigation would be provided to Congress as soon as the question of grand jury redactions had been resolved by the court. Any material not protected by Rule 6(e) would be turned over to the Subcommittee. With respect to the investigation of Company A, Mr. Trott offered to make all non-grand jury documents available as soon as they could be reviewed. The Company C investigation, however, presented different considerations because it has been reopened and is now under active grand jury investigation. He promised, however, to turn over the materials pertaining to the Company C investigation at the completion of the case. The October 1 subpoena followed, requesting materials relating to all three cases.

At the appointed hour on October 4, 1984, Assistant Attorney General Trott appeared before the Subcommittee and read a prepared statement. That statement explained that the Department of Justice was making available to the Subcommittee all of the subpoenaed material that, in the judgment of Assistant Attorney General Trott and his staff, was not prohibited from release by Rule 6(e) of the Federal Rules of Criminal Procedure, which imposes an obligation to maintain the secrecy of "matters occurring before the grand jury." Documents related to the Company A and Company C investigations were therefore made available after redaction to protect grand jury materials. With respect to this redacted grand jury material, Mr. Trott explained his intention to file a motion in the Eastern District of Virginia no later than October 12, 1984 seeking permission to release the remainder of the subpoenaed material. We have been informed that such a motion was filed and is currently pending before the court.

Assistant Attorney General Trott's statement to the Subcommittee explained that different treatment is required of information relating to the Company B investigation, because that matter is currently the subject of an open criminal investigation that is pending before an active grand jury. Due to the need to protect the integrity of the prosecutorial process, Mr. Trott declined to release the files from the Company B investigation, but offered to make them available on the same basis as the other two cases, "[a]s soon as the [Company B] case is closed." The Subcommittee responded to Mr. Trott's submission with a state-

ment issued by Senator Grassley on October 5, 1984, and with its October 5 subpoena to the Attorney General. Senator Grassley's statement set forth the Senator's conclusion that the Department had not fully complied with the October 1 subpoena, but noted that the Executive Branch had requested more time in which to respond to the request for documents related to Company B.

To summarize, Mr. Trott has made available to the Subcommittee all documents relative to the closed investigations, with redactions made to enable the Department to comply with Rule 6(e)'s prohibition on disclosure of matters occurring before the grand jury. Consistent with a prior representation to the Subcommittee, the Department has filed a motion with the district court on this issue to clarify the application of Rule 6(e) to the specific documents contained in the two closed files. The Department has agreed to provide all documents from the two closed files that are determined not to contain grand jury materials. With respect to the investigation of Company B, Mr. Trott has informed the Subcommittee that the Department is hindered in complying with the subpoena both by Rule 6(e), which presents particular problems because the investigation is currently under the review of a sitting grand jury, and by the Executive's obligation not to compromise an ongoing criminal investigation. On October 9, the Subcommittee was provided a list of the approximately 56 documents in the Company B file.

Senator Grassley's Subcommittee did not indicate why Mr. Trott's submission of September 28 and the proposal contained therein were not adequate to satisfy its needs. Rather, it issued the October 1 subpoena and gave the Department three days in which to comply. Following Mr. Trott's appearance at the October 4 hearing, the Subcommittee again articulated no basis for disagreement with the legal position taken by Mr. Trott with respect to the release of documents pertaining to an ongoing criminal investigation. It simply issued the October 5 statement and subpoena, demanding the release of the open Company B files, and declaring that "if the deadline of October 19th is not honored, the Subcommittee will do whatever it must to enforce its subpoena."

The Senator has declined repeated requests from Assistant Attorney General McConnell to meet and discuss the issues relating to disclosure of the subpoenaed documents. The most recent of Mr. McConnell's efforts was a letter of October 17, 1984, in which he offered again to bring Assistant Attorney General Trott, Associate Attorney General Jensen, or Deputy Attorney General Dinkins to Senator Grassley's office for discussions.

II. Impediments to Disclosure

The principal objections to release of certain of the subpoenaed files can be divided into two categories: the attorneys' obligation under Federal Criminal Procedure Rule 6(e) to protect the confidentiality of matters occurring before the grand jury, and the obligation of the Executive Branch not to disclose internal information pertaining to an open investigation. In an effort to resolve the first issue, the Criminal Division has filed a motion with the appropriate

district court seeking guidance on the applicability of Rule 6(e) to the subpoenaed files of the two closed cases. Under the rule, disclosure may be made "when so directed by a court preliminarily or in connection with a judicial proceeding." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 220 (1979). With respect to the two closed cases, the Department has expressed its intention to release all materials that are not protected by the court's decision regarding the reach of Rule 6(e). The October 1 subpoena thus appears to us to have been substantially complied with, at least with respect to the two closed investigations.

The open investigation raises more serious concerns. On the one hand, the October 5 subpoena purports to disavow any intention to request grand jury materials relating to the Company B investigation. On the other hand, the descriptions of requested documents in the attachment to the subpoena depict materials which are, for the most part, quintessentially grand jury materials when requested in the context of an ongoing criminal investigation. For example, "all prosecutors' memoranda," documents revealing "the status of the investigation," and "investigative plans," as specified in the subpoena, are precisely the type of information the courts have required to be withheld in order to protect the integrity of the grand jury process. Thus, the nominal exclusion of 6(e) materials from the subpoena does not correct an apparent failure on the part of the Subcommittee to recognize that files of a case under active consideration by a grand jury may likely be protected in their entirety from disclosure by Rule 6(e). In light of this uncertainty in the intended scope of the subpoena, we explain in more detail the restrictions imposed on the Department by the courts through Rule 6(e).

A. Duty to Protect Grand Jury Secrecy

The secrecy of grand jury activities, which enjoys ancient common law roots, has received consistent and emphatic protection from the Supreme Court over the years. *See, e.g., United States* v. *Baggot*, 463 U.S. 476 (1983); *United States* v. *Sells Engineering*, 463 U.S. 418 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399–400 (1959); *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681–82 (1958). The doctrine is an outgrowth of the extraordinary powers granted the grand jury. In order to determine when there is probable cause to believe a crime has been committed and to screen charges not warranting prosecution, the operation of the grand jury "generally [is] unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). Unlike most administrative investigations, the scope of the grand jury's inquiry is not "limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Id.* (quoting *Blair* v. *United States*, 250 U.S. 273, 282 (1919)).

The broad powers enjoyed by the grand jury, as well as its need to pursue investigations effectively, have given rise to a "long-established policy that maintains the secrecy of grand jury proceedings in the federal courts." *United States* v. *Proctor and Gamble Co.*, 356 U.S. at 681. As explained on several occasions by the Supreme Court, this doctrine serves several distinct purposes: (1) to prevent the escape of persons whose indictment may be contemplated; (2) to ensure freedom to the grand jury in its deliberations; (3) to prevent subornation of perjury or tampering with grand jury witnesses; (4) to encourage the free disclosure of information to the grand jury; and (5) to protect from unfavorable publicity persons who are accused of crimes but are ultimately exonerated. *Id.* at 681–82 n.6. Thus, grand jury secrecy is "'as important for the protection of the innocent as for the pursuit of the guilty.'" *United States* v. *Sells*, 463 U.S. at 424–25 (quoting *United States* v. *Johnson*, 319 U.S. 503, 513 (1943)).

This long established policy is currently codified in Rule 6(e) of the Federal Rules of Criminal Procedure. Under this Rule, no attorney for the Department of Justice[4] may disclose "matters occurring before the grand jury" to any other person, unless one of five narrow exceptions is met.[5] While none of these exceptions covers disclosure of grand jury materials to a committee of Congress in the present circumstances, it is useful to review the courts' treatment of two of these exceptions, which highlight the importance the courts place on shielding matters that fall within Rule 6(e).

The first of these exceptions permits disclosure of "matters occurring before a grand jury," "when so directed by a court preliminary to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(c)(i). Narrowly interpreting the scope of this section, the Supreme Court recently held in *United States* v. *Baggot*, 463 U.S. at 480, that the section provided an exemption only "when the primary purpose of the disclosure is . . . to assist in preparation or conduct of a judicial proceeding." Thus, under the Court's decision in *Baggot*, the Internal Revenue Service could not obtain information pertaining to matters occurring before the grand jury for use in a civil tax audit because the audit was not related to "some identifiable litigation." *Id.*

Although committees of Congress have on occasion sought to claim this exception as a basis for enforcement of subpoenas seeking material protected by Rule 6(e), the analysis employed by the Supreme Court in *Baggot*, as well as in several lower court decisions denying such claims, does not sustain such an argument in this case. A congressional committee's oversight responsibilities

[4] The prohibition also covers grand jurors, interpreters, stenographers, operators of recording devices, typists who transcribe testimony, and government personnel to whom documents are disclosed in order to assist government attorneys in their responsibilities with respect to the grand jury. *See* Fed. R. Crim. P. 6(e)(2).

[5] The exceptions include (1) disclosure to another government attorney for use in the performance of such attorney's duty; (2) disclosure to such government personnel as are deemed necessary to assist an attorney for the government in the performance of his duties; (3) disclosure directed by a court preliminary to or in connection with a judicial proceeding; (4) disclosure by a government attorney to another grand jury, and (5) disclosure at the request of a defendant and approved by a court "upon a showing that grounds may exist for motion to dismiss the indictment because of matters occurring before the grand jury." Fed. R. Crim. P. 6(e).

simply "do not constitute a 'judicial proceeding'" within the meaning of Rule 6(e). *In re Grand Jury Impanelled October 2, 1978*, 510 F. Supp. 112, 114 (D.D.C. 1981); *see also In re Grand Jury Investigation of Uranium Industry*, 1979–2 Trade Cas. (CCH) ¶ 62,798, at 78,639, 78,643–44 (D.D.C. Aug. 16, 1979). Indeed, the Subcommittee apparently concedes that its inquiry is subject to the restrictions of Rule 6(e).[6]

The other exception that has recently been the subject of Supreme Court examination is set forth in Rule 6(e)(3)(A)(i), which permits disclosure to "an attorney for the government for use in the performance of such attorneys' duty." The language of this provision is exceedingly broad, and would ordinarily suggest that attorneys for the government — generally defined in Rule 54(c) of the Federal Rules of Criminal Procedure to cover all authorized attorneys in the Department of Justice — could freely exchange grand jury materials. In *United States* v. *Sells Engineering*, 463 U.S. at 428, however, the Supreme Court once again interpreted an exception to Rule 6(e) very narrowly, finding that disclosure among Department of Justice attorneys "is limited to use by those attorneys who conduct the criminal matters to which the materials pertain." As a general matter, therefore, Department attorneys who are assisting the grand jury may not disclose such materials to any other attorney in the Department for purposes of civil litigation even though there may be a legitimate use for the materials under this exception and the attorneys work for the same Department.

In reaching this narrow construction of what would otherwise appear to be a rather broad authorizing provision, the Court in *Sells* relied heavily on the need to maintain the secrecy of grand jury proceedings. Among other things, it suggested that expanding the number of persons with access to grand jury materials would "threat[en] . . . the willingness of witnesses to come forward and to testify fully and carefully." 463 U.S. at 432. "If a witness knows or fears that his testimony before the grand jury will be routinely available for use in governmental civil litigation or administrative action," the Court reasoned, "he well may be less willing to speak for fear that he will get himself into trouble in some other forum." *Id.* Although the decision in *Sells* obviously does not bear directly on the question of what materials can be disclosed to a congressional committee in these circumstances, it does serve to highlight the importance the Supreme Court places on the protections of Rule 6(e), even to the point of precluding attorneys within this Department engaged in parallel civil and criminal investigation from exchanging grand jury material subject to Rule 6(e).

Because the materials sought by the Subcommittee relate to three separate grand jury investigations, and do not fall within any of the exceptions to Rule 6(e) secrecy, it is necessary for this Department to review each document to determine whether release of its contents would reveal a "matter occurring before the grand jury." While the meaning of this ambiguous phrase has been

[6] *See* October 5 subpoena; Letter from Senators Proxmire and Grassley to Assistant Attorney General Trott (Aug. 9, 1984).

the subject of extensive litigation, and some apparently inconsistent judicial decisions, *compare, e.g., Fund for Constitutional Government* v. *National Archives*, 656 F.2d 856, 870 (D.C. Cir. 1981) *with, e.g., United States* v. *Weinstein*, 511 F.2d 622, 627 n.5 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975), it is generally recognized that Rule 6(e) prohibits the disclosure of any material that would reveal the strategy or direction of the grand jury investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else about the grand jury's deliberations. *See Fund for Constitutional Government* v. *National Archives*, 656 F.2d at 869; *United States* v. *Hughes*, 429 F.2d 1293, 1294 (10th Cir. 1970). The application of this general standard, however, requires sensitive judgments with respect to all of the documents by attorneys who are familiar with the particular investigation. Moreover, there exists some uncertainty as to the application of Rule 6(e) to documents which have been subpoenaed by or presented to the grand jury, but which are sought for their own sake rather than to learn what took place before the grand jury. *See United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). Due in part to the difficulty of these questions, and in response to the Supreme Court decision in *Sells* and *Baggot*, the Department established a Working Group on Rule 6(e), which recently published an extensive "Guide to Rule 6(e) After *Sells* and *Baggot*" to assist our attorneys in keeping abreast of the developing case law in this area.

In light of the Supreme Court's recent pronouncements in *Sells* and *Baggot*, we cannot overemphasize the statutory duty of government attorneys to protect grand jury materials. It is therefore imperative that the Department screen the documents sought by the Subcommittee's October 5 subpoena and withhold those which are prohibited from disclosure under Rule 6(e). Because of the uncertainty in determining whether some documents are protected, and the importance of the issue, steps may have to be taken to clarify the application of Rule 6(e) to any of the open files about which there is doubt.

Members of our Office have discussed certain facts relating to the Company B file with the Deputy Chief of the Fraud Section, Criminal Division, the attorney responsible for supervising the investigation. The Deputy Chief believes that a very high percentage of the substance of the files, perhaps 98 to 99 percent, relates to matters occurring before the grand jury. This high percentage is explained by the fact that the investigators in this case were unable to obtain evidence or cooperation without the assistance of the grand jury process, so virtually the entire investigation was conducted before the grand jury. The Deputy Chief has stated that redaction of grand jury materials would not be feasible because little or nothing of substance would remain. Assistant Attorney General Trott has informed the Subcommittee of the impracticability of redacting grand jury materials.

Although we have not as yet examined the approximately 56 documents contained in the Company B file, and although we are not accustomed to making Rule 6(e) determinations, we rely on the representations of the Criminal Division in believing that, with regard to many of the documents, the

Department of Justice may have no discretion to release, nor the Subcommittee to demand, the grand jury materials contained therein. Rule 6(e) therefore appears to remove from contention large portions of the documents, and perhaps some documents in their entirety. Depending upon the decision with respect to other possible bases for protecting these documents from disclosure to the Subcommittee, it may be necessary or desirable to seek judicial guidance in determining which documents or portions of documents are protected from disclosure under Rule 6(e). We discuss this option further below.

B. Duty to Protect the Integrity of Ongoing Investigations

In the case of an ongoing criminal investigation, not only are the concerns of Rule 6(e) heightened because the case is currently before the grand jury, but also further concerns counsel against compliance with a congressional subpoena. The policy of the Executive Branch throughout this Nation's history has been generally to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, articulated this 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).

Thus the dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, there would appear to be no reason not to adhere in this instance to the consistent position of previous presidents and attorneys general. Deputy Assistant Attorney General Kauper explained the concerns:

> Over a number of years, a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress with information from open investigative files. Most

> important, the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional 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, Re: Submission of Open CID Investigation Files 2 (Dec. 19, 1969). 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 of law enforcement files.

Other grounds for objecting to the disclosure of law enforcement files include: the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy; concern over the safety of confidential informants and the chilling effect on sources of information; 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. These concerns are very close to those which underlie Rule 6(e), but they extend to the entire investigative process, not just those problems associated with a grand jury.

Not the least internal concern, of course, is that effective and candid deliberations among the numerous advisers who participate in a case in various roles and at various stages of a prosecution would be rendered impossible if confidential deliberative communications were held open to public scrutiny. *Cf. United States* v. *Nixon*, 418 U.S. 683, 708 (1974). The deliberative memoranda that constitute a significant portion of investigative files are an intrinsic part of the prosecutorial process. Employees of the Department would be reluctant to express their personal, unofficial views if those views could be obtained by Congress upon request. This concern is particularly acute in the context of an ongoing investigation in which persons called upon to make recommendations regarding prosecution must be assured that their advice will not be subject to immediate review and publicity by a congressional committee.

In addition, potential targets of enforcement actions are entitled to protection from widespread premature disclosure of investigative information. Because the Congress and the Department of Justice are both part of the United States Government which prosecutes a criminal defendant, there is "no difference between prejudicial publicity instigated by the United States through its execu-

tive 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.* The discretion of prosecutive officials to conduct their investigations and trials in the manner they deem to be the most efficient and constructive can be infringed by precipitous disclosures which prompt a court to impose remedial procedural obligations upon the Government.

The Department of Justice also has an obligation to ensure that the fairness of the decisionmaking with respect to its prosecutorial function is not compromised by excessive congressional pressures, and that the due process rights of those under investigation are not violated. *See Pillsbury* v. *Federal Trade Comm'n*, 354 F.2d 952 (5th Cir. 1966). Just as an agency's ability to fulfill its statutory obligation may be impermissibly strained by pressure from the Legislative Branch during the administrative decisionmaking process, *D.C. Federation of Civic Ass'ns* v. *Volpe*, 459 F.2d 1231, 1246–1247 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972), excessive interference with the exercise of prosecutorial discretion can substantially prejudice the rights of persons under investigation. Persons who ultimately are not prosecuted may be subjected to prejudicial publicity without being given an opportunity to cleanse themselves of the stain of unfounded allegations. Moreover, the injection of impermissible factors in the decision whether to initiate prosecution offends not only the rights of the accused, but also the professional obligation of government attorneys to the integrity of the judicial process and, ultimately, the obligation of the Executive faithfully to execute the laws.

Article II of the Constitution places the power to enforce the laws squarely 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 by directing the Executive to prosecute particular individuals. *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869). This principle was explained in *Smith* v. *United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967), in which the court considered the applicability of the Federal Tort Claims Act to a prosecutorial decision not to arrest or prosecute persons injuring plaintiff's business. The court ruled that the government was immune from suit under the discretionary decision exception of the Act on the ground that the Executive's prosecutorial discretion was rooted in the separation of powers under the Constitution:

> The President of the United States is charged in Article 2, Section 3, of the Constitution with the duty to "take care that the laws be faithfully executed . . . ." The Attorney General is the President's surrogate in the prosecution of all offenses against

> the United States . . . . The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute. . . .
>
> This discretion is required in all cases.
>
> * * *
>
> We emphasize that this discretion, exercised in even the lowliest and least consequential cases, can affect the policies, duties, and success of a function placed under the control of the Attorney General by our Constitution and statutes.

375 F.2d at 246–47. The court went on to state that this prosecutorial discretion is protected "no matter whether these decisions are made during the investigation or prosecution of offenses." 375 F.2d at 248. "Courts are rightly reluctant to encroach on the constitutionally-based independence of the prosecutor and grand jury." *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). A court "will not interfere with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process." *United States* v. *Welch*, 572 F.2d 1359, 1360 (9th Cir.), *cert. denied*, 439 U.S. 842 (1978).

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 Serv. Sys.* 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. 303, 315 (1946). The constitutional role of Congress is to adopt general legislation that will be applied and implemented 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 Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. As the Supreme Court stated in *Lovett*:

> 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.

328 U.S. at 317. Justice Powell recently echoed this concern: "The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'" *INS* v. *Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring). It is well established that courts

may not require prosecution of specific individuals, even though the Judicial Branch is expressly assigned the role of adjudicating individual guilt. *A fortiori*, the Legislative Branch, which is assigned the role of passing laws of general applicability and specifically excluded from questions of individual guilt or innocence, may not decide on an individual basis who will be prosecuted. "'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).

Finally, 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 (1983). 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). Although arguments can be made that the Model Code is not binding on federal officials, we know of no justification in this instance for failing to observe the minimum standard of conduct prescribed by the American Bar Association for attorneys in the investigation of criminal matters. Indeed, courts have held that the prosecution has a special obligation not to release information that might prejudice the defendant's right to a fair trial. *Delaney* v. *United States*, 199 F.2d 107, 113 (1st Cir. 1952).

C. Specific Application to this Investigation

The wisdom and necessity of these general principles, developed over years of judicial, congressional and executive experience, are clearly illustrated by consideration of the specific damaging effects congressional interference has had and may continue to have upon the Company B investigation. The principal trial attorney responsible for the investigation, the Deputy Chief of the Fraud Section of the Criminal Division, prepared a statement which outlines the specific ways in which release of prosecutive or investigative memoranda would interfere with the ongoing investigation of the Electric Boat matter. The following concerns are drawn from that statement.

The key witness in the Company B matter, Mr. D, has already delayed cooperating with the Department because he hoped to benefit from congressional pressure on the Department related to his pending indictment in another matter. Further, certain Members of Congress have declared that they possess substantial evidence relevant to the Company B investigation but have refused Department of Justice requests for access to that evidence.

In addition, employees of Company B, both former and present, are in fear of retribution if their cooperation should be disclosed. The Department may be

unable to secure reliable evidence from employees if it cannot guarantee total confidentiality. Further, disclosure of Federal Bureau of Investigation reports will effectively preclude the Bureau's providing assistance in the investigation and deprive the Department of the valuable resources on which it depends. Moreover, the pursuit of parallel investigations of the same matter by a congressional subcommittee and the Department of Justice will confuse matters in the public eye and enable potential targets to continue to play Congress and the Department against one another.

The Department also has serious concerns about the possibility of jeopardizing the indictments that may be secured as a result of the investigation. Department participation in abusive publicity or inadvertent release of grand jury material inextricably bound up with other material, whether willing or in response to a congressional subpoena, could subject an indictment to dismissal. In sum, the serious concerns for the integrity of the investigative and prosecutive process that underlie the legal principles discussed above have vivid application to the current matter.

III. Limitations on Power to Withhold

The policy of confidentiality does not necessarily extend to all material contained in investigative files. Depending upon the nature of the specific files and type of investigation involved, certain of the information contained in such files may be shared with Congress in response to a proper request. Indeed, Assistant Attorney General Trott has informed the Subcommittee that the Department will release all documents in the closed files that are judicially determined not to reveal grand jury material. In the same vein, there may be documents in even the open Company B files that do not implicate any of the constitutional or pragmatic problems identified in our discussion. If that is the case, those documents should be turned over to Congress in response to a proper request. However, each document should be examined in light of the basic principles articulated above.

An additional limitation on the assertion of executive privilege is that the privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers. The documents must therefore be reviewed for any evidence of misconduct which would render the assertion of privilege inappropriate. "[I]t should always be remembered that even the most carefully administered department or agency may have made a mistake or failed to discover a wrongdoing committed inside or outside the Government." Study, *Congressional Inquiries Concerning the Decisionmaking Process and Documents of the Executive Branch: 1953–1960.* The greatest danger attending any assertion of executive privilege has always arisen from the difficulty, perhaps impossibility, of establishing with absolute certainty that no mistake or wrongdoing will subsequently come to light which lends credence to congressional assertions that the privilege has been improperly invoked. We are unaware of any serious allegations of criminal or unethical conduct in this matter, but we

nevertheless strongly recommend a document-by-document review of the relevant materials to avoid any possibility of a misapplication of the privilege.

IV. Needs of Congress

The letters from Senator Proxmire and Senator Grassley do not specify the purpose for seeking access to an open investigative file. Although they have cited their intent to review the Department of Justice's management of certain fraud investigations, neither the letters nor the subpoenas articulate a reason for including an ongoing investigation in that review process. In our opinion, the mere statement of review power falls far short of the test established by the United States Court of Appeals for the District of Columbia: "The sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the fulfillment of the committee's functions." *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974).

V. Recommendations and Conclusions

The above discussion emphasizes the fact-specific nature of the determinations required to be made before investigative files can be turned over to Congress consistent with federal prosecutors' obligations to the court and to potential defendants, and the constitutional obligation of the Executive to execute the laws. The very core of these determinations necessitates a careful review and deliberation for every document involved. In addition, the complexity of our obligations to preserve the confidentiality of matters occurring before the grand jury involves a careful examination of each document in the Company B file. Because of the importance of protecting this investigation and future Department of Justice investigations, and based upon the conclusion of the Criminal Division concerning the dangers to the ongoing criminal investigation, we believe documents in the open file should not be disclosed to the Subcommittee. As the great bulk of the material is, we have been informed, already protected from disclosure by Rule 6(e), the extent to which an assertion of executive privilege will be necessary to achieve this result may well depend upon how far Rule 6(e) is interpreted to reach with respect to the particular documents at issue. The broadest application of Rule 6(e), of course, might obviate the need for resort to executive privilege. Even a less expansive construction of Rule 6(e) would substantially narrow the number of documents in dispute and focus the points of controversy on a relatively small group of materials.

We recommend, therefore, that careful attention be given to a determination of the Rule 6(e) issue. If there are some documents or portions of documents that simply cannot be placed with confidence on one side or the other of the Rule 6(e) line, and a good-faith motion to the appropriate district court could be made for clarification of the Rule's effect on certain specific documents, then we believe the court's guidance should be sought. We have a strong interest in

establishing the extent of our Rule 6(e) obligation regardless of whether the President decides to invoke his privilege. If he declines to invoke the privilege, we have an obligation to the court not to reveal matters occurring before the grand jury. If the President should decide to invoke the privilege, then where appropriate we will want to claim Rule 6(e), as well as the privilege, as a basis for refusing to comply with the Subcommittee's subpoena. Because the Subcommittee seems to agree that it is not entitled to receive Rule 6(e) documents, a judicial determination of our Rule 6(e) obligation could serve to narrow the range of controversy and limit the number of documents for which a claim of executive privilege would be necessary. Perhaps negotiations with the Subcommittee could be more successful under these circumstances.

Should the President decide not to invoke his privilege, the Department will still be under an obligation to protect the confidentiality of grand jury materials. As discussed above, we have been informed by the Criminal Division that the vast majority of the materials sought by the Subcommittee's subpoenas are grand jury materials by definition, although the Subcommittee has indicated that it is not seeking materials subject to Rule 6(e). Under these circumstances, it would seem reasonable to take the Subcommittee at its word and make available only those materials that we determine in good faith are not subject to Rule 6(e). Again, it may be useful to seek guidance from the supervising court to help define the scope of our Rule 6(e) obligation not to reveal matters occurring before a grand jury.

Finally, in the event that there is not adequate time before the return date of the subpoena to consider and resolve whether a claim of executive privilege should be asserted by the President, the question may arise whether the documents may be withheld without the formal assertion of a claim on the basis that additional time is necessary to determine whether a claim should be made.

We conclude that, inherent in the constitutional doctrine of executive privilege is the right to have sufficient time to review subpoenaed documents in order to determine whether an executive privilege claim should be made. If the Executive Branch could be required to respond to a subpoena (either judicial or congressional) without having adequate opportunity to review the demanded documents and determine whether a privilege claim would be necessary in order to protect the constitutional prerogatives of the President, the President's ability effectively to assert a claim of executive privilege would be effectively nullified. Therefore, if the President is to be able to assert executive privilege at all, he must have adequate time within which to make a determination whether or not to assert the privilege. Thus, in the right to withhold documents for a time sufficient to make a determination whether to assert privilege is an element of executive privilege itself, and it is a justifiable basis upon which to withhold documents.

This Office has previously concluded that it would be constitutionally impermissible to prosecute an Executive Branch official for asserting the President's constitutionally based claim of executive privilege. *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). For the reasons articulated in that memorandum, it would be equally impermissible to prosecute an Executive Branch official for withholding subpoenaed documents for a reasonable time sufficient to make a determination whether executive privilege should be asserted.

ROBERT B. SHANKS
Deputy Assistant Attorney General
Office of Legal Counsel

Overview of the War Powers Resolution

Summary of previous Office of Legal Counsel advice concerning the War Powers Resolution for the purpose of providing guidance in future analyses of War Powers Resolution problems.

October 30, 1984

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

On a number of occasions during this Administration, this Office has provided both written and oral legal advice to you, the Deputy Attorney General, the Counsel to the President and the National Security Council regarding the War Powers Resolution (WPR). This advice has been rendered in connection with the deployment of United States Armed Forces in Lebanon, the provision of military assistance and intelligence to our allies in Central America, the deployment of sophisticated radar aircraft in Chad and in the Sinai, responses to an armed attack on our armed forces in the Gulf of Siddra, the deployment of troops to Grenada, and in various other circumstances. We have summarized the highlights of that advice and outlined certain historical information in this memorandum in order to provide guidance to you and to our respective successors in future analyses of War Powers Resolution problems.

I. The War Powers Resolution: Summary of Provisions

A. Stated Constitutional Basis

The War Powers Resolution became effective on November 7, 1973 after Congress overrode President Nixon's veto of the Resolution.[1] It is codified at 50 U.S.C. §§ 1541–1548. Section 1 of the WPR sets out the name of the enactment; § 2 of the WPR states its purpose and the constitutional authorities upon which it is predicated. Its purpose is said "to fulfill the intent of the framers of the Constitution" to

[1] President Nixon vetoed the War Powers Resolution on October 24, 1973. His veto message declared that the automatic 60 day termination provision, § 5(b), and legislative veto provision, § 5(c), were unconstitutional. The veto was overridden on November 7 by a four vote margin in the House and by a substantial margin in the Senate.

Senator Javits, one of the principal sponsors of the WPR, had hoped to avoid a veto. He felt that a WPR which was enacted with the approval of the President would constitute a "compact" between Congress and the President. Holt, *The War Powers Resolution: The Role of Congress in U.S. Armed Intervention* 1–2 (1978).

> insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

Id. Section 2(b) invokes the Necessary and Proper Clause of the Constitution. Section 2(c) declares that the President's constitutional powers as Commander-in-Chief with respect to the introduction of United States Armed Forces into hostilities or situations in which hostilities are clearly indicated "are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

B. Consultation

Section 3 of the WPR calls for consultation "with Congress" "in every possible instance . . . before introducing United States Armed Forces" into hostile situations and "regularly" thereafter until hostilities cease or those forces have been removed.

C. Reporting under the WPR

Section 4(a) of the WPR calls for a report to be filed with Congress within 48 hours in any case in which troops are introduced

> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, air space or waters of a foreign nation, while equipped for combat . . . ; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation . . . .

Section 4(a) provides that the report must set forth: (A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which the forces have been introduced; and (C) the estimated scope and duration of the deployment. Section 4(c) requires the President to report to Congress no less often than every six months, as long as the forces remain in the situation giving rise to the report.

Under § 5(a), the report required by § 4(a)(1) (deployment into hostilities or situations where imminent involvement in hostilities is clearly indicated) must be transmitted to the Speaker of the House and the President *pro tempore* of the Senate and to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations.

D. Removal of Troops

Section 5(b) provides that "[w]ithin sixty calendar days after a report is submitted or is required to be submitted pursuant to" § 4(a)(1), the President must terminate the use of United States Armed Forces unless Congress has declared war, enacted a specific authorization for the use of troops, or extended the 60 day period, or unless the President is unable to do so because of an armed attack on the United States. The President may extend the 60–day period by 30 days if "unavoidable military necessity respecting the safety of" the forces "requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

Section 5(c) contains an unconstitutional legislative veto device purporting to authorize Congress, acting by a concurrent resolution not subject to the President's veto, to require removal of troops in any situation involving actual hostilities. This Administration testified before Congress that this provision was implicitly invalidated by the Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983).[2] Congress has not disputed that conclusion. Indeed, the counsel to the House of Representatives came to virtually the same conclusion.[3]

E. Miscellaneous Provisions

Section 6 of the WPR sets out expedited procedures for consideration by both Houses of joint resolutions extending the time of the deployment of troops under § 5(b). Section 7 does the same for the unconstitutional concurrent resolution procedure under § 5(c).

Section 8 of the WPR contains certain other miscellaneous provisions. One expressly provides that authority to introduce United States Armed Forces into § 4(a)(1) situations "shall not be inferred" from any provision of law, including any appropriations provision, "unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities . . . and states that it is intended to constitute specific statutory authorization within the meaning of" the WPR. This provision, along with a similar provision negating any similar inferences from any treaty, are intended to preclude Executive Branch reliance for deployments of United States Armed Forces on any ambiguous statutes (including appropriations laws) or treaties.[4] Thus, under § 8 the President's authority to deploy armed forces into hostilities must be grounded in his inherent constitutional powers unless Congress has specifically provided by statute for such deployment.

Subsection § 8(c) states that under the WPR the term "'introduction of United States Armed Forces'" includes the "assignment of members of such

[2] *Hearings on the U.S. Supreme Court Decision Governing the Legislative Veto, before the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 63 (1983) (remarks of Deputy Attorney General Schmults).

[3] *Hearings, supra* note 2, at 36 (agreeing that § 5(c) is "now presumptively invalid").

[4] Prior to the enactment of the WPR, many enactments of Congress, especially appropriations measures, could justifiably have been regarded by the Executive as constituting implied authority to continue the deployment of our armed forces in hostilities

armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces of any foreign country or government are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."

II. Selected Facts, Historical Information, Analysis and Conclusions Regarding Applicability of the War Powers Resolution

A. Executive Interpretation of the Effect of WPR

The Executive Branch has taken the position from the very beginning that § 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces. The Department of State's position set forth in a letter of November 30, 1973 was that § 2(c) was a "declaratory statement of policy." Were the Executive to concede that § 2(c) represented a complete recitation of the instances in which United States Armed Forces could be deployed without advance authorization from Congress, the scope of the Executive's power in this area would be greatly diminished.[5]

Any attempt to set forth all the circumstances in which the Executive has deployed or might assert inherent constitutional authority to deploy United States Armed Forces would probably be insufficiently inclusive and potentially inhibiting in an unforseen crisis. However, some efforts have been made to itemize examples of such situations. In 1975, the Legal Adviser to the Department of State listed six non-exclusive situations in which he contended the President had constitutional authority as Commander-in-Chief to direct United States Armed Forces into combat without specific authorization from Congress:

1. To rescue Americans;

2. To rescue foreign nationals where doing so facilitates the rescue of Americans;

3. To protect U.S. Embassies and legations;

4. To suppress civil insurrection in the United States;

5. To implement and administer the terms of an armistice or cease fire designed to terminate hostilities involving the United States; and

6. To carry out the terms of security commitments contained in treaties.

[5] Whether § 2(c) was to be viewed as an exhaustive, binding list of the President's deployment powers was a major issue between the House and Senate in 1973 and was resolved by the Senate's accession to the House's position that § 2(c) could only be viewed as a statement of policy. *See* H.R. Conf. Rep. No. 547, 93d Cong., 1st Sess. 1–2 (1973).

Hearings on War Powers: A Test of Compliance, Before the House Comm. on International Relations, 94th Cong., 1st. Sess. (Part VI) 90 (1975). The Legal Adviser went on to state that the Administration did "not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander-in-Chief authority could be exercised." *Id.* at 90–91.

The President's authority to deploy armed forces has been exercised in a broad range of circumstances during our history; 192 such exercises between 1798 and 1971 are documented in Emerson, *War Powers Legislation*, 74 W. Va. L. Rev. 53, 70 (1971).

B. Hostilities

The House Report on the WPR had used the word "hostilities" rather than "armed combat" because the former was considered broader. The term "hostilities" was said to encompass "a clear and present danger of armed conflict."[6] The Ford Administration took the position that "hostilities" meant a situation in which units of our armed forces are "actively engaged in exchanges of fire." It added that a situation involving "imminent hostilities" meant a situation in which there is a "serious risk" from hostile fire to the safety of United States Armed Forces. "In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area."[7]

C. Consultation

After virtually every WPR incident, Members of Congress have complained about the level, extent or timeliness of whatever consultation actually occurred. Congress has repeatedly insisted that it have "real involvement in [the] decisionmaking."[8] In light of *Chadha*, there may be some significant constitutional question regarding how there can be "real involvement" of Congress, as an institution, in such typically fast-breaking decisionmaking without formal legislative action by both Houses and submission to the President. Notwithstanding this constitutional question, Members of Congress have generally been unsatisfied if the "consultation" has not occurred prior to the decisionmaking, has not included participation by the President himself as well as his staff, or because a perceived insubstantial number of Members have been involved in the consultations.

Based upon the reactions by Members of Congress to the "Mayaguez" consultations by President Ford, it seems likely that virtually any level or degree of consultation will leave some Members unsatisfied. After the hostage

[6] H.R. Rep No. 287, 93d Cong., 1st. Sess. 7 (1973).

[7] *Hearings on War Powers: A Test of Compliance, before the House Comm. on International Relations*, 94th Cong., 1st Sess. 39 (1975).

[8] *The War Powers Resolution: A Special Study of the Committee on Foreign Affairs* 211 (House Comm. on Foreign Affairs 1982) (Foreign Affairs Special Study).

rescue mission in Iran, the Senate Committee on Foreign Relations asserted that "consultation" involves "permitting Congress to participate in the decisionmaking," and that the judgment about whether consultation is required in a particular situation "must be made jointly by the President and Congress."[9]

D. Reporting Requirement

Early in this Administration, the Legal Adviser of the Department of State took the position that the reporting requirement of § 4(c), which calls for periodic reports "so long as such armed forces continue to be engaged in such hostilities or situation," applies only to instances in which a deployment falls within the § 4(a)(1) category of report (actual or imminent hostilities). The rationale was that the word "situations" in § 4(a)(1) refers to "situations" where "imminent involvement in hostilities is clearly indicated by the circumstances." Thus, the Legal Adviser contended that "situations" did not include § 4(a)(2) or § 4(a)(3) circumstances and that the latter conditions did not require a report. This Office disagreed for the following reasons:

> (1) The Executive has never taken the view that the reporting provisions present a constitutional issue and therefore there is no legal need to construe them narrowly to avoid a constitutional issue.
>
> (2) Congress could have specifically limited the requirement to § 4(a)(1) instead of § 4(a). It did so elsewhere in the WPR. The word "situations" is not in itself a limiting one or a term of art.
>
> (3) The language in the final version of § 4(c) of the WPR appeared for the first time in the Conference Report. The Senate bill is clearly limited in its reporting requirement to "hostile" situations. S. 440, accompanying S. Rep. No. 220, 93d Cong., 1st Sess. (1973). Thus, the Senate bill cannot be said to determine the meaning of the Conference version, which does not have such a limit in § 4(c). The debates on the Conference Report in the Senate and House suggest nothing about the construction of § 4(c), as applied here. 119 Cong. Rec. 33547 *et seq.*; *id.* at 33858 *et seq.*

The best support for the Department of State's position is a sentence in the Conference Report which states that § 4 "requires supplementary reports at

[9] One aspect of the WPR's "consultation" provision worthy of note here is that, because it does not absolutely require consultation in advance of deployment in all cases (rather it requires consultation only "in every possible instance"), the consultation provision does not technically prevent the President from deploying United States Armed Forces for any period of time. Thus, the consultation provision does not go as far as § 1005 of H.R. 5119, considered during the 98th Congress, which, if enacted, would have purported to prevent the President from deploying armed forces in connection with joint military exercises in Central America until a 30–day "waiting" period had passed after the intent to make such a deployment had been communicated to Congress.

least every six months so long as those forces are engaged." The use of the word "engaged" could be interpreted to mean active engagement rather than deployments such as the deployment of the Sinai force. H.R. Rep. No. 547, 93d Cong., 1st Sess. 8 (1973). By itself, this single phrase in the conference report does not seem to overcome the relatively clear text of § 4(c).

On balance, it seemed to serve no important purpose not to provide Congress with periodic updates regarding the status of troop deployments which have been reported under § 4. Finally, taking the position that periodic reports were required only with respect to § 4(a)(1) situations would, with respect to deployments greater than six months duration, require the Executive to take a position as to whether any given circumstance fell within § 4(a)(1) or § 4(a)(2). This Administration, like its predecessors, has believed it to be important not to have to be forced to take such a position with respect to any particular deployment of United States Armed Forces.

This Administration determined to file periodic reports under § 4(c) in all situations. This practice has generally been followed.

E. Rescue Operations

According to a special study issued by the House Committee on Foreign Affairs, the majority of Members of Congress after the "Mayaguez" incident supported the concept that the President had constitutional authority to use armed forces for a rescue operation of the type involved in that incident. Foreign Affairs Special Study at 216. A staff memorandum to the Chairman of the House Committee on Foreign Affairs even cited historical examples of United States Armed Forces being used to protect American merchant ships and to punish those who interfered with United States shipping. One example cited was President Grant's decision to send elements of the United States Navy to Korea to punish natives for murdering the crew of the American schooner "General Sherman" and burning the ship. *Id.*[10] In 1980, we concluded that the President had constitutional authority to send a military expedition to rescue the hostages held in Iran or to retaliate against Iran if the hostages were harmed. "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization," 4A Op. O.L.C. 185 (1980).

F. Justiciability

During this Administration, two attempts to secure judicial resolution of the applicability of the WPR have been made by private litigants and have been rejected by the courts as presenting nonjusticiable issues. *See Crockett* v. *Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir.

[10] In *Durand* v. *Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 186), the court upheld the legality of the Executive's decision to order the bombardment of a Nicaraguan town which had refused to pay reparations for an attack by a mob on the United States Consul.

1983); *Sanchez Espinoza* v. *Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F. 2d 202 (D.C. Cir. 1985).

In addition, some Members of Congress have raised with the Administration, including this Office and the Office of the Counsel to the President, the question of the desirability and feasibility of the filing of litigation by Members of Congress to test the constitutionality of several provisions of the WPR. In this Office's view, the Administration would generally have to resist, on constitutional and jurisprudential grounds, the bringing of such issues before the federal courts.

G. Implementation of the WPR

Attached as an appendix to this memorandum is a chart which itemizes each instance since the enactment of the WPR in which the provisions of the WPR may arguably have been implicated. This chart shows whether the Executive filed a report under the WPR and describes the type of report filed. The only § 4(a)(1) report which has been filed was in connection with the "Mayaguez" incident, although the Ford Administration conceded after the fact that the Saigon evacuation was, in its view, a § 4(a)(1) situation. *See* Foreign Affairs Special Study, *supra* note 8, at 201.

III. Major War Powers Resolution Situations During this Administration to Date

A. El Salvador and Nicaragua

As early as the spring of 1981, questions were raised by Members of Congress and the media regarding the relationship between the WPR and various actions taken by the Executive in El Salvador and Nicaragua. The Administration took the position that the WPR had not been triggered by events in El Salvador. *See* Foreign Affairs Special Study at 249–52. On April 16, 1984, the Administration responded to specific questions from Representative Fascell regarding the involvement of United States Armed Forces in El Salvador.

B. Sinai

On March 19, 1982, the President transmitted to the Speaker and President *pro tempore* a report consistent with § 4(a)(2) of the WPR covering the introduction into the Sinai of United States Armed Forces as participants in the Multinational Force and Observers, a force created to assist in the implementation of the 1979 Treaty of Peace between Egypt and Israel. In that letter, the President stated that this deployment was "undertaken pursuant to Public Law No. 97–132 of December 29, 1981, and pursuant to the President's constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief of U.S. Armed Forces."

C. Libya

In August of 1981, two Libyan jet fighters attacked aircraft of the Sixth Fleet, which was conducting routine, scheduled operations in the Gulf of Siddra. Although Libya claimed that the area in which the attack occurred was Libyan airspace, the United States took the position that the airspace was over international waters. The Sixth Fleet aircraft downed the two Libyan aircraft.

The Administration subsequently determined that a report pursuant to the WPR was not required because the isolated incident did not rise to the level of "hostilities" as defined in the WPR, and the occasion did not amount to the "introduction" of United States Armed Forces into hostilities as required by the WPR. The Administration took the position that this incident was an unanticipated and unwarranted attack on our aircraft in international territory, and that our aircraft defended themselves fully in accord with international law. The Administration expected no repetition of the incident and anticipated no further action by Libya to violate the rights of the vessels and aircraft of this Nation to travel in international waters and airspace.

D. Lebanon

The WPR was implicated vis-a-vis Lebanon when, in July of 1982, consideration began of a plan to create a multinational military force to be placed in Lebanon to assume essentially peacekeeping duties. Because United States Armed Forces were to comprise a substantial element of the multinational force, we met on several occasions with representatives of the Office of the Counsel to the President, the Departments of Defense and State, and the National Security Council to address the issues raised and to prepare in draft the appropriate report.

A report consistent with the WPR was ultimately transmitted to the Speaker and President *pro tempore* by the President on August 24, 1982. That report, like its predecessors, was made "consistent with the War Powers Resolution" and did not indicate whether it had been filed pursuant to § 4(a)(1) of the WPR ("hostilities") or § 4(a)(2) (deployment of troops "equipped for combat").[11]

By the time a second six-month report would have been due, the situation in Lebanon had worsened considerably, with United States Armed Forces increasingly coming under attack. A § 4(c) report was submitted to the Speaker and President *pro tempore* by the President on August 30, 1983. By early September of 1983, many Members of Congress were taking the position, publicly and privately, that § 5(b) of the WPR had been triggered because, in their view, United States Armed Forces were now engaged in "hostilities." If § 5(b) had been triggered by these events, then § 5(b)'s 60–day clock on keeping United States Armed Forces in Lebanon would have begun to run. Debate over whether

[11] In an exchange of diplomatic letters between the United States and the Government of Lebanon, the Lebanese Government stated: "In carrying out its mission, the American force will not engage in combat. It may, however, exercise the right of self-defense."

§ 5(b) had been triggered by those events became academic, however, because Congress moved to consider and enact a resolution specifically authorizing the retention of United States Armed Forces in Lebanon.

On September 26, 1983, the Senate Committee on Foreign Relations reported out a "compromise," S.J. Res. 159, which had been negotiated with Congress by representatives of the President. On September 27, 1983, the President signed letters to a number of key congressional leaders expressing his intention "to seek Congressional authorization . . . if circumstances require any substantial expansion in the number or role of United States Armed Forces in Lebanon." On October 19, 1983 the President signed S.J. Res. 159 into law and, in doing so, issued a signing statement which carefully reserved judgment on the several constitutional issues raised by S.J. Res. 159.

E. Chad

On August 8, 1983, the President transmitted a report, consistent with the WPR, to the Speaker and President *pro tempore* in which he reported the introduction into Chad, at the request of that country's government, of various warning and fighter aircraft, accompanied by air and ground logistical support forces.

F. Grenada

On October 25, 1983, the President transmitted to the Speaker and President *pro tempore* a report, consistent with the WPR, detailing the deployment to Grenada and surrounding waters of United States Armed Forces.

G. Persian Gulf

In early June of 1984, two Iranian F-4's penetrated a "hot line" established by the Government of Saudi Arabia in the Persian Gulf. The Iranian aircraft were intercepted and shot down by Saudi F-15s inside the "hot line" but outside Saudi territorial waters. The Saudi F-15s were assisted as to target location and refueling by aircraft operated by United States Armed Forces which were at all relevant times flying in Saudi territorial air space on predetermined courses. A Saudi air controller provided the actual targeting information to the Saudi F-15s.

It was determined subsequently that this one-time, unanticipated incident did not trigger the WPR because of the absence of hostilities.

THEODORE B. OLSON
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Office of Legal Counsel

APPENDIX

POTENTIAL INVOCATIONS OF THE WAR POWERS RESOLUTION

War Powers Report Filed/Not Filed

Incident	*Date*	*Report*
	Nixon Administration	
Evacuation of Cyprus (military evacuation of Americans caught in hostilities)	July 21–23, 1974	No report filed
Cambodia Resupply Missions (airdrops)	Summer 1974	No report filed
	Ford Administration	
Cambodian Reconnaissance Flights (isolated unanticipated firing)	Fall 1974	No report filed
Danang Sealift	April 4, 1975	Pursuant to § 4(a)(2)[12]
Phnom Penh evacuation	April 12, 1975	Pursuant to § 4 (The report said "taking note of § 4" without specifying a subsection.)

[12] This was the first report ever filed under the WPR. The text of the report stated that President Ford was sending it "in accordance with my desire to keep Congress fully informed on the matter" and "taking note of" the provisions of the WPR It did not concede the validity, or accept the authority, of the WPR.

Incident	*Date*	*Report*
Saigon evacuation (a major military operation with hostile fire and casualties)	April 30, 1975	Pursuant to § 4[13] (The message stated that the "operation was ordered and conducted pursuant to the President's constitutional executive power and his authority as Commander-in-Chief of the U.S. Armed Forces.")
Mayaguez (Cambodian Communist forces seize American merchant ship — U.S. forces sent on rescue mission; 18 American troops killed or missing and 500 presumed dead)	May 12–16, 1975	Report filed in accordance with the President's "desire that Congress be informed on this matter" and taking note of § 4(a)(1) of the WPR.
Lebanon Evacuation (Navy used to evacuate Americans from Lebanon)	June/July 1976	No report filed[14]
Korean Tree Cutting Incident (troops sent into DMZ to cut tree as retaliation for incident 3 days earlier in which American troops had been killed and wounded)	August 21, 1976	No report filed[15]

[13] The Legal Adviser of the Department of State later conceded in testimony that this was a § 4(a)(1) situation, but because the operation was over by the time the report was filed, no specification was necessary. *See Hearing, supra*, at 9–10.

[14] Congress seems to have implicitly conceded that the WPR did not require a report or consultation in this incident.

[15] Some Members of Congress reacted with antagonism to the Department of State's position that no report or consultation was required in this incident, but the controversy subsided almost immediately.

Incident	*Date*	*Report*
	Carter Administration	
Zaire Airlift	May 1978	No report filed
Iran Rescue Operation	April 26, 1980	Pursuant to the WPR (The report was based on a desire that Congress be informed, it was *consistent* with the reporting provisions of the WPR, and it asserted exercise of Commander-in-Chief powers; no advance consultation was made.)[16]
	Reagan Administration	
El Salvador (security advisers/ defense attaches)	Spring 1981/ August 1984	No report filed (advisers were armed but not "equipped" for combat)
Gulf of Siddra, Libya	August 19, 1981	No report filed
Sinai	March 19, 1982	Pursuant to § 4(a)(2)
Lebanon	August 24, 1982	Pursuant to the WPR
Lebanon	Sept. 29, 1982	Pursuant to the WPR
Chad	August 8, 1983	Pursuant to § 4
Lebanon	August 30, 1983	Pursuant to § 4
Grenada	October 25, 1983	Pursuant to § 4
Persian Gulf	June 4, 1984	No report filed

[16] This incident spawned *Crockett* v. *Reagan*, 558 F. Supp. 893 (D.D C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir 1983), which resulted in an opinion by the United States District Court for the District of Columbia dismissing the suit as nonjusticiable. *See* Part II.F *supra*.

VISA Fraud Investigation

Although facially a violation of applicable statutes, the State Department may issue a visa to an ineligible alien in order to facilitate an undercover operation conducted by the Immigration and Naturalization Service. Undercover operations often involve facially illegal conduct by government officers, but courts have not held such conduct to be illegal if it is necessary to secure a permissible law enforcement objective.

November 20, 1984

MEMORANDUM OPINION FOR THE GENERAL COUNSEL,
IMMIGRATION AND NATURALIZATION SERVICE

This responds to your request for our opinion on whether the Department of State may issue a visa to an ineligible alien in order to facilitate an undercover operation being conducted by the Immigration and Naturalization Service (INS). We believe that the Department of State may issue the visa.

I. Background

INS is presently conducting an undercover operation to investigate individuals suspected of paying American citizens to enter into sham marriages with aliens.[1] INS has focused on a group suspected of smuggling into the United States large numbers of aliens who then enter into sham marriages. In order to infiltrate the group, INS has persuaded an American citizen who has admitted entering into a sham marriage to cooperate with the INS. The individual has filed a visa petition on behalf of his putative wife. The petition has been approved by the INS and forwarded to the American consul in Canada for processing. As explained by INS officials, the approval of the petition and issuance of the visa will enable the individual to win the confidence of the suspects:

> The objective is to have both the alien and the United States citizen spouse, a cooperating private individual (CPI), travel to [Canada] so that in addition to obtaining the visa, the CPI would

[1] Once married to the American citizen, the alien is eligible to receive a resident visa.

meet with additional conspirators and gain their confidence by letting them know that the visa had been successfully issued.

Once the visa was issued, it would be taken from the alien at the port of entry and the alien would be issued a Form I-94 indicating entry and the pending issuance of a Form I-551, as is normal procedure. The visa would then be retained as evidence by the United States Attorney's Office, and be returned eventually to the Department of State.

Memorandum for Maurice C. Inman, Jr., General Counsel, INS, from John F. Shaw, Assistant Commissioner for Investigations, INS (Oct. 23, 1984). When the individual and his wife return to the United States, it is hoped that the suspects, having been assured of the individual's reliability, will ask him to recruit others, thereby allowing infiltration by INS and eventual prosecution.

The Department of State has declined to issue the visa necessary for the operation to proceed, and has raised the question whether issuance of the necessary visa would violate 8 U.S.C. § 1201(g)(3), which provides that "[n]o visa . . . shall be issued to an alien if . . . the consular officer knows or has reason to believe that such alien is ineligible." Because the American consul knows the alien in this case has entered into a sham marriage, the Department of State will not issue the visa unless this Office opines to the contrary.

II. Analysis

Government law enforcement efforts frequently require the literal violation of facially applicable statutes. One obvious example would involve police officers who must exceed the applicable speed limit in order to catch a speeder or an escaping criminal. In order to explain why such law enforcement activity does not violate the law, the courts have construed prohibitory laws as inapplicable when a public official is engaged in the performance of a necessary public duty. In reaching this conclusion, some courts have focused on legislative intent, reasoning that these statutes do not apply "where public officers are impliedly excluded from language embracing all persons [because] a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm." *Nardone* v. *United States*, 302 U.S. 379, 384 (1937) (footnote omitted). Other courts have simply referred to the basic principle that action by public officials that would otherwise violate a statutory prohibition is justifiable if it is *necessary* to achieve a legitimate government objective and is done in a *reasonable* fashion.[2] Thus, the courts have held

[2] This principle appears to be derived from the common law defense of necessity. W. LaFave & A. Scott, *Handbook on Criminal Law* 381 n.1 (1972). The federal case law is not well-developed, "probably because common sense usually prevents a prosecution in such a case." K. Sears & H. Weihofen, *May's Law of Crimes* § 60, at 68 (4th ed. 1938).

inapplicable not only speeding laws,[3] but virtually the entire spectrum of civil[4] and criminal law.[5]

The case law is nevertheless relatively sparse since few states or cities prosecute their law enforcement officers for their activities and, therefore, the defense of official conduct seldom needs to be raised.[6] However, defendants challenging their convictions have often argued that the government's activity violated a law and that the defendant's conviction is therefore invalid. The courts have almost uniformly rejected these challenges, noting that it is often necessary for law enforcement officers to engage in otherwise illegal conduct in order to catch criminals. This is especially true in undercover operations, as the Supreme Court has recognized. For example, in *United States* v. *Russell*, 411 U.S. 423, 430 (1973), a defendant challenged his conviction for manufacturing PCP on the grounds that the government's undercover involvement, including contributing one of the major ingredients, was so outrageous that it violated the Due Process Clause. The Supreme Court rejected the argument, stating that the undercover agent did not "violate any federal statute or rule or commit any crime, in infiltrating the . . . drug enterprise." *Id.* at 430.

> In order to obtain convictions for illegally manufacturing drugs, . . . law enforcement personnel have turned to one of the only practical means of detection: the infiltration of drug rings and a *limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation*; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them.

Id. at 433 (emphasis added). Thus, the Supreme Court recognized that undercover operations often involve technically illegal conduct by government officers and approved that conduct because it is necessary to secure the law enforcement objective.[7] A few years later, the Court rejected attempts to read *Russell*

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[3] *Warren Petroleum Co.* v. *Thomasson*, 265 F.2d 5, 10 (5th Cir. 1959); *Lilly* v. *West Virginia*, 29 F.2d 61, 64 (4th Cir. 1928); *City of Norfolk* v. *McFarland*, 145 F.Supp. 258, 260 (E.D. Va. 1956); *State* v. *Swift*, 143 A.2d 114, 115 (N.H. 1958).

[4] *State of Montana* v. *Christopher*, 345 F. Supp. 60, 61 (D. Mont. 1972) (operating trailer without lights); *State* v. *Knoxville*, 80 Tenn. 146 (1883) (open field burning by city officials not a nuisance when necessary to prevent spread of disease).

[5] *State* v. *Emerson*, 517 P.2d 245, 247 (Wash. Ct. App. 1974) (accepting services of prostitute) ("Practical considerations require that, in the performance by police of crime detection duties, at least some deceitful practices and 'a limited participation' in unlawful practices be tolerated and recognized as lawful."); *State* v. *Torphy*, 78 Mo. App. 206 (1899) (gambling).

[6] *See* Sears & Weihofen, *supra* note 2; Dix, "Undercover Investigations and Police Rulemaking," 53 Tex. L. Rev. 203, 284–86 (1975).

[7] The Court indicated that there might be a situation in which the Government's involvement was so outrageous that it would offend due process principles, but "the instant case is not of that breed." *United States* v. *Russell*, 411 U.S. at 432. Nor has the Court found such a case since *Russell*.

narrowly when it affirmed a conviction in which the government had allegedly supplied the heroin which the defendant was charged with selling. *Hampton* v. *United States*, 425 U.S. 484 (1976). Even though heroin is contraband and its possession is "illegal and constituted the corpus delicti for the sale of which the petitioner was convicted," the Court rejected the argument that the Government's involvement "deprived defendant of any right secured to him by the Constitution." 425 U.S. at 489, 490–91 (Rehnquist, J.) (plurality opinion). "Government participation ordinarily will be fully justified in society's 'war with the criminal classes.'" *Id.* at 495 (Powell, J., concurring) (citation omitted).[8] Since *Hampton*, the courts of appeal have explicitly and repeatedly upheld a variety of undercover techniques that technically violate a variety of civil and criminal statutes but whose use has been deemed necessary to particular undercover operations.[9]

Conclusion

We believe, therefore, that the courts have recognized that it is generally lawful for law enforcement agents to disregard otherwise applicable law when taking action that is necessary to attain the permissible law enforcement objective, when the action is carried out in a reasonable fashion,[10] and when the action does not otherwise violate the Constitution.[11] Pursuant to this general principle, this Office has repeatedly advised various agencies, including the Department of State, that the use of false documents in particular undercover operations is legal. *See, e.g.*, Memorandum for Roberts B. Owen, Legal Adviser, Department of State, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (July 3, 1980) (regarding issuance of false passports).

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[8] Both Justice Rehnquist and Justice Powell recognized that government involvement in otherwise illegal activities may at some point go beyond what is necessary and become punishable. 425 U.S. at 490–91; *id.* at 494 nn.5 & 6. Justice Rehnquist noted that "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Id.* at 490. Justice Powell felt that there should be some limiting principle on government involvement in crime, but did not believe it was necessary to develop the principle in *Hampton*. *Id* at 494 nn.5 & 6. One principle that might be used is to permit acts that involve *malum prohibitum*, such as possession of contraband or obtaining false birth certificates, but to forbid activities that involve *malum in se*, such as homicide and assault.

[9] *See, e.g., United States* v. *Gamble*, 737 F.2d 853, 854, 858 (10th Cir. 1984) (postal workers obtained false drivers licenses, filed false accident reports, obtained insurance and registered cars under false names, pled guilty to nonexistent traffic violations and filed false claims with insurance companies); *United States* v. *Beverly*, 723 F.2d 11, 12 (3d Cir. 1983) (government supplied gasoline and disguises to arsonist); *United States* v. *McCown*, 711 F.2d 1441, 1449 50 (9th Cir. 1983) (government supplied marijuana); *United States* v. *Romano*, 706 F.2d 370, 372 (2d Cir. 1983) (government supplied heroin); *United States* v. *Khatib*, 706 F.2d 213, 217 (7th Cir. 1983) (government sold unregistered firearms); *United States* v. *Norton*, 700 F.2d 1072, 1076 (6th Cir.) (government supplied explosives for bomb), *cert. denied*, 461 U.S. 910 (1983); *United States* v. *Gianni*, 678 F.2d 956, 958 (11th Cir.) (government sold over 1000 pounds of marijuana), *cert. denied*, 459 U.S. 1071 (1982); *United States* v. *Parisi*, 674 F.2d 126, 127 (1st Cir. 1982) (government sold food stamps at illegal discount).

[10] Thus, a police officer may speed but the court will evaluate whether, under the circumstances, he exercised reasonable care for the safety of third parties. *State* v. *Swift*, 143 A.2d 114, 115 (N.H. 1958); *Edberg* v. *Johnson*, 184 N.W. 12, 13 14 (Minn. 1921).

[11] *United States* v. *United States District Court*, 407 U.S. 297 (1972); *Lewis* v. *United States*, 385 U.S. 206, 209 (1966); *Zweibon* v. *Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

In the instant case, there is nothing in the language of 8 U.S.C. § 1201(g)(3) that suggests that Congress intended to restrict the use of visas in undercover operations. Moreover, the ultimate objective of § 1201(g) to prevent manipulation of the visa process will not be frustrated by this operation. Rather, as in many undercover operations, the Government's activity will involve "limited participation" in the methods of suspected criminals in order to achieve the ultimate objective of ending the criminal behavior. *Russell*, 411 U.S. at 433. Accordingly, we conclude that the issuance of a visa by the Department of State is necessary for the operation to proceed; that the issuance under the circumstances described — for a limited purpose and under close supervision — is reasonable; and that the issuance of the visa is, therefore, legal notwithstanding the language in 8 U.S.C. § 1201(g).

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