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OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

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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 twelve volumes of opinions published covered the years 1977 through 1988; the present volume covers 1989. The opinions included in Volume 13 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 1989 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 informal opinions to the various federal agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

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OPINION

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Deportation Proceedings for Joseph Patrick Thomas Doherty

The Attorney General disapproved the decision of the Board of Immigration Appeals to permit the respondent to reopen his deportation proceedings in order to apply for relief from deportation and to redesignate his country of deportation.

June 30, 1989

IN DEPORTATION PROCEEDINGS

This matter has been certified to me by the Commissioner of the Immigration and Naturalization Service ("INS") from the decision of the Board of Immigration Appeals ("BIA"). 8 C.F.R. § 3.1(h)(1)(iii). On November 14, 1988, the BIA granted the respondent's motion to reopen these proceedings in order to allow him to apply for asylum and for withholding of deportation and to permit him to redesignate his country of deportation. *Matter of Doherty*, No. A26 185 231 (BIA Nov. 14, 1988). For the reasons set forth below, I disapprove the BIA's decision, and deny respondent's motion to reopen his deportation proceedings.

I.

1. Respondent is a 34-year-old native of Northern Ireland and a citizen of both the United Kingdom ("U.K.") and the Republic of Ireland. He has been an active volunteer in the Provisional Irish Republic Army ("PIRA") since 1972. The BIA summarized his criminal record as follows:

> He has an extensive criminal record in Ireland beginning with convictions as a juvenile for burglary and larceny. He was sentenced to probation, fines, and 1 month in a training school. At approximately age 15, the respondent joined Na Fianna Eireann, a youth organization in Ireland that is considered to be a stepping stone into the PIRA. When he turned 17, in 1972, he joined the PIRA as a volunteer. In 1973, he was arrested, and later convicted, for possession of a firearm. He was sentenced to 1 year in prison and he served 9 months. In 1974, he was arrested for possession of 80 pounds of explosives. He was convicted and sentenced

> to 10 years imprisonment. He served 5 years and 9 months of that sentence. During that term of imprisonment, the respondent attempted to escape, but he was unsuccessful. He was convicted of prison breaking with intent to escape and received a sentence of an additional 18 months [of] imprisonment. After his release from prison in December of 1979, he returned to the PIRA. On May 2, 1980, while on a mission for the PIRA, he was involved in a gun battle in which a British army Captain was killed. He was tried and found guilty of murder, attempted murder, possession of firearms and ammunition, and belonging to a proscribed organization.

In re Doherty, No. A26 185 231, slip op. at 1-2 (BIA Mar. 4, 1985).

Throughout the course of these proceedings, respondent has never disputed the underlying facts relating to the last set of crimes. On May 2, 1980, he and several other PIRA members seized and occupied a private home, from which they planned to ambush British troops. In the ensuing gunfight with the troops, Captain Herbert Richard Westmacott, a British Army captain, was shot and killed. Respondent was arrested and charged with murder, attempted murder, illegal possession of firearms, and other offenses. On June 10, 1981, after trial, but before a decision was reached, respondent escaped from prison. On June 12, 1981, he was convicted, in absentia, of murder and the other offenses with which he had been charged, and was sentenced to life imprisonment.

After his escape, respondent made his way to the United States, where he was arrested on June 18, 1983. A formal request for extradition was filed in the Southern District of New York on August 16, 1983. At about the same time, a deportation warrant was also filed against him. On June 28, 1983, respondent filed for asylum and withholding of deportation.

2. The extradition proceeding was brought pursuant to 18 U.S.C. § 3184 and Article VII of the then-existing Treaty of Extradition between the United States and the United Kingdom, Extradition Treaty, Oct. 21, 1976, U.S.-U.K., 28 U.S.T. 227, (effective Jan. 21, 1977) ("Extradition Treaty"), under which "political offenses" were an exception to extradition. A hearing was held in the United States District Court for the Southern District of New York in March and April of 1984. In December 1984, the court ruled that respondent could not be extradited because the murder he had committed was "of a political character" within the meaning of the Extradition Treaty. The court thus denied the request for extradition. *Matter of Doherty by Gov't of U.K.*, 599 F. Supp. 270 (S.D.N.Y. 1984).

Although the court determined that respondent was not extraditable, it rejected the contention that the proceedings against him in Northern Ireland had failed to provide due process. The court concluded:

> [B]oth Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and...the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard.

Matter of Doherty by Gov't of U.K., 599 F. Supp. at 276.[1]

3. Immediately upon the conclusion of the extradition proceeding, the deportation proceeding went forward. It was delayed, however, for almost 18 months, from March 18, 1985, until September 3, 1986, as a result of a stay which was entered on respondent's motion, and which the INS opposed. *See Doherty v. Meese*, 808 F.2d 938, 941 (2d Cir. 1986).

On September 12, 1986, at a hearing before an immigration judge, respondent, through his counsel, withdrew the applications for asylum and for withholding of deportation that he had filed in June 1983, and conceded deportability.[2] Asked by the immigration judge whether he was saying that he "no longer wish[ed] to apply for asylum and [was] ... waiving his right to asylum", respondent's counsel replied, "[t]hat is correct, Your Honor." Respondent's counsel continued: "We would, at this time, withdraw the application for political asylum. The only thing that we would request would, of course, be the opportunity to desingnate [sic] a country." *See* Transcript of Sept. 12 Hearing, *supra* note 2, at 38. The colloquy between the immigration judge and respondent's counsel continued as follows:

> Q. ...I just want to be sure there won't be any application for political asylum and/or withholding of deportation, correct?
>
> A. That is correct.
>
> Q. No application for voluntary departure?
>
> A. That is correct.
>
> Q. In other words, there is no application for relief from deportation that you will be making?

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[1] The United States challenged the denial of extradition by bringing an action under the Declaratory Judgment Act, 28 U.S.C. § 2201, in the Southern District of New York. The district court and the United States Court of Appeals for the Second Circuit both held, however, that bringing the extradition request before another judge was the only proper means of challenging the decision denying extradition. *United States v. Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff'd*, 786 F.2d 491 (2d Cir. 1986).

[2] *See* Transcript of Hearing at 36, 38-40, *Matter of Doherty*, No. A26 185 231 (BIA Sept. 12, 1986) ("Transcript of Sept. 12 Hearing"); *see also* Petition of Joseph Patrick Thomas Doherty for an Order to Show Cause for a Writ of Habeas Corpus at para. 43, *Doherty v. Meese*, 808 F.2d 938 (2d Cir. 1986) ("Doherty Petition"), Affidavit of Mary Boresz Pike (Counsel for Respondent), sworn to Dec. 2, 1987, at paras. 10-14 ("Pike Affidavit").

A. That is correct.

Id. at 38-39. Respondent designated the Republic of Ireland as his country of deportation, pursuant to 8 U.S.C. § 1253(a). The INS strongly opposed this designation on the ground that it would be prejudicial to the interests of the United States to send respondent to Ireland. The INS explained to the court that the deportation of respondent to the United Kingdom was a matter of great interest at the highest levels of the federal government. Transcript of Sept. 12 Hearing, *supra* note 2, at 41-43, 47-48; Transcript of Hearing at 57, *Matter of Doherty*, No. A26 185 231 (BIA Sept. 19, 1986). The court denied the INS' request for permission to submit evidence of additional grounds for deportation, because respondent had conceded deportability and waived his claims to asylum and withholding of deportation. *See* Transcript of Sept. 12 Hearing, *supra* note 2, at 39-40.

One week later, on September 19, 1986, the immigration judge found respondent deportable on his own admission for having entered this country in February 1982 by fraud and without a valid immigrant visa. *See* 8 U.S.C. §§ 1182(a)(19)-(20), 1251(a)(1).[3] Over the INS' strenuous objection, the immigration judge ordered respondent deported to the country of his designation, the Republic of Ireland.

At the time of the immigration judge's decision, respondent faced a ten-year sentence of imprisonment in Ireland under a "dual prosecution agreement" between Ireland and the United Kingdom. *Doherty v. Meese*, 808 F.2d at 940.[4] Respondent's consent to deportation and his withdrawal of his applications for relief from deportation were apparently prompted by the imminent ratification and implementation of the Supplementary Extradition Treaty with the United Kingdom, S. Exec. Rep. No. 99-17 (1985) (effective Dec. 23, 1986) between the United States and the United Kingdom ("Supplementary Treaty").[5] Under the Supplementary Treaty, respondent could have been extradited directly to the United Kingdom, where, as noted, he faced a life sentence for murder. "[Respondent] thus urgently want[ed] to leave the United States for Ireland, where he face[d] only a ten-year sentence, before the British

[3] *Matter of Doherty*, No A26 185 231 (BIA Sept 19, 1986)

[4] It was also likely that respondent would be tried in the Republic of Ireland for his escape from prison in Belfast, Northern Ireland. *See* Doherty Petition, *supra* note 2, at para 55.

[5] The Supplementary Treaty amended the Extradition Treaty. The Supplementary Treaty had been ratified by the United States Senate on July 17, 1986, and, at the time of the immigration judge's September 19, 1986 decision, was pending before the British House of Commons. Respondent apparently expected the House of Commons to ratify the treaty sometime in October 1986. *See* Doherty Petition, *supra* note 2, at para. 33. The Supplementary Treaty became operative on December 23, 1986

Under Article 4 of the Supplementary Treaty, the "political offense" exception to extradition in the Extradition Treaty was eliminated with retroactive effect. Thus, ratification and implementation of the Supplementary Treaty might have rendered respondent subject to extradition, despite the prior district court decision denying such a request

House of Commons act[ed] upon the treaty." *Doherty v. Meese*, 808 F.2d at 940.

4. The INS appealed the immigration judge's decision to the BIA. Respondent, however, in an attempt to prevent the INS from continuing to contest respondent's deportation to Ireland, petitioned the district court for a writ of habeas corpus, which was denied on September 25, 1986. *Id.* at 941. Respondent appealed to the Second Circuit.

On December 23, 1986, the Second Circuit affirmed the district court's denial of respondent's habeas corpus petition. In so doing, the court rejected respondent's contention that the government was resisting respondent's departure to Ireland solely for the purpose of assuring his continued availability for extradition to the United Kingdom upon final ratification of the Supplementary Treaty. The court stated that it had jurisdiction to intervene in the pending deportation proceeding "only if the Attorney General is clearly outside the discretion granted to him by Section 1253(a) in rejecting the Republic of Ireland and designating the United Kingdom and is clearly unreasonable in pressing his position through the administrative process." *Id.* at 942.

The court determined that the INS' appeal of the immigration judge's order to the BIA was not unjustified because it was reasonable for the Attorney General to conclude and to argue that the interests of the United States would be prejudiced by deporting respondent to Ireland. *Id.* at 943. The court stated that the judgment as to whether the interests of the United States would be prejudiced was "an essentially political determination." *Id.* The court also noted that "[t]he lack of precedent hardly renders the government's position frivolous." *Id.* at 941 n.3. Further, the court pointed out that, in a case such as this, apart from claims such as fraud, lack of jurisdiction, or unconstitutionality, "the determination of the Attorney General is essentially unreviewable." *Id.* at 944 (footnote omitted).

5. Thereafter, on March 11, 1987, the BIA dismissed the INS' appeal of the immigration judge's September 19, 1986 order, and denied an INS motion to supplement the record. The Commissioner of the INS sought review by Attorney General Meese pursuant to 8 C.F.R. § 3.1(h)(1)(iii). The Attorney General granted the INS' request for review and allowed respondent and the INS to submit additional evidence and memoranda.

On December 3, 1987, while the issue of respondent's deportation to Ireland was pending before Attorney General Meese, respondent moved to reopen his deportation proceedings pursuant to 8 C.F.R. §§ 3.2, 3.8, and 242.22, to apply for asylum and withholding of deportation, and to change his designated country of deportation. Motion of Respondent to Reopen or to Reconsider at 1, *Matter of Doherty*, No. A26 185 231 (BIA Dec. 3, 1987). Respondent claimed that his motion was prompted by a change in Irish law. In the opinion of respondent's counsel, the Extradition (European Convention on the Suppression of Terrorism) Act ("Extra-

dition Act"), which went into effect in Ireland on December 1, 1987, would allow respondent's extradition from Ireland to the United Kingdom.[6]

6. On June 9, 1988, Attorney General Meese disapproved the BIA's decision, ruled that the INS had shown that respondent's deportation to Ireland would be prejudicial to the interests of the United States, and ordered respondent deported to the United Kingdom. *Deportation Proceedings of Joseph Patrick Thomas Doherty*, 12 Op. O.L.C. 1 (1988) ("Deportation Proceedings"). The Attorney General rested his decision on two separate considerations: first, that respondent's deportation to the United Kingdom would serve the policy of the United States that those who commit violent acts against a democratic state should be promptly and lawfully punished and second, that the Department of State had shown that respondent's deportation to Ireland rather than to the United Kingdom would be detrimental to the United States' foreign policy interests.[7] Respondent's motion to reopen also was considered in the Attorney General's June 9, 1988 ruling; the motion was remanded to the BIA. *Id.*

7. On November 14, 1988, five months after Attorney General Meese's order, the BIA granted respondent's motion to reopen by a 3-2 vote. *Matter of Doherty*, No. A26 185 231 (BIA Nov. 14, 1988). The BIA majority acknowledged that there is "no absolute right to withdraw a prior designation of a country of deportation." *Id.* slip op. at 5. However, the BIA found that at the time of his hearing before the immigration judge, respondent had "the reasonable expectation ... that he would be deported to Eire" and that "[t]he likelihood of his being deported to the United Kingdom appeared remote." *Id.* at 6. "Given the state of the law at that time, the respondent could not have been expected to anticipate that he would not be deported to his country of choice. The respondent's failure to file for asylum under these circumstances is excusable." *Id.*

The BIA also held that "the Attorney General's decision of June 1988 disallowing the respondent's choice of a country of deportation constitutes changed circumstances which have arisen since the hearing." *Id.* Additionally, respondent had "submitted recently published background evidence which we find to be material to the respondent's case." *Id.* The BIA majority provided no analysis of this evidence to support its conclusion.

Finally, the BIA majority held that respondent's evidence established a prima facie claim of a well-founded fear of persecution. It noted that the INS would have the opportunity to prove that respondent had engaged in conduct which rendered him either ineligible for withholding of deporta-

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[6] *See* Pike Affidavit, *supra* note 2, at paras. 25-28; *see also* European Convention on the Suppression of Terrorism, 1977, Europ T.S. No. 90

[7] Respondent has appealed the Attorney General's June 9, 1988 ruling to the Second Circuit. *Doherty v. United States Dep't of Justice*, No 88-4084 (2d Cir filed June 21, 1988) The parties have agreed to suspend any action on that appeal pending the outcome of this appeal by the INS.

tion or unfit for asylum, and concluded that the motion to reopen should be granted. *Id.*

8. The INS appealed the decision of the BIA to me on December 5, 1988.

II.

The Attorney General has retained the authority to review final decisions of the BIA, 8 C.F.R. § 3.1(h), and he may do so either on his own initiative or upon request. *Id.* § 3.1(h)1(i)-(iii). The relief sought by respondent — reopening of proceedings — is wholly discretionary. The BIA has promulgated regulations governing its consideration of motions to reopen proceedings. *See* 8 C.F.R. §§ 3.2, 3.8, and *infra* note 17. These regulations, however, apply only to the BIA, not to the Attorney General, although of course the Attorney General may refer to these regulations when considering a motion to reopen. The Attorney General's decision is de novo; he is not confined to reviewing for error. His decision is final, *see Deportation Proceedings*, 12 Op. O.L.C. at 4, subject only to judicial review for "abuse of discretion."[8] This is the backdrop against which I consider respondent's motion to reopen.

Respondent relies upon three separate grounds in arguing for reopening of his deportation proceedings.[9] First, in relying upon the BIA opinion, he claims that Attorney General Meese's order that he be deported to the United Kingdom because deportation to Ireland would be prejudicial to the interests of the United States, see *id.* at 6-7, was an unforeseen,

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[8] *See INS v Rios-Pineda*, 471 U S. 444, 449 (1985); *INS v Jong Ha Wang*, 450 U.S. 139, 144 (1981); *Bahramnia v. INS*, 782 F.2d 1243, 1246 & n.15 (5th Cir), *cert. denied*, 479 U.S 930 (1986); *Garcia-Mir v. Smith*, 766 F 2d 1478, 1490 & n.16 (11th Cir. 1985), *cert denied*, 475 U.S. 1022 (1986); *Muigai v INS*, 682 F.2d 334, 337 (2d Cir 1982), *Schieber v. INS*, 461 F 2d 1078, 1079 (2d Cir. 1972); *Wong Wing Hang v INS*, 360 F 2d 715, 718-19 (2d Cir 1966).

[9] Respondent seeks reopening so that he can request asylum and withholding of deportation. Asylum is discretionary with the Attorney General. *INS v. Stevic*, 467 U.S. 407, 423 n.18, 426 (1984), *INS v. Cardoza-Fonseca*, 480 U S. 421, 444-45 (1987). To be eligible for asylum, the alien must demonstrate that he is a "refugee." 8 U.S.C. § 1101(a)(42)(A). He must show that he is unable or unwilling to return to his country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, group membership, or political opinion — a standard that is lower than the "clear probability" standard in withholding of deportation cases, and that does not require a showing that persecution is more likely than not *Cardoza-Fonseca*, 480 U S. at 432, 449 & n 31 *Ipina v INS*, 868 F2d 511, 513-14 & n.6 (1st Cir. 1989). The BIA has held that "an applicant for asylum establishe[s] a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution." *Matter of Barrera*, 19 I & N Dec 837, 845 (1989).

Asylum requests made after the institution of deportation proceedings shall also be considered as requests for withholding of exclusion or deportation. 8 C.F.R. § 208.3(b), *Matter of Martinez-Romero*, 18 I & N Dec 75, 77 n 6 (1981), *aff'd, Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982)

An alien seeking withholding of deportation from any country must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S C § 1253(h)(1) Withholding of deportation is nondiscretionary It must be granted if the Attorney General finds that the alien would be threatened for any of the five reasons listed in the statute. *INS v Stevic*, 467 U S. at 421 n 15, 426; *Cardoza-Fonseca*, 480 U S at 430 The burden is on the alien to establish a "clear probability" of persecution on any one of the statutory grounds. *INS v Stevic*, 467 U.S. at 430; *Ipina v INS*, 868 F.2d at 515.

adverse administrative decision, constituting a "new fact."[10] Second, he claims that, after he admitted deportability and withdrew his claims for asylum and withholding of deportation, there was a change in Irish law as a consequence of the December 1, 1987 implementation of the Extradition Act in Ireland. Specifically, he contends that, if deported to Ireland, the provisions of the Extradition Act would result in his "certain" extradition to the United Kingdom.[11] He argues that, had he known of this subsequent development, he might have made different decisions at his deportation proceedings.

As a third ground for reopening, respondent claims that there is new and material evidence bearing on his deportability that should now be considered. The asserted new evidence consists of (1) a 1988 report by Amnesty International on the British security forces' treatment of suspected IRA members, and other supporting documents; (2) an affidavit from his mother, relating chiefly to the experiences of her family and other republican sympathizers with the British security forces;[12] and (3) affidavits from respondent's counsel.[13]

I do not believe that any of these three arguments justifies reopening respondent's deportation proceedings and, accordingly, I deny the motion.

As to the arguments relied upon by respondent in support of the motion, first, throughout these proceedings, respondent knew that the Attorney General might deny his designation of Ireland as the country to which he would be deported. This authority is expressly reserved to the Attorney General by statute, 8 U.S.C. § 1253(a), and the INS consistently took the position that it would oppose respondent's deportation to any country other than the United Kingdom. It also informed respondent that his deportation to the United Kingdom was a matter of interest at the highest levels of the federal Government. It is clear from the record that respondent made the conscious decision that he would rather be exposed to the risk that the Attorney General would deny his deportation to Ireland than to the risk of extradition directly to the United Kingdom by the United States under the Supplementary Treaty, then in the final stages of ratification.

It is unlikely that the Attorney General's decision to avail himself of his recognized authority to reject a deportee's designation can ever constitute new evidence. It certainly cannot properly be considered new evidence where, as here, deportation to the country designated by the alien

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[10] Respondent does not make this argument in terms. However, the BIA specifically granted the motion to reopen on the ground that Attorney General Meese's order was, in effect, new evidence. For this reason, I address the argument here.

[11] *See* Brief for Respondent-Appellee to the Attorney General at 14 (April 26, 1989) ("Respondent's Brief").

[12] *See* Affidavit of Mary (Maureen) Doherty, sworn to Dec. 2, 1987 ("M. Doherty Affidavit").

[13] *See* Pike Affidavit, *supra* note 2, Supplemental Affidavit of Mary Boresz Pike, sworn to Aug. 9, 1988 ("Pike Supplemental Affidavit")

has been vigorously contested throughout the proceedings by the federal Government; it has been represented that there is interest at the highest levels of the Government that the alien not be deported to the country designated; and the Attorney General ultimately concludes that the national interests should prevail. Appeal to the Attorney General and decision consistent with the interests of the United States under such circumstances should reasonably be expected. *See* discussion *infra* pp. 12-13.

Second, on the assumption that the implementation of the Extradition Act represented a change in law, it did not change the rules of decision applied by the immigration officials or Attorney General Meese. If the implementation of the Extradition Act represents a change in fact, it is an immaterial change. The Extradition Act gave effect in Irish law to the provisions of the European Convention on the Suppression of Terrorism ("European Convention"), to which the United Kingdom is also a party. The Irish Government expressed its intention to sign the European Convention in November 1985, and did in fact sign it in February 1986. Accordingly, respondent knew or should have known well before December 1, 1987, that Ireland had endorsed the provisions of the European Convention. Furthermore, respondent was subject to extradition to the United Kingdom from Ireland even before Ireland became a party to the European Convention. Thus, Ireland's subsequent adoption and implementation of the Extradition Act did not in itself create a risk of extradition; nor did it materially increase the risk that respondent would be extradited to the United Kingdom. *See* discussion *infra* pp. 13-18.

Third, much of the "new" factual evidence proffered by respondent is not new at all; it was available at the time of the earlier proceedings, and respondent offers no reason for his failure to present it at that time. The evidence that was not available is not material; for the most part, it is cumulative of evidence presented in the earlier proceedings. It does not support the existence of a threat different in character from that known at the time of the deportation proceedings. *See* discussion *infra* pp. 18-20.

Thus, none of the grounds offered for reopening respondent's deportation proceedings is sufficient to warrant reopening.

In addition to finding the arguments advanced in support of reopening insufficient, I would, in the exercise of my discretion and as an independent basis for decision, deny the motion to reopen on the ground that respondent explicitly waived his claims to asylum and withholding of deportation as part of a calculated plan to ensure immediate deportation to Ireland before the United Kingdom ratified its treaty with the United States, which would have allowed respondent to be extradited directly to the United Kingdom. *See* discussion *infra* Part IV.[14] The integrity of the administrative process dictates that a deportee who, with the advice and

[14] *Cf Communication Workers of Am., Local 5008 v. NLRB*, 784 F.2d 847, 851 (7th Cir. 1986) (court must sustain administrative decision if any of the independent grounds that support the decision is correct).

assistance of counsel, makes such deliberate tactical decisions, not be permitted to disown those decisions merely because they ultimately result in action adverse to his interests. This is especially the case where the possibility of that action was not only foreseeable but foreseen.

Finally, I also deny respondent's motion to reopen on the unrelated ground that respondent would not ultimately be entitled to either asylum, the discretionary relief he seeks, or withholding of deportation, the nondiscretionary relief he seeks. *See* discussion infra Part V.[15]

Respondent simply has not carried the heavy burden of showing either that he is entitled to reopen his deportation proceedings or that, as a matter of discretion, he should be allowed to do so. The record reveals clearly that respondent made deliberate, well-informed, tactical decisions throughout the proceedings to ensure deportation, if at all, to the country of his choice; that he recognized and knowingly assumed the risks that attended each decision; and that all that has happened is that the risks he recognized have in fact materialized. That which the Supreme Court said in the context of a similar attempt to rescind a litigating decision in an immigration proceeding is applicable to respondent:

> His choice was a risk, but calculated and deliberate and such as follows a free choice. [Respondent] cannot be relieved of such a choice because hindsight seems to indicate to him that his decision ... was probably wrong.... There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Ackermann v. United States, 340 U.S. 193, 198 (1950).[16]

III.

I turn first to the claims that respondent should be permitted to reopen his deportation proceedings because of (1) the unexpected, adverse decision of Attorney General Meese ordering him deported to the United Kingdom, (2) the supervening implementation in Ireland of the Extradition Act, *see* Respondent's Brief, *supra* note 11, at 14; Pike

[15] *See supra* note 14.

[16] *See also Ballenilla-Gonzalez v INS*, 546 F.2d 515, 520 (2d Cir 1976) (alien's waiver of claimed right to counsel was binding, despite her mistaken impression of the law, denial of motion to rehear upheld), *cert. denied*, 434 U S. 819 (1977), *Small v. INS*, 438 F.2d 1125, 1128 (2d Cir 1971) (alien's waiver through counsel of right to present further evidence at new hearing was binding; deportation order affirmed); *La Franca v. INS*, 413 F.2d 686, 690 (2d Cir 1969) (no reason to reopen proceeding to permit alien to try to establish eligibility for voluntary deportation where alien's counsel had previously waived request for hearing on voluntary departure); *Matter of M-*, 5 I & N Dec. 472, 474 (1953) (counsel's decision not to file application for suspension of deportation during pendency of deportation hearing was analogous to error of judgment in conduct of defense, since filing became untimely, denial of motion to reopen would not violate due process; motion was granted "purely as a matter of grace").

Affidavit, *supra* note 2, at paras. 24-28; and (3) the affidavits, book and report submitted by respondent. These events are portrayed as "new facts" warranting a reopening of proceedings. The BIA held that Attorney General Meese's order justified reopening and permitting respondent to withdraw his prior waivers of claims to asylum and withholding of deportation. *See* Respondent's Brief, *supra* note 11, at 9 & n.5. Respondent raised, but the BIA was not required to decide, the question of the effect of the Extradition Act because of its holding that Attorney General Meese's order was alone sufficient grounds upon which to reopen. *See Matter of Doherty*, No. A26 185 231, slip op. at 5-6 (BIA Nov. 14, 1988). The BIA suggested, but did not explicitly hold, that the affidavits and books would be sufficient to justify reopening. *Id.* at 6.

Deportation proceedings may be reopened by the BIA on the basis of new evidence if the evidence "is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2.[17] A motion to the BIA to reopen a deportation proceeding on the basis of previously unavailable evidence is "appropriate[ly] analog[ized]" to "a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden." *INS v. Abudu*, 485 U.S. 94, 110 (1988). Motions to reopen deportation proceedings on this ground are plainly "disfavored," *id.* at 107,[18] for reasons "comparable to those that apply to petitions for rehearing, and to motions for new trials on the basis of newly discovered evidence." *Id.* (footnotes omitted).[19] Generally, a motion to reopen on the grounds of new evidence will not prevail unless the proffered evidence is such that it probably would change the outcome of the prior proceeding.[20]

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[17] "Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 3.8. "Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Id.* at § 3.2.

Similarly, a motion to the immigration judge for reopening pursuant to 8 C.F.R. § 242.22 "will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." Except as otherwise provided, a motion to reopen under 8 C.F.R. § 242.22 "shall be subject to the requirements of § 103.5," which states in part that "a motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 103.5(a). A motion to reopen pursuant to 8 C.F.R. § 208.11 on the basis of an asylum request "must reasonably explain the failure to request asylum prior to the completion of the . deportation proceeding." *See also Ghosh v. Attorney General*, 629 F.2d 987, 989 (4th Cir. 1980), *Matter of Haim*, 19 I. & N. Dec. 641 (1988), *Matter of Lam*, 14 I. & N. Dec. 98, 99 (1972).

[18] *See also INS v. Jong Ha Wang*, 450 U.S. 139, 143 n.5 (1981) (regulatory language disfavors reopening).

[19] Failure to introduce previously available, material evidence, 8 C.F.R. § 3.2 (or, in an asylum application case, failure to reasonably explain the failure to apply for asylum initially, 8 C.F.R. § 208.11), is an independent ground upon which the BIA may deny a motion to reopen. *INS v. Abudu*, 485 U.S. at 104.

[20] *See United States v. Agurs*, 427 U.S. 97, 111 & n.19 (1976) (standard is generally applied on motions for new criminal trials), *Philip v. Mayer, Rothkopf Indus., Inc.*, 635 F.2d 1056, 1063 (2d Cir. 1980) (no new trial in civil case where movant's post-trial evidence would not "change our result here"); *United States v. Slutsky*, 514 F.2d 1222, 1225 (2d Cir. 1975) (post-trial evidence must be "so material that it would probably produce a different verdict"), *United States v. On Lee*, 201 F.2d 722, 724 (2d Cir.) (same), *cert. denied*, 345 U.S. 936 (1953).

While the BIA standards apply only to the BIA, not to the Attorney General, I refer to them in my consideration of the arguments made for reopening in this part because I believe they embody neutral inquiries that go directly to the issue of the applicant's justification for asking for, and the administrative system's justification for allowing, the reopening of proceedings previously closed.

Under these standards, I do not believe that either Attorney General Meese's decision or the implementation of the Extradition Act warrants reopening of respondent's deportation proceedings. Neither constitutes previously unobtainable material evidence as required by the regulations, *see* 8 C.F.R. §§ 3.2, 3.8, 242.22, nor a reasonable justification for permitting respondent to withdraw his waiver of his claim for asylum. *Id.* § 208.11.[21]

1. Attorney General Meese's June 9 order cannot properly be considered a "new fact." While the actual fact of the order is in some sense "new," the possibility that the Attorney General would refuse to accept respondent's designation of Ireland as the country to which he wanted to be deported was known, or should have been known, throughout the proceedings.

The authority of the Attorney General, in his discretion, to deny deportation to the country designated by an alien is plain on the face of the same statute that gives the alien the right to designate the country to which he wishes to be deported:

> The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, 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, *unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States.*

8 U.S.C. § 1253(a) (emphasis added). Given this explicit reservation of authority and its appearance in the very same sentence that accorded

[21] It is unnecessary for me to address (and I do not) the question whether respondent has established a prima facie case for the substantive relief sought. The Attorney General may decide not to reopen a deportation proceeding, even if the movant establishes a prima facie case for granting asylum or withholding of deportation. *See INS v. Abudu*, 485 U.S. at 105-07 (holding that motion to reopen may be denied in an asylum case if alien fails reasonably to explain failure to file asylum claim initially, and stating that "the BIA has discretion to deny a motion to reopen even if the alien has made out a prima facie case for relief" and that "in a given case, the BIA may determine . . as a sufficient ground for denying relief . . whether the alien has produced previously unavailable, material evidence (§ 3.2)"); *see also INS v. Rios-Pineda*, 471 U.S. at 449 ("even assuming that respondents' motion to reopen made out a prima facie case of eligibility for suspension of deportation, the Attorney General had discretion to deny the motion to reopen"), *INS v. Jong Ha Wang*, 450 U.S. at 144 n.5 (8 C.F.R. § 3.8 "does not affirmatively require the Board to reopen the proceedings under any particular condition"); *Bahramnia v. INS*, 782 F.2d at 1249, *Yousif v. INS*, 794 F.2d 236, 241 (6th Cir. 1986); *Ahwazi v. INS*, 751 F.2d 1120, 1122 (9th Cir. 1985), *Matter of A-G-*, 19 I. & N. Dec. 502 (1987), *Matter of Barocio*, 19 I. & N. Dec. 255 (1985).

respondent the right to designate Ireland his country of deportation, it is inconceivable that anyone represented by counsel could not know that there always existed a risk that the Attorney General would deny respondent's deportation to Ireland to protect the interests of the United States.

Even if the possibility of denial by the Attorney General were not so clear from the face of the statute alone, it should have been evident from the position taken by the Government from the outset of the proceedings. At the September 12, 1986, hearing at which respondent designated Ireland as his country of deportation, counsel for the INS objected to that designation, and stated that the INS would take the position that deportation to any country other than the United Kingdom would be prejudicial to the interests of the United States. Transcript of Sept. 12 Hearing, *supra* note 2, at 41-43, 47-48. The INS even represented that there was interest at the highest levels of the federal government in having respondent deported to the United Kingdom. *Id.* at 47 ("[T]his matter is of some concern at the highest levels of government and ... was under consideration by the legal advisor to the State Department and will be under the personal review of Attorney General Meiss [sic] this coming week.").

Given these representations by the INS, respondent clearly should have understood, if he did not, that "[a]fter the BIA determination, the case might ultimately be referred to the Attorney General at his request, at the request of the Chairman or a majority of the BIA, or at the request of the Commissioner of the INS." *Doherty v. Meese*, 808 F.2d at 942. Contrary to the conclusion of the BIA, *Matter of Doherty*, No. A26 185 231, slip op. at 6 (BIA Nov. 14, 1988), once this possibility was acknowledged, respondent reasonably should have known (again, if he did not) that the Attorney General ultimately might forbid deportation to Ireland. The ultimate decision in an administrative process cannot itself constitute "new" evidence to justify reopening. If an adverse decision were sufficient, there could never be finality in the process.

2. Respondent also characterizes Ireland's implementation of the Extradition Act, and specifically the provisions permitting extradition to the United Kingdom, as a supervening change requiring reopening of the proceedings. He terms this asserted change "the watershed event," Respondent's Brief, *supra* note 11, at 11-12, "the gravamen of [his] motion to reopen," *id.* at 14, and "[t]he event warranting the motion," Pike Affidavit, *supra* note 2, at para. 5.[22] For the reasons below, I do not believe that implementation of the Extradition Act was a "new fact." Moreover, even assuming that it was new and did represent a change in

[22] At one time, respondent suggested that the change in Irish law was the sole cause of his motion. *See* Reply Brief of Respondent-Appellee to Opposition to Respondent's Motion to Reopen or To Reconsider at 6 (Apr. 22, 1988) ("The cause of [respondent's motion's] December 3, 1987, filing was the implementation on December 1, 1987, of the Extradition Act. No grounds for its filing existed until December 1, 1987, respondent can hardly be faulted for not having filed it prior to that date.") (footnote omitted)

Irish law, it is irrelevant, given that Attorney General Meese ordered respondent deported to the United Kingdom, not Ireland.

It is plain that implementation of the Extradition Act was not a "new" fact. In the Anglo-Irish Agreement entered into at Hillsborough, Northern Ireland on November 15, 1985, the Irish Government expressed its intention "to accede as soon as possible to the European Convention on the suppression of terrorism." Ireland-United Kingdom: Agreement on Northern Ireland, Nov. 15, 1985, 24 I.L.M. 1579, 1581. Ireland signed the European Convention on February 24, 1986, *see, e.g., Ireland Signs Terrorism Convention*, Fin. Times, Feb. 25, 1986, § 1, at 4, more than six months before respondent withdrew his applications for asylum and for withholding of deportation and conceded deportability. *See* discussion *supra* pp. 3-4. Both the November 1985 Anglo-Irish Agreement and Ireland's February 1986 signing of the European Convention were widely publicized. *See, e.g., Fitzgerald Discusses Anglo-Irish Pact, U.S. Aid*, Ir. Echo, Mar. 22, 1986, at 6; Holland, *Ireland to Sign Anti-Terrorist Convention*, Ir. Echo, Mar. 1, 1986, at 2; *Complete Text of Anglo-Irish Agreement on Ulster*, The Times (London), Nov. 16, 1985, at 4. Respondent, having expressly based his designation on a counseled understanding of Irish extradition laws, is properly chargeable with knowledge of Ireland's signing of the European Convention.

The Extradition Act, which gave effect in Irish law to the European Convention and amended the Extradition Act of 1965, was passed on January 21, 1987. Extradition (European Convention on the Suppression of Terrorism) Act, No. 1 (1987). Section 13 of the Extradition Act provided that its implementation was suspended until December 1, 1987, subject to the condition that resolutions of both Houses of the Irish Parliament could bring it into force at an earlier date or provide for further postponement. *Id.* § 13.[23] In sum, "the watershed event" upon which respondent relies was neither sudden nor unforeseeable. Instead, it was the logical culmination of a lawmaking process that had been set in motion more than two years prior to December 1, 1987.

Even were the fact of the Extradition Act "new," it would not justify reopening of the deportation proceedings. A supervening change in the law does not generally constitute a reason for granting a new trial or for amending a judgment, even if the litigant has abandoned a claim or defense that might be meritorious in light of the change.[24] And, as noted, a change in law that would not constitute grounds for a new trial ordi-

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[23] Pursuant to section 13, the Extradition Act was automatically implemented on December 1, 1987. Acceleration or postponement of the implementation date, however, would not have affected the Extradition Act's applicability to respondent. By its terms, the Extradition Act applies to offenses committed or alleged to have been committed "before or after" the date of passage, January 21, 1987. Extradition Act at § 1(4)

[24] *See* Fed R. Civ P. 59(a), *Del Rio Distrib , Inc. v Adolph Coors Co* , 589 F2d 176, 178-79 (5th Cir.), *cert denied*, 444 U.S. 840 (1979)

narily does not justify reopening deportation proceedings. *INS v. Abudu*, 485 U.S. at 913-14. Some courts have held that an exception to this general rule against a new trial exists where the change in law would affect the rule pursuant to which the prior decision was made. *See, e.g., United States v. Bank of America Nat'l Trust & Sav. Ass'n*, 51 F. Supp. 751, 751 (N.D. Cal. 1943). *But see McMann v. Richardson*, 397 U.S. 759, 774 (1970). Here, however, the Extradition Act did not alter the rules of decision applied by the immigration judge or the Attorney General in either the section 1253 proceedings or the asylum and withholding of deportation proceedings. As to the former, the immigration judge and Attorney General Meese ordered respondent deported to Ireland and the United Kingdom, respectively, based upon their assessments of the foreign policy interests of the United States. The interests of the United States, and the compatibility of deporting respondent to either country with those interests, are the same now as they were prior to the implementation of the Extradition Act. As to the latter, the Extradition Act could not have and did not change the standards that apply to respondent's asylum and withholding of deportation claims under the statutes of the United States. Accordingly, any change in law wrought by the Extradition Act does not call into question the legal correctness of the decisions that were made by either the immigration officials or Attorney General Meese.

Respondent presumably would argue that, if not a change in law, the implementation of the Extradition Act must represent a change in fact justifying reopening of the proceedings because the Extradition Act expressly provides for extradition by Ireland to the United Kingdom. This argument, too, is unpersuasive.

I do not believe that the Extradition Act's provisions, as they relate to respondent, represent a change in fact that would warrant reopening these deportation proceedings. Respondent was extraditable by Ireland to the United Kingdom before the Extradition Act was implemented; he would be extraditable under the Extradition Act. Indeed, respondent himself repeatedly emphasized the serious risk of extradition by Ireland before passage of the Extradition Act in arguing for affirmance of the immigration judge's order that he be deported to Ireland.[25] For example, in his December 1986 brief, he states, "the Service fails to note that decisions of the Irish Supreme Court are viewed as having vitiated the political offense exception, thereby removing any obstacle to respondent's extradition from Ireland to Northern Ireland. *See, e.g., McGlinchey v. Wren*, 3 Ir. L. Rep. Monthly 169 (1982)." Brief for Respondent Appellee Joseph Patrick Thomas Doherty at 16 (Dec. 19, 1986). In the Doherty

[25] *See* Doherty Petition, *supra* note 2, at paras 53-54, Brief for Respondent-Appellee Joseph Patrick Thomas Doherty at 16 (Dec 19, 1986), Reply of Respondent to Opposition of the INS to Respondent's Motion for Summary Dismissal at 7 n 5 (Oct. 27, 1986), Brief for Appellant John Patrick Thomas Doherty at 14 (Oct 2, 1986)

Petition, *supra* note 2, at paras. 53-54, respondent's attorney, Stephen Somerstein, stated:

> The Republic of Ireland ... has extradition arrangements with the United Kingdom and has recently extradited to Northern Ireland individuals who had raised the political offense exception as a defense to their extradition, but were found by the Irish courts to be non-political offenders. Upon his deportation to Ireland, Mr. Doherty is subject to extradition from Ireland to Northern Ireland pursuant to a request therefor by the English government. His case will be considered by the courts of the Republic of Ireland pursuant to the well established law of that country in an historical context but best understood by the Irish and British themselves.

The only difference since implementation of the Extradition Act appears to be that extradition is now expressly provided for by statute, whereas previously extradition was simply ordered on the basis of less formal "extradition arrangements" between the United Kingdom and Ireland. *See* Doherty Petition, *supra* note 2, at para. 53. Given that respondent faced a serious risk of extradition by the United Kingdom before implementation of the Extradition Act, it cannot be said that the mere express provision for extradition in the statute constitutes new evidence.

Respondent claims that the Extradition Act transformed "the possibility of [his] removal from Ireland to the United Kingdom ... into a certainty." *See* Respondent's Brief, *supra* note 11, at 14. Respondent's effort to minimize the risk of deportation by Ireland before implementation of the Extradition Act contradicts the statements that he made before the BIA in defense of the immigration judge's order deporting him to Ireland. *See* discussion *supra* note 25.

Furthermore, it is unsupported by the provisions of the Extradition Act itself which, incorporating the terms of the European Convention, provide for denial of extradition where

> there are substantial grounds for believing that —
>
> ...
>
> (ii) the warrant was in fact issued for the purpose of prosecuting or punishing (the person named) on account of his race, religion, nationality or political opinion or that his position would be prejudiced for any of these reasons.

Extradition (European Convention on the Suppression of Terrorism) Act, No. 1 § 8 (1987); *see also id.* § 9. Thus, existing Irish law explicitly pre-

serves for respondent the right to raise essentially those claims that he would have relied upon under pre-existing Irish law. Accordingly, if respondent has a meritorious claim that extradition to the United Kingdom by Ireland would result in persecution, he could raise that claim today before Irish officials who, as respondent has previously suggested, *see* discussion *supra* p. 15, would view his claim with greater understanding.[26] The reasonable inference therefore is that respondent cannot credibly maintain now that the change in Irish law has made his return to the United Kingdom inevitable, and that, as a consequence, he should be permitted to reopen and redesignate a country other than Ireland.[27]

Respondent's argument on the Extradition Act comes down to the fact that he believes that he will be given a more sympathetic hearing on an asylum or withholding of deportation claim in this country than he would receive on a denial of extradition claim in his own country. Absent reason to think that respondent will not receive a fair hearing in his home courts of Ireland, this is simply not a basis for reopening his deportation proceedings.

I would reject respondent's claim based upon implementation of the Extradition Act on a separate and independent ground: even if I agreed that the Extradition Act was a new fact and constituted a change in Irish law, I believe that any change in Irish law is irrelevant. Attorney General Meese determined that it would be against the interests of the United States to deport respondent to Ireland, and in furtherance of our national interests to deport him to the United Kingdom where he could be

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[26] Indeed, there is reason to believe that the Extradition Act has actually enhanced the defenses available to an individual seeking to resist extradition from Ireland to the United Kingdom. Under the Extradition (Amendment) Act, No 25 (1987), the Attorney General of Ireland is prohibited from endorsing for execution an arrest warrant under the Extradition Act unless he is of the opinion that "there is a clear intention to prosecute or .. continue the prosecution of, the person named or described in the warrant concerned for the offence specified therein" in the country seeking extradition, and "such intention is founded on the existence of sufficient evidence " *Id* § 2(1)(a). Furthermore, extradition may also be refused on the grounds that, "by reason of the lapse of time since the commission of the offence . or the conviction of the person named .. and other exceptional circumstances, it would ... be unjust, oppressive or invidious to deliver him up " *Id* § 2(1)(b). At least one recent study indicates that the Extradition Act does not go as far as the Irish Supreme Court has gone in circumscribing the political offense exception. Gerard Hogan & Clive Walker, *Political Violence and the Law in Ireland* 292-93 (1989)

The actual administration of Irish extradition law after the implementation of the Extradition Act also suggests that it is less than certain that respondent would be extradited to the United Kingdom were he deported to Ireland. On December 13, 1988, the Attorney General of Ireland issued a statement rejecting a request by the government of the United Kingdom to extradite the suspected PIRA terrorist Patrick Ryan, whom the British authorities wished to try for alleged terrorist activities, including conspiracy to murder, possession of explosives, and conspiracy to cause explosions. *See, e g.*, Sheila Rule, *Irish Deny British Bid to Extradite Priest Suspected of Aiding I.R.A.*, N.Y. Times, Dec. 14, 1988, at A3 In view of the Irish Attorney General's decision not to comply with that extradition request, it seems entirely possible that a request to extradite respondent from Ireland might also be rejected

[27] Even were I to assume that implementation of the Extradition Act increased the risk that respondent would be extradited to the United Kingdom from Ireland, I would not grant the motion to reopen respondent's proceedings. Any change in the risk of extradition would necessarily be immaterial, given that the risk was "serious" before implementation of the Extradition Act and is no more than serious (*i.e.*, not certain) today

promptly punished for the crimes he has committed. *Deporation Proceedings*, 12 Op. O.L.C. at 6-7. Unless I overturn Attorney General Meese's order, which I have no reason to do, a change in Irish law has no effect upon respondent. Respondent cannot be deported to Ireland because of the extant determination that that would be contrary to the interests of the United States, and he cannot claim asylum against deportation to the United Kingdom because he assumed the risk of deportation to the United Kingdom when he designated Ireland. *See* discussion *supra* pp. 12-13. This is unlike the situation where an alien designates a particular country and there is a subsequent change in the country that increases the likelihood of his persecution in that country. In that circumstance, the alien may be harmed by the change because he is being deported to the country in which the change occurred. Here, in contrast, assuming arguendo that there was a change in Irish law, that change cannot affect respondent because he is not going to be deported to Ireland.

3. Respondent also urges reopening on the ground that he is proffering new evidence in the form of affidavits and documents. This evidence is not both material and previously unobtainable. *See* 8 C.F.R. §§ 3.2, 242.22.[28] "When an alien has already had one full deportation hearing, with all the procedural rights accompanying it, ... he or she may have it reopened only upon a showing of significant new evidence." *Acevedo v. INS*, 538 F.2d 918, 920 (2d Cir. 1976) (per curiam). Substantially all of the evidence submitted by respondent is either cumulative of that which he has previously presented, discoverable long ago, or not material in light of the evidence that was presented. None of the evidence supports existence of a threat of persecution of which respondent was unaware or a material change in the character of a threat previously recognized.

(a) Respondent proffers certain documents, including a report by Amnesty International, *United Kingdom/Northern Ireland: Killings by Security Forces and "Supergrass" Trials* (1988) ("Amnesty Report"), and a book relied on by Amnesty International in its report, John Stalker, *The Stalker Affair* (1988); by the former Deputy Chief Constable of the Greater Manchester (U.K.) Police Force, which he maintains contain new evidence of the threat he faces by deportation.[29] Both the Amnesty Report and the Stalker book focus on allegations that British security forces have killed or wounded unarmed individuals suspected of membership in republican armed opposition groups, as part of a government policy of eliminating rather than arresting such individuals. The incidents of "particular concern" to Amnesty International were "the killings of six

[28] The BIA provided no analysis to support its conclusory assertion that "respondent has submitted recently published background evidence which we find to be material to the respondent's case." *Matter of Doherty*, No. A26 185 231, slip op. at 6 (BIA Nov. 14, 1988) Nor did Board Member Heilman provide any analysis of these materials in his concurring opinion.

[29] The contents of these documents are summarized by respondent's counsel in the Pike Supplemental Affidavit, *supra* note 13

unarmed persons in late 1982." Amnesty Report at 7; *see id.* at 17-25 (discussing the 1982 events). Information concerning these events was available to respondent well before he brought his motion to reopen, and indeed even before he withdrew his claims for asylum and withholding of deportation in September 1986. *See Matter of Lam*, 12 I & N Dec. 696 (1968).[30] Thus, although the Amnesty Report itself first appeared in 1988, respondent could, with due diligence, have presented significant amounts of the information contained in it at a much earlier stage of these proceedings.[31] He offers no reasonable explanation for his failure to do so.

(b) Respondent also proffers an affidavit from his mother, describing her family's dealings with the British security forces, and with Ulster "unionist" elements outside the government.[32] Even accepting as true the recitals set forth, the affidavit merely presents evidence that was discoverable earlier. Again, he offers no explanation as to why he did not proffer the evidence during any of the earlier proceedings.[33]

Moreover, the evidence is essentially cumulative of that offered previously. The theme of the affidavit is that a longstanding pattern of conduct by British military and police forces in Northern Ireland, coupled with the violent activities of pro-unionist elements among the Protestant population, indicates the presence of danger to suspected republican sympathizers generally, and particularly to the respondent and his family.[34] This claim, and indeed much of the evidence cited to support it, is substantially the same as that presented by respondent when he first claimed relief in June 1983; it does not suggest existence of either a new source

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[30] *Lam* is closely analogous to this case In *Lam*, the BIA denied a concededly deportable alien's motion to reopen in order to withdraw his designation of Hong Kong as his country of deportation, and to permit him to apply for temporary withholding of his deportation thereto The alien claimed that he should have been given the opportunity to withdraw his designation because of Communist riots that broke out in Hong Kong in May 1967 He contended that he had fled from mainland China as a refugee from Communism, and that the riots gave rise to a fear that he would be persecuted by the Communists if he were sent to Hong Kong. The BIA denied his motion, in part because his evidence was not previously unobtainable. the movant could have advanced his claim for asylum in a July 1967 hearing, *i e.*, two months after the riots, but had not done so

[31] Amnesty International's concerns over the causes of the incidents against Irish republic groups do not bear on the treatment of individuals held in prison for criminal activities Assuming for the purposes of this motion that British security forces have on occasion sought to kill suspected republican opposition members who were outside their custody, it does not follow that an individual actually in the keeping of British forces would also be exposed to such a threat.

[32] The affidavit's references to the conduct of nongovernmental "unionist" elements relate generally to the unstable conditions in Northern Ireland, but do not substantiate a claim that he would be threatened by persecution at the hands of British governmental authorities *Cf Matter of A- G-*, 19 I & N Dec 502, 506 (1987)

[33] The affidavits of respondent's counsel, *supra* notes 2-3, also fail to provide previously unobtainable material evidence. The pertinent facts recited therein are found elsewhere in respondent's submissions or are otherwise matters of record

[34] The danger indicated, it should be noted, need not be understood as a danger of *persecution* The lawful use of force by authorized officials which is reasonably aimed at detecting, preventing, or punishing criminal activity does not support a claim of persecution The affiant's statement does not attempt to distinguish such activity on the part of the British military and police from the other types of conduct she describes.

of persecution or a heightened danger of persecution from an existing source which respondent did not previously apprehend.[35] In fact, substantial portions of Mrs. Doherty's affidavit relate to matters which occurred even before respondent withdrew his claims for asylum and withholding of deportation.[36] Other events of more recent occurrence, although they may comprise information not previously available to respondent, are not sufficiently material to warrant reopening.[37]

IV.

I am also exercising my discretion to deny respondent's motion to reopen on the independent ground that he knowingly and intelligently waived any claim that he might have had to asylum and withholding of deportation.

In my judgment, at least in this particular case, the interests in the integrity of the administrative process and finality of decision should pre-

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[35] *See Ganjour v. INS*, 796 F.2d 832, 838 (5th Cir. 1986) (application for reopening untimely where based on information from telephone call by alien's sister in Iran predating immigration hearing and appeal); *Young v. INS*, 759 F.2d 450, 456-57 (5th Cir.) (affidavit stating that alien's daughter had recently been arrested and interrogated about him by Guatemalan police was cumulative of prior evidence), *cert. denied*, 474 U.S. 996 (1985), *cf. Bernal-Garcia v. INS*, 852 F.2d 144, 146-47 (5th Cir. 1988) (new evidence consisted of letter received after conclusion of deportation proceedings relating previously unknown death threat made two weeks earlier), *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (supporting affidavits described political events "that, in relevant part, had not occurred until [after (movant's)] earlier deportation proceedings had concluded").

[36] *See* M. Doherty Affidavit, *supra* note 12, at paras. 1-20, 22-23, 25-27, 36-38 (relating information, substantially all of which was available prior to respondent's withdrawal of his claims for asylum and withholding of deportation on September 12, 1986). Thus, for instance, the affiant's accounts of arrest, trial, and acquittal of respondent's sister on a charge of murder in 1983, *see id.* at para. 20, or of subsequent events in 1985 and 1986 involving her daughter and of the man with whom her daughter lives, *see id.* at paras. 23-28, would appear to have been available to respondent well before his waiver of his asylum claim. Indeed, in his 1983 application for asylum, respondent referred to arrests of his mother, father, and three sisters at various times in the *prior twelve* years, and to the bombing of his family's house *in 1974* by what he described as a "quasi-official Protestant group." *See* Respondent's Application for Political Asylum, signed June 27, 1983. Much of respondent's mother's affidavit simply elaborates on or adds detail to such allegations.

[37] For example, the affiant states that her son-in-law had been arrested about five weeks before she made out her affidavit, and that while he was detained, the police "made abusive remarks to him" about respondent. M. Doherty Affidavit, *supra* note 12, at para. 35. Again, for example, the affiant states that on two unidentified occasions on which her daughter was detained by the police, "the interrogators talked about [respondent] and what would be done to him upon his return." *Id.* at para. 24. Such evidence is not different in tenor from the allegations respondent made when originally claiming asylum in 1983. Furthermore, the statements attributed to the security personnel are ambiguous. Bearing in mind that respondent has been convicted of a murder, "abusive" statements about him by the police, or statements about "what would be done to him" if he were returned, do not have to be understood as implied threats of persecution on forbidden grounds.

Other submissions by the affiant concern, for example, the exposure of an alleged conspiracy in September 1987 by nongovernmental "unionist" elements to murder Anthony Hughes, the man with whom affiant's daughter lives. *Id.* at paras. 31-32. Such evidence is not relevant to establishing that the respondent would have a well-founded fear of persecution at the hands of *governmental* authorities, or that they would threaten him with loss of life or freedom for proscribed reasons.

Finally, other parts of affiant's statements, *e.g.*, *id.* at para. 40, are cumulative of evidence submitted elsewhere in this motion.

vail over whatever interest respondent has in withdrawal of his calculated waivers because of an unfavorable decision, which was clearly foreseeable at the time. [38]

Respondent expressly conceded deportability and withdrew his claims to asylum and withholding of deportation on September 12, 1986. He did so on the record, through counsel, in response to a direct question from the immigration judge as to whether he intended to waive these claims. *See* discussion *supra* pp. 3-4. By any standard, respondent's decision was an intentional relinquishment of any right to claim asylum relief from deportation. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Further, it was a knowing waiver. It was calculated in an attempt to avoid extradition directly to the United Kingdom under a treaty between the United States and the United Kingdom soon to be ratified. *See Doherty v. Meese*, 808 F.2d at 940. It appeared likely at the time that the United Kingdom would ratify its treaty with the United States, which could have provided for respondent's direct extradition to the United Kingdom, before any decision could be made on asylum or withholding of deportation. Facing imminent ratification of this treaty, respondent chose to leave the United States as quickly as possible, rather than risk direct extradition to the United Kingdom in the event the treaty were ratified. *See id.* (respondent "urgently want[ed]" to escape the effects of the then-pending Supplementary Treaty). When he chose to waive any claims to asylum and withholding of deportation to avoid the possibility of direct extradition to the United Kingdom, he assumed the risk that Attorney General Meese might deny deportation to Ireland, whatever risks to him that existed at the hands of the Irish, and the risk that the move then underway to obtain ratification of Ireland's treaty with the United Kingdom would prove successful.

This tactical decision by respondent was fully within his rights. However, when he made this decision, he assumed the risk that he would be denied his request to be deported to Ireland, and required to go elsewhere. *See* discussion *supra* pp. 12-13. The fact that respondent's attempt to work the regulatory process to his advantage failed, should not, absent exceptional circumstances, relieve him of the consequences of the decisions made in the attempt to work the process to his advantage.[39] The Supreme Court has observed that courts "cannot permit an accused to

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[38] Again, here, as in Part III *supra*, I need not and do not decide whether respondent can make out a prima facie case for the substantive relief sought. *See supra* note 21

[39] Respondent's concession of deportability and withdrawal of any claim to relief is analogous to a guilty plea "[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary" *United States v. Broce*, 488 U.S 563, 569 (1989). *See also Brady v United States*, 397 U.S 742, 757 (1970) ("A defendant is not entitled to withdraw his plea [of guilt] merely because he discovers long after [it] has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.").

elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide." *Johnson v. United States*, 318 U.S. 189, 201 (1943).[40] So here, respondent's tactical decisions should not be revocable merely because later events did not unfold as he wished. If we were not to give near-preclusive effect to an express waiver under circumstances such as exist here, the regulatory process could be manipulated at will by litigants making and withdrawing waivers *ad libitum*, at the expense of the fair and expeditious administration of meritorious deportation claims.

V.

I also deny the motion on the separate ground that respondent would not ultimately be entitled either to the discretionary relief of asylum or to withholding of deportation.

1. I deny the motion to reopen to permit the claim of asylum because, in my view, respondent would not ultimately be entitled to this discretionary relief, *INS v. Abudu*, 485 U.S. at 105, even if he could now establish a prima facie case for such relief.[41]

The grant of asylum is discretionary with the Attorney General.[42] In my discretion, I would not grant the respondent asylum. First, it is "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." *Deportation Proceedings* 12 Op. O.L.C at 6. Deporting respondent to the United Kingdom would unquestionably advance this important policy. *See id.* at 5-6. Second, the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom. *Id.* at 6-7. Third, respondent knowingly and intentionally waived his claim to asylum, and for the reasons explained in Part IV, *supra*, I would not permit withdrawal of that waiver. Fourth, I believe that respondent's membership in and assistance of the PIRA in its acts of persecution, and the nature and number of his criminal acts in general, *see* discussion *supra* pp. 1-2, suggest that he is not deserving of equitable relief.

2. I also deny the motion for reopening to permit respondent to raise a

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[40] *See also United States v. Prince*, 533 F.2d 205 (5th Cir. 1976) (antitrust defendants not permitted to withdraw *nolo contendere* pleas, made after consulting counsel, when sentences proved harsher than expected).

[41] Insofar as respondent also requests reopening to enable him to seek the nondiscretionary relief of withholding of deportation, I conclude, for the reasons set forth *infra* pp. 22-27, that respondent is statutorily ineligible for that relief.

[42] *See INS v. Stevic*, 467 U.S. at 421 n 15, 426; *INS v. Cardoza-Fonseca*, 480 U S. at 443-45. The discretionary authority of the Attorney General is not restricted to the enumerated grounds which compel an INS district director to deny asylum 8 C.F.R. § 208 8(f)(1)-(vi)

sustain an argument that, upon deportation, his "life or freedom would be threatened ... on account of race, religion, nationality, membership in a particular social group, or political opinion" within the meaning of 8 U.S.C. § 1253(h)(1), he would be ineligible, on two separate grounds, for nondiscretionary withholding of deportation under 8 U.S.C. § 1253(h)(2)(A), (C).

(a) Subsection 1253(h)(2)(C) provides that the prohibition on deportation in § 1253(h)(1) is inapplicable where "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States."[43] By its terms, this subsection does not require the Attorney General to find that an alien has actually committed a serious nonpolitical crime, but merely to find that there are serious reasons for *considering* that an alien has committed such a crime. *See McMullen v. INS*, 788 F.2d 591, 596-99 (9th Cir. 1986). In conferring this latitude on the Attorney General, the statute recognizes that cases involving alleged political crimes arise in myriad circumstances, and that what constitutes a "serious nonpolitical crime" is not susceptible of rigid definition. As one commentator has observed, "[i]n practice, characterization of an offence as 'political' is left to the authorities of the state," and "the function of characterization itself is ... one in which political considerations will be involved." Guy S. Goodwin-Gill, *The Refugee in International Law* 35 (1983).

In *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986), the court set forth an analytical framework for determining whether an alien has committed a "serious nonpolitical crime" within the meaning of section 1253(h)(2)(C). There must be a "'close and direct causal link between the crime committed and its alleged political purpose and object.'" *Id.* at 597 (quoting Guy S. Goodwin-Gill, *supra*, at 61). Additionally, the crime "should be considered a serious nonpolitical crime if the act is disproportionate to the objective, or it is 'of an atrocious or barbarous character.'" *Id.* at 595 (quoting Guy S. Goodwin-Gill, *supra*, at 61). Both strands of this suggested analysis are satisfied here.[44]

It is the official position of the United States Government that the PIRA is a terrorist organization. U.S. Dep't of State, *Patterns of Global Terrorism: 1986* at 33-34 (1988) & 1989 at 74-75 (1990) (identifying the

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[43] Thus subsection, which was added to the Immigration and Nationality Act as part of the Refugee Act of 1980, Pub L No 96-212, § 203(e), 94 Stat. 102, 107, is based directly upon, and is intended to be construed consistent with, the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, which incorporates by reference the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 *See McMullen v. INS*, 788 F.2d at 594-95.

[44] That respondent's extradition was denied on the grounds that the crime for which extradition was sought was a political offense under the Extradition Treaty then in force, *see Matter of Doherty by Gov't of United Kingdom*, 599 F Supp. 270 (S.D N.Y 1984), has no bearing on the instant inquiry, which is a matter of statutory interpretation of 8 U.S.C. § 1253(h)(2)(C) *See McMullen v INS*, 788 F.2d at 596-97.

Terrorism: 1986 at 33-34 (1988) & 1989 at 74-75 (1990) (identifying the PIRA as a terrorist organization);[45] *see also McMullen v. INS*, 788 F.2d at 597 ("[t]he PIRA is unquestionably a 'terrorist' organization"). The INS has introduced substantial evidence that PIRA is a terrorist organization which commits violent acts against innocent civilians, *see Matter of McMullen*, 19 I & N Dec. 90 (1984). And the BIA has specifically found that the PIRA has engaged in "indiscriminate bombing campaigns, ... murder, torture, and maiming of innocent civilians who disagreed with the PIRA's objectives and methods." *Id.* at 99-100, *quoted in McMullen v. INS*, 788 F.2d at 597.

In my view, there is substantial evidence that PIRA has committed terrorist activities directed at innocent, civilian populations. *See McMullen v. INS*, 788 F.2d at 597 (substantial evidence exists that PIRA committed "terrorist activities directed at an unprotected civilian population"). These "random acts of violence" against civilians constitute "serious nonpolitical crimes" for purposes of 8 U.S.C. § 1253(h)(2)(C). *Id.* at 598.

As the court held in *McMullen*, 788 F.2d at 599, I need not determine that respondent committed any of these unprotected crimes against the civilian population. "We are unmoved by the pleas of a terrorist that he should not in any way be held responsible for the acts of his fellows; acts that, by his own admission, he aided ... and assisted ... and otherwise abetted and encouraged." *Id.*[46] I need only find that there is "probable cause" to believe that respondent committed such crimes. *Id.*

In *McMullen*, the court held that conduct remarkably similar to respon-

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[45] *See also* 1 Pub Papers of Ronald Regan 751 (1984) (PIRA "has all the attributes of a terrorist organization"); 43 Cong Q. 1388, 1389 (1985) (address by President Reagan); 84 State Dep't Bull. 12, 13, 15 (Dec. 1984) (Sec Shultz) (U.S. joins U.K. and Irish government "in opposing any action that lends .. support to the Provisional IRA"), Staff of House Comm on Foreign Relations, 101st Cong , 1st Sess , Country Reports on Human Rights Practices for 1988 at 1236-37 (Comm Print 1989) (Reports submitted by Dep't of State) (PIRA admissions of terrorist activities); Affidavit of Assoc Att'y Gen. Stephen S. Trott, sworn to Feb 19, 1987, at para. 8 ("It is the position of the United States Government that the crimes committed by Doherty — hostage taking, murder, and assault with intent to commit murder — are terrorist offenses.").

[46] Under general principles of conspiracy law, a co-conspirator is chargeable with any criminal act committed by another co-conspirator in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946) Respondent's membership in the PIRA makes him a co-conspirator in the PIRA's effort to overthrow British rule in Northern Ireland by violent means, and hence responsible for any *nonpolitical* crimes his co-conspirators commit in pursuit of that objective. The "PIRA's random acts of violence against the ordinary citizens of Northern Ireland and elsewhere" are "exhaustively documented in the record" of the *McMullen* case. *McMullen*, 788 F.2d at 598 Moreover, the BIA has found that

> the PIRA is a clandestine, terrorist organization committed to the use of violence to achieve its objectives . [and has engaged in] attacks on both government civilian institutions and military installations, random violence against innocent civilian populations through indiscriminate bombing campaigns, the murder or maiming of targeted individuals for political reasons based on their public opposition to the PIRA, and the use of violence to maintain order and discipline within the PIRA's membership. Its operations have been funded, in part, through the commission of thousands of armed robberies.

Matter of McMullen, 19 I & N Dec 90, 92 (1984) (citations omitted), *aff'd on other grounds*, 788 F.2d 591 (9th Cir. 1986) Based on these judicial and administrative findings, I of course have serious reasons to consider that PIRA members have committed serious nonpolitical crimes in the course of their conspiracy, and thus to conclude that respondent, as a co-conspirator, can be held responsible for committing crimes of such a character, even if he personally did not perform them.

dent's was sufficient to establish probable cause to believe that the petitioner had committed some of PIRA's unprotected nonpolitical crimes. The relevant passage bears quotation at some length:

> McMullen admits that he was an active member in the PIRA, that he trained its members and participated in unlawful arms shipments as well as bombings of military installations. With regard to the PIRA itself, there is no question that it has undertaken terrorist activities directed at civilian targets in a manner unprotected as a political offense. We conclude that the "totality of the circumstances," *cf. Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527, [543] (1983), which include McMullen's willing and material involvement in a terrorist organization that carried out acts of violence against civilians, his assistance in training members of that organization and procuring arms shipments, support the BIA's conclusion that there are "serious reasons" to believe that McMullen committed some of these unprotected, serious nonpolitical crimes.

788 F.2d at 599. Here, as with the petitioner in *McMullen*, there clearly is the requisite probable cause to believe respondent has committed unprotected crimes. Respondent is a longstanding, active member of the PIRA. *See* discussion *supra* pp. 1-2 and *infra* notes 47, 53. He has admittedly committed violent acts in furtherance of the purposes of the PIRA. Like the petitioner in *McMullen*, respondent has provided the PIRA with "the physical and logistical support" that enables this terrorist group to operate. 788 F.2d at 599.[47]

Respondent's membership and participation in, aiding of, and assistance to the PIRA is sufficient to constitute probable cause to believe that respondent has committed unprotected criminal acts, and therefore sufficient basis upon which to conclude that there are "serious reasons" to believe that respondent has committed "serious nonpolitical crimes."

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[47] Respondent readily admits

> the facts that [he] was an "admitted member" of the Irish Republican Army, that he was convicted of the murder of a British Army officer and other violent offenses, that he and seven other IRA volunteers escaped from prison in Northern Ireland, and that he is currently the subject of outstanding warrants of arrest in the United Kingdom are, pursuant to the opinion [by Judge Sprizzo] in *Matter of Doherty*, matters of public information and readily available to all, including immigration judges.

Brief for Respondent-Appellee Joseph Patrick Thomas Doherty, *supra* note 25, at 3 (footnote omitted).

[48] Attorney General Meese noted in his June 9, 1988 opinion that violence against military personnel in a democratic society is unjustified, as is violence against civilians. *Deportation Proceedings*, 12 Op. O.L.C. at 5. Nothing herein is intended to suggest otherwise. It is not necessary for me to decide here whether violence against military personnel is alone sufficient to satisfy section 1253(h)(2)(C) because (1) respondent's other activities, together with his acts against British military personnel, are clearly sufficient, and (2) respondent's participation in violent acts against civilians is also alone sufficient.

McMullen, 788 F.2d at 598.[48] Indeed, this may even be a stronger case for application of the exception than in *McMullen*, given the record evidence that respondent committed a murder; smuggled large quantities of explosives in a car hijacked by a PIRA unit; drove to an ambush site in a hijacked van, the driver of which was held captive; and took over a family-occupied house in a civilian, residential neighborhood for the purpose of ambushing a British army patrol. *See* Transcript of Respondent's Testimony at 773-74, 783-86 & 792-96, *Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp. 270 (S.D.N.Y. 1984) ("Doherty Transcript").[49] *Compare McMullen v. INS*, 788 F.2d at 592-93, 599.[50]

(b) Respondent also has "assisted, or otherwise participated in the persecution of ... person[s] on account of ... political opinion," rendering him ineligible for withholding of deportation under 8 U.S.C. § 1253(h)(2)(A). *See McMullen v. INS*, 788 F.2d at 600 (Goodwin, J., concurring). Respondent is a member of the PIRA, an organization that the BIA found has killed or attempted to kill those who politically oppose its activities.[51] Moreover, as a PIRA officer, respondent was admittedly responsible for distributing arms and gathering ammunition, Doherty Transcript, at 726, and he engaged in training and drilling other PIRA members. *Id.* at 734. These facts establish by ample evidence that respondent would be ineligible for withholding because of his participation in the PIRA's persecution of political opponents.

Again, it is not necessary for me to find that respondent was directly and personally involved in any of the PIRA's attacks on political targets. *See, e.g., McMullen v. INS*, 788 F.2d at 600 (Goodwin, J., concurring).[52] Respondent's active roles in arming and training the PIRA, coupled with his willing membership in that organization, the length of his service in it,

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[49] As the dissenting opinion in the BIA decision below pointed out, "it is fortuitous that the civilian hostages [taken by respondent and his associates] were uninjured in view of the fact that they were ... exposed to a gun battle." *Matter of Doherty*, No. A26 185 231, slip op. at 4 (BIA Nov. 14, 1988) (Morris, B.M., dissenting).

[50] Apart from the *McMullen* analysis, I determine that there are "serious reasons for considering" the offenses indisputably committed by respondent, *see, e.g.*, discussion *supra* note 47, to be "serious non-political crimes" within the meaning of section 1253(h)(2)(C). These crimes standing alone involved disproportionate threats to civilian life and property.

[51] *See Matter of McMullen*, 19 I. & N. Dec. 90 (1984) (PIRA engages in the murder or maiming of target individuals for political reasons based on their public opposition to the PIRA, among these targeted individuals was Ross McWhirter, founder of the *Guinness Book of Records*, for whose death the PIRA claimed "credit").

[52] *Cf. Kulle v. INS*, 825 F.2d 1188, 1192-93 (7th Cir. 1987) (almost identical language to 8 U.S.C. § 1253(h)(2)(A) held not to require proof of individual participation); *Schellong v. INS*, 805 F.2d 655, 661 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). *See also United States v. Osidach*, 513 F. Supp. 51, 72 (E.D. Pa. 1981) ("[U]nder § 13 of the [Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009], mere willing membership — without proof of personal participation in acts of persecution — in a movement that persecute[s] civilians is sufficient to warrant a finding of ineligibility [for admission into the United States] as a displaced person."), *but cf. Laipenieks v. INS*, 750 F.2d 1427, 1431 (9th Cir. 1985).

[53] In his extradition trial, respondent testified.

> I held several [PIRA] staff positions in Long Kesh [prison], from the section leader, company staff, officer's position. I was a company quartermaster, a company training officer, a com-

Continued

and the rank he attained,[53] more than suffice to show that he "assisted" the PIRA's political persecutions under the statute. Even if membership in the PIRA, standing alone, would be insufficient to bar respondent from relief under section 1253(h)(2)(A), *see Matter of Rodriguez-Majano*, 19 I & N Dec. 811 (1988), respondent's activities on behalf of the PIRA fairly implicate him in those persecutions.[54]

Additionally, section 1253(h)(2)(A) reaches persons who have "otherwise participated in" persecution, even if they have not "assisted" in the persecution. This broad language covers forms of collaboration that are not otherwise captured by the Act, and undoubtedly extends to respondent's activities.[55]

On either of the above bases, respondent is not entitled to withholding of deportation.

Conclusion

For the foregoing reasons, the decision of the BIA is disapproved, and the respondent's motion to reopen these proceedings is denied.

Respectfully,
DICK THORNBURGH

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[53] (...continued)

> pany drill sergeant — well, we call them a drill officer. You call them in the United States Army drill Sergeants. I was in charge of the men in the yard and military formation, etc. After that I was a company — my God, I was everything — a company finance officer, and the highest rank that I have ever held inside the company was the company adjutant. I was the second in command of a company of 78 men.

Doherty Transcript at 734.

[54] Respondent reads *Rodriguez* to make the INS's persecution argument "frivolous." Respondent's Brief, *supra* note 11, at 27 n.19. But *Rodriguez* holds only that those who are members of opposing forces in a civil war are not ineligible for withholding of deportation or asylum as political persecutors if they inflict harms arising as the natural consequence of civil strife (*e.g.*, burning automobiles). The instant case, however, involves a terrorist group's particularized attempts to destroy targeted civilian political opponents.

[55] General principles of conspiracy law again underscore this conclusion. *See supra* note 46. The statute's broad reference to those who "otherwise participate" in political persecutions is fairly read to encompass those individuals whose co-conspirators engage in political persecutions in furtherance of the conspiracy.

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Constitutionality of Section 7(b)(3) of the Emergency Veterans' Job Training Act of 1983

The statute's exclusion of religious activities from the ambit of activities for which the Veterans' Administration may fund training does not violate the Free Exercise Clause.

The statute's inclusion in the program of institutions that are religiously-affiliated but not pervasively sectarian does not violate the Establishment Clause. The inclusion of pervasively sectarian institutions is also constitutional, so long as the selection of the institution is the result of the genuinely independent and private choice of the veteran.

The Veterans' Administration may constitutionally prescribe by regulation criteria to distinguish between religious and nonreligious activities

General considerations that may aid in promulgating regulations to distinguish between religious and nonreligious activities include, at a minimum, (1) whether the activity is also traditionally performed in nonreligious organizations and (2) the degree to which the activity is informed and affected by the religious tenets of the organization.

January 23, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
VETERANS' ADMINISTRATION

This memorandum responds to your request that we assess the constitutionality of section 7(b)(3) of the Emergency Veterans' Job Training Act of 1983 ("VJTA"), 29 U.S.C. § 1721 note (Supp. III 1985).[1] That section excludes from a proposed program of job training "employment which involves political or religious activities." Specifically, you have asked whether "Congress, under the Free Exercise Clause of the Constitution, as a condition of authorization of payments to employers under the VJTA program, [may] require the VA to determine that the veteran's employment does not involve religious activities." Memorandum at 7. Assuming the answer is yes — that Congress may exclude veterans seeking employment performing religious activities from the program — you request our view about whether "the VA constitutionally may establish, by regulation, criteria for ascertaining which activities of an employer are religious activities similar to those enunciated by the lower court in *Amos v. Corporation of Presiding Bishop*, 594 F. Supp. 791 (D. Utah 1984), *rev'd*

[1] *See* Memorandum for Charles J Cooper, Assistant Attorney General, Office of Legal Counsel, from Donald L Ivers, General Counsel, Veterans' Administration ("VA") (Oct 1, 1987) ("Memorandum")

on other grounds, 483 U.S. 327 (1987), and/or those formally applied in the CETA program." *Id.* If not, you wish us to advise you as to which "type of criteria would be constitutionally permissible." *Id.* at 7-8.[2] We conclude that Congress may refuse to pay to train veterans to perform religious activities without violating the Free Exercise Clause, because the federal government is under no obligation to subsidize the exercise of constitutional rights. We then address whether the Establishment Clause prohibits religiously-affiliated institutions and a narrower class of religious institutions labelled "pervasively sectarian" by the Supreme Court from participating in the VJTA program. We conclude that both religiously-affiliated and pervasively sectarian institutions may participate in the program and may train veterans for nonreligious activities. Finally, we conclude that the VA may constitutionally fashion criteria to distinguish between religious and nonreligious activities and we then set forth general considerations that may aid in promulgating regulations to distinguish between such activities.

I. The Emergency Veterans' Job Training Act of 1983

The VJTA establishes a program "defraying the costs of necessary training" of eligible veterans for "stable and permanent positions that involve significant training." Section 4(a). Any veteran from the Korean conflict or the Vietnam era who "is unemployed at the time of applying" or who has "been unemployed for at least 10 of the 15 weeks immediately preceding the date of [his] application" is eligible for participation in the program. *Id.* § 5(a)(1)(A) and (B). An eligible veteran submits an application to the Administrator supporting his eligibility. If the Administrator approves the application, the veteran is given a "certificate of that veteran's eligibility for presentation to an employer offering a program of job training under this Act." *Id.* § 5(b)(3)(A). The veteran takes that certificate to an employer of his choice whose job training program has been approved by the Administrator as satisfying certain criteria. The employer can then be reimbursed directly with government funds for one-half of the wages it pays to the veteran up to $10,000. *Id.* § 8(a)(2).

Any employer program of job training meeting the statutory criteria is to be approved for participation in the program. Those criteria require, among other things, that the employer plan to employ the veteran in the

[2] You also asked us to consider the implications of a determination that the Free Exercise Clause bars Congress from excluding religious activities from the program. In that event you sought our advice whether the VA could "disregard so much of section 7(b)(3) of the VJTA as bars approval of programs of job training for employment involving religious activities and make direct payments to employers without being in violation of the prohibitions of the first amendment to the Constitution regarding establishment of a religion." Memorandum at 7 Because we conclude that Congress *may* constitutionally exclude training for employment performing religious activities from the program, we do not address this question in precisely this context.

position for which he is being trained; that the wages paid to the veteran cannot be less than the wages paid to "other employees participating in a comparable program of job training"; and that employment of the veteran under the program cannot result in the "displacement of currently employed workers." *Id.* § 7(d)(2) and (3)(A). Excluded from consideration are programs of job training for "seasonal, intermittent, or temporary jobs," for employment where commissions are the primary source of income, and for employment in the Federal Government. *Id.* § 7(b)(1). Also excluded are those programs training "for employment which involves political or religious activities." *Id.* § 7(b)(3).[3] The latter restriction, by intentionally excluding "religious activities," gives rise to your question whether such "discrimination" violates the Free Exercise Clause of the First Amendment.

II. The Free Exercise Clause of the First Amendment

We believe that Congress' decision to exclude religious activities from those it will fund under its job training program for veterans does not violate the Free Exercise Clause for two related reasons. As a matter of original understanding (an understanding which is reflected in recent Supreme Court decisions), the Free Exercise Clause is aimed primarily at prohibitory laws forbidding or preventing the practice of religion. Congress' refusal to fund religious activities does not constitute such a direct prohibition. More generally, it is now well established that the government does not unconstitutionally circumscribe an individual's exercise of a constitutional right merely by refusing to pay for that exercise. While the Supreme Court held in *Sherbert v. Verner*, 374 U.S. 398 (1963), that denying a government benefit to an individual on account of his exercise of religion is unconstitutional, it has also made clear that refusing to fund religious activities does not violate the Free Exercise Clause. Accordingly, Congress' decision not to subsidize the training of veterans to perform religious activities does not violate the Free Exercise Clause.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

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[3] Nothing in the legislative history addresses the issue of why Congress chose to exclude religious activities from the VJTA program.

First, it should be noted that only laws "prohibiting" the free exercise of religion are enjoined, and not those "respecting" or "abridging" it. This is a somewhat narrower prescription. "Prohibit" unequivocally means, and meant at the time of the founding, "[t]o forbid; to interdict by authority ... [t]o debar; to hinder." Samuel Johnson, *A Dictionary of the English Language* (1755). *See* Noah Webster, *American Dictionary of the English Language* (1828). "Abridge" can mean to "contract, to diminish, to cut short" or it can mean "[t]o deprive of; in which sense it is followed by the particle *from*, or *of*, preceding the thing taken away." Samuel Johnson, *A Dictionary of the English Language* (1755) (emphasis in original). The word "abridging" as used in the First Amendment is not followed by the "particle from or of." As the Supreme Court has recognized, by using the word "prohibiting" in the Free Exercise Clause and "abridging" elsewhere in the First Amendment, the Framers were placing different limits on Congress' authority to enact different types of laws. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) ("The crucial word in the constitutional text is 'prohibit ....'"). This language, when read in historical context, leads to the conclusion that in drafting the Free Exercise Clause the Framers were enjoining primarily prohibitory laws forbidding or preventing the practice of religion.

Moreover, the history of the Free Exercise Clause suggests that it was meant to enjoin prohibitory laws.[4] At the time the Constitution was drafted, as the Court has put it, "Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated." *Everson v. Board of Educ.*, 330 U.S. 1, 10 (1947) (footnote omitted). The abhorrence of this sort of conduct gave rise to the religion

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[4] Examples of prohibitory laws are those mandating attendance at approved services, expelling religious nonconformists, requiring support for the established church, and imprisoning those preaching unpopular doctrines *See* Chester James Antieau *et al.*, *Freedom from Federal Establishment* 16-29 (1964).

[5] This conclusion is supported by the origins of the clause. In explaining the religion clauses, the Court has often looked to Thomas Jefferson's Virginia Bill for Religious Liberty as an earlier statement of the ideas embodied within them *McGowan v. Maryland*, 366 U.S. 420, 437 (1961); *Everson*, 330 U.S. at 12-13, *Reynolds v. United States*, 98 U.S. 145, 163-64 (1878). The Bill for Religious Liberty provided in part

> That no man shall be *compelled* to frequent or support any religious worship, place, or ministry whatsoever, nor shall be *enforced*, *restrained*, *molested* or *burthened* in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief[ ]

Act for Establishing Religious Freedom, ch. XXXIV, 1823 Va. Acts 86 (Hening) (emphasis added) *quoted in Everson*, 330 U.S. at 13 Similarly, the principal sponsor of the First Amendment, James Madison, said its purpose was to ensure "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of Cong 758 (Joseph Gales ed., 1789)

clauses of the First Amendment. *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J., joined by Powell and Rehnquist, JJ.).[5]

Thus, the origins, the history and the language suggest that the First Amendment enjoins only relatively direct prohibitions of the free exercise of religion.[6] The Court's recent decisions reflect this interpretation. *See, e.g., Lyng*, 485 U.S. at 451, (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)) ("'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government'"); *Bowen*, 476 U.S. at 706 (plurality opinion) ("[G]overnment regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.").

The constitutionality of Congress' decision not to subsidize the training of veterans to perform religious activities is also apparent from cases that address generally the validity of refusing to subsidize constitutional rights. The Court has made plain that the government does not "penalize" a decision to exercise a constitutional right simply by refusing to pay for it. Two cases most clearly elucidate this distinction between a refusal to subsidize constitutionally-protected activity and an unconstitutional condition. In *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), the Court faced challenges to government decisions not to fund abortions. The Court held that notwithstanding the judicially-articulated constitutional right to an abortion under *Roe v. Wade*, 410 U.S. 113 (1973), neither the state nor the federal government had an obligation to fund abortions — even those that were "therapeutic."

The *Harris* Court specifically met and rejected the argument that *Sherbert* made mandatory the funding of the exercise of a constitutional

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[6] That the government has in place a general program for job training for veterans does not change the nature of the prohibition from an indirect to a direct one. For example, the Court held in *Johnson v Robison*, 415 U S 361 (1974), that denial of special veterans' benefits to a conscientious objector was constitutionally permissible. There, a conscientious objector who had performed alternative civilian service challenged the federal funding scheme granting educational benefits only to veterans who had served in active duty. He argued that this denial of benefits "interferes with his free exercise of religion by increasing the price he must pay for adherence to his religious beliefs " *Id* at 383. The Court rejected this argument, saying·

> The withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion — if, indeed, any burden exists at all Appellee and his class were not included in this class of beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to do so would not rationally promote the Act's purposes . [T]he Government's substantial interest in raising and supporting armies, Art I, § 8, is of "a kind and weight" clearly sufficient to sustain the challenged legislation, for the burden upon appellee's free exercise of religion — the denial of the economic value of veterans' educational benefits under the Act — is not nearly of the same order or magnitude as the infringement upon free exercise of religion suffered by petitioners in *Gillette*

Id. at 385-86 (citations and footnote omitted)

right. In *Sherbert*, the Supreme Court held that a statute making ineligible for unemployment benefits an employee who had been forced to leave her job because of religious reasons violated the Free Exercise Clause. The *Harris* Court said:

> The appellees argue that the Hyde Amendment is unconstitutional because it "penalizes" the exercise of a woman's choice to terminate a pregnancy by [an] abortion. In *Maher*, the Court found only a "semantic difference" between the argument that Connecticut's refusal to subsidize non-therapeutic abortions "unduly interfere[d]" with the exercise of the constitutional liberty recognized in *Wade* and the argument that it "penalized" the exercise of that liberty. 432 U.S., at 474, n.8. And, regardless of how the claim was characterized, the *Maher* Court rejected the argument that Connecticut's refusal to subsidize protected conduct, without more, impinged on the constitutional freedom of choice. This reasoning is equally applicable in the present case. A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert* v. *Verner*, 374 U.S. 398, where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath. But the Hyde Amendment, unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from receipt of public benefits. Rather, the Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.

Harris, 448 U.S. at 317 n.19 (citations omitted).

Congress has chosen to create a program to subsidize the training of veterans so that they may be employed in a variety of nonreligious, nongovernmental, nonpolitical jobs. The program neither proscribes a religious practice nor compels any practice contrary to any religious beliefs. First, no veteran is compelled to do that which he might choose not to do on religious grounds. Nor is Congress punishing those choosing to exer-

cise their rights. It is simply refusing to subsidize the exercise of those rights. No veteran is made ineligible for all veterans' benefits by virtue of his constitutionally-protected determination to seek employment involving a religious activity. Like the Hyde amendment and the Connecticut welfare provision in *Maher*, and unlike the statute in *Sherbert*, the VJTA represents no more than a refusal to fund a protected activity.[7]

In short, although the Constitution "affords protection against unwarranted government interference" with certain freedoms, "it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution." *Harris*, 448 U.S. at 317-18. To paraphrase Justice Stewart in *Harris*, it cannot be that because government may not prohibit individuals from engaging in certain religious activities, government therefore has an affirmative constitutional obligation to ensure that all persons have the financial resources to fulfill their religious obligations or to perform religious tasks. *Id.*

III. Participation of Religiously-Affiliated and "Pervasively Sectarian Institutions" in the VJTA Program

Having concluded that the VJTA does not violate the Free Exercise Clause, we now turn to the question of which institutions may participate in the VJTA program. We first address whether religiously-affiliated institutions in general may participate in the VJTA program so long as the funds are provided for training veterans to perform non-religious activities. We then address whether a narrower class of religious institutions labelled "pervasively sectarian" by the Supreme Court may participate under the same conditions. We conclude that two recent Supreme Court cases interpreting the Establishment Clause, *Bowen v. Kendrick*, 487 U.S. 589 (1988) and *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), make clear that religiously-affiliated employers may participate in the VJTA program and may train veterans for nonreligious activities. While the question is closer, we believe that, under the analysis set forth in *Witters* pervasively sectarian employers may participate under the same conditions.

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[7] Nor does the VJTA place an "obstacle[]" in the path of the veteran seeking employment performing a religious activity. *Maher*, 432 U.S. at 474. The veteran who seeks such employment "suffers no disadvantage as a consequence" of Congress' decision to subsidize the training of other veterans at other activities. *Id.* Congress may not have eased other difficulties in obtaining employment performing a religious activity, such as the veteran's lack of qualifications or the market conditions, but these difficulties were "neither created nor in any way affected" by the VJTA *Id.* Eligible veterans are free to choose to enroll in the program or not. They are free to choose, within certain limitations, the type of activity for which they wish to be trained. Nothing prevents them from pursuing their chosen profession, whether it is in government, performing a political activity, or training for the ministry.

A. Training Veterans for Nonreligious Activities by Religiously-affiliated Institutions

In *Kendrick*, 487 U.S. 589 (1988), decided last term, the Court upheld a federally funded program providing for the involvement of religious institutions in counseling adolescents about premarital sex. The Court noted that it had "never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Id.* at 609. Only if a statute provides for "direct government aid to religiously-affiliated institutions [with] ... the primary effect of advancing religion" is it unconstitutional. *Id.* Also, in *Witters*, 474 U.S. 481 (1989), the Court upheld a vocational rehabilitation program aiding the blind even though government aid was used to subsidize a student at a private Christian college who was studying to become a pastor, missionary or youth director. That the money ended up in the coffers of the religious institution mattered not at all, said the Court, where the "aid ... ultimately flow[ing] to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 487.

Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in light of these two cases makes clear that religiously-affiliated institutions may participate in this program to train eligible veterans to work in nonreligious activities. First, under the *Lemon* standard, courts may invalidate a statute only if it is "motivated wholly by an impermissible purpose," *Kendrick*, 487 U.S. at 602. That is certainly not the case here; the program has a clear secular purpose: the elimination or reduction of unemployment among veterans. *Id.*

Nor is the primary effect of including religiously-affiliated institutions in the program to advance religion: only training for nonreligious activities is included in the program. Moreover, as in *Witters*, that the aid ultimately benefits the religious institution is due primarily to the choice the eligible veteran makes to take his certificate to a religiously-affiliated employer. That the funds are paid directly to an employer at the veteran's behest and do not pass through the veteran's hands does not change the character of the program.[8] The program is "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' and is in no way skewed towards religion." *Witters*, 474 U.S. at 487-88 (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 782-83 n.38). In fact, here it is deliberately directed away from religion: funding religious activities is expressly prohibited by statute. By no means can the VJTA be said to "create [a] financial incentive for" eligible veterans to undertake a religious activity, nor does it "provide greater or broader benefits" to recipients who choose to work in religious organizations. *Id.* at 488.

[8] This point is discussed in greater detail *infra* at p. 41.

> On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian.

Id. Finally, "[t]he function of the ... program is hardly 'to provide desired financial support for nonpublic, sectarian institutions.'" *Id.* (quoting *Nyquist*, 413 U.S. at 783).

We believe that the program also passes the third prong of the *Lemon* test, which prohibits excessive entanglement, as that prong has recently been interpreted in *Kendrick*, 487 U.S. at 615-16. The *Kendrick* Court squarely rejected the argument that including religious institutions in neutral programs subsidizing the performance of secular tasks may lead to an "'excessive government entanglement with religion.'" *Id.* at 615 (quoting *Lemon*, 403 U.S. at 613). Noting that this prong of the *Lemon* test had been much criticized over the years, the *Kendrick* Court explained that cases finding entanglement had mostly involved aid to parochial schools, which were "pervasively sectarian" and had "'as a substantial purpose the inculcation of religious values.'" *Id.* at 616 (quoting *Aquilar v. Felton*, 473 U.S. 402, 411 (1985)). By contrast, the Court noted that there was no reason to assume that the religious institutions eligible for government funds are pervasively sectarian and thus no reason to fear that the kind of monitoring required to assure that public money is spent in a constitutional manner will lead to excessive entanglement. *Id.*

B. "Pervasively Sectarian" Institutions

Thus far we have determined that under *Kendrick* and *Witters* the VA may reimburse religiously-affiliated institutions for training veterans for employment performing nonreligious activities. There is, however, some tension between these two cases as to whether the VA may also include within the program what the Court refers to as "pervasively sectarian" institutions. The Court has at times examined the nature of the religious institution and refused to allow government monies to go to institutions "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt v. NcNair*, 413 U.S. 734, 743 (1973).[9] For example, in *Kendrick* the majority seemed to indicate that the "entanglement" prong of the *Lemon* test forbids including pervasively sectarian institutions even within programs designating funding for "specific secular purposes." 487 U.S. at 610.

[9] In *Roemer v. Board of Pub Works*, 426 U.S 736 (1976), the Court defined a "pervasively sectarian" institution somewhat tautologically as an institution "so permeated by religion that the secular side cannot be separated from the sectarian " *Id.* at 758-59 (quoting the district court, 387 F. Supp. at 1293)

All of the members of the Court, however, do not share this view: there is considerable disagreement among them about the significance of a determination that an organization is "pervasively sectarian." There is some suggestion in Chief Justice Rehnquist's majority opinion in *Kendrick* that the class of "pervasively sectarian" institutions is limited to parochial schools. *Kendrick*, 487 U.S. at 611. Moreover, Justice Kennedy, in his concurring opinion in *Kendrick* for himself and Justice Scalia, indicates some skepticism about the utility of the "pervasively sectarian" concept and suggests that the significant determination is not the nature of the institution but how the money given by the federal government is spent. As Justice Kennedy puts it, "[t]he question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant." *Id.* The separate concurrence of Justice O'Connor also suggests that the proper inquiry is whether any public funds have been used to promote religion. *Id.* at 623.

Even Justices Blackmun, Brennan, Marshall and Stevens in their dissent in *Kendrick* indicated that "the Constitution does not prohibit the government from supporting secular social-welfare services solely because they are provided by a religiously-affiliated organization." 487 U.S. at 640.[10] Thus, the dissent in *Kendrick* suggests the importance of evaluating the substantive nature of the use of public funds.[11]

We need not, however, resolve the differing viewpoints among the Justices in *Kendrick* as to whether the proper focus of the inquiry is on the institution or on the use to which the money is put because we believe that *Witters* is controlling in this context. Because *Witters* makes clear that funds from a government program similar in almost every respect to the VJTA can be used for training in *religious* activities, a fortiori VJTA funds can be used for training in *nonreligious* activities even if performed for pervasively sectarian institutions. Many of the similarities between the program in *Witters* and the VJTA program have already been set forth above. Both programs involve government funding for an "unmistakably secular purpose"; "no more than a minuscule amount of the aid awarded under [each] program is likely to flow to religious education"; no one can suggest that the "'actual purpose' in creating the program[s] was to endorse religion"; despite the direct payment under the

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[10] Significantly, the dissent noted

> There is a very real and important difference between running a soup kitchen or a hospital, and counseling [clients] on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.

Kendrick, 487 U.S. at 641 (Blackmun, J., dissenting) (footnote omitted).

[11] Confusingly, the dissent also indicated that the label "pervasively sectarian" may serve in some cases as a proxy for a more detailed analysis of the institution, the nature of the aid, and the manner in which the aid may be used *Kendrick*, 487 U.S. at 633 (Blackmun, J., dissenting). *See also Roemer*, 426 U.S. at 758.

VJTA, the choice of recipient is made by the veteran, thus "[a]ny aid provided under [the] program[s] that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of [the] aid recipient[]"; and the programs are "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' and [are] in no way skewed towards religion." *Witters*, 474 U.S. at 485-88 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) and *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 782-83 n.38). Finally, in both programs the funds are specific reimbursement for costs previously incurred, not cash or in-kind grants with the effect "'of a direct subsidy to the religious [institution]' from the State." *Id.* at 487 (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 394 (1985)).[12]

The only difference between the VJTA and the program upheld in *Witters* is that here the money is paid directly to the pervasively sectarian institution employing the veteran, while in the vocational rehabilitation program challenged in *Witters*, the vocational assistance was paid directly to the student, who transmitted it to the educational institution of his choice. The difference between the program upheld in *Witters* and this one, however, is wholly formal: while the name of a pervasively sectarian organization appears on a government check in the VJTA but not the *Witters* program, in both programs the religious employer providing the training receives the money "as a result of the genuinely independent and private choices of" the aid recipient. *Id.* at 487. Thus, as in *Witters*, "it does not seem appropriate to view any aid ultimately flowing to the (pervasively sectarian institution) as resulting from a state action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion." *Id.* at 488-89. Accordingly, regardless of the possibly pervasively sectarian identity of the recipient of the government's check, the VJTA program is constitutional under the analysis in *Witters* because the veteran, not the government, is choosing the recipient of the funds.[13] Thus, we believe that the Establishment Clause does not erect barriers to any institution's participation in the VJTA program for training in nonreligious activities.[14]

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[12] These similarities distinguish the VJTA from programs reimbursing parochial schools for part of the salaries of teachers who teach both secular and sectarian subjects, *Grand Rapids Sch. Dist v Ball*, 473 U S 373 (1985), as well as programs where government-employed teachers provide remedial services to parochial school students on parochial school grounds, *Aguilar*, 473 U S at 412. In those and in most of the other cases involving government aid to parochial schools, the court looked to the amount and percentage of funds going to parochial schools. Where the principal beneficiaries of an aid program are religious institutions, the Court often infers that its purpose is to endorse religion, and thus invalidates the program. Here, the purpose of the program is to aid veterans, and no more than a "minuscule amount of the aid awarded" will go to pervasively religious institutions. *Witters*, 474 U S. at 486

[13] The decision to pay the monies directly to the employer rather than to the veteran is unexplained in the legislative history, but its purpose could be to reduce administrative costs or the possibility of fraud

IV. Distinguishing Religious From Nonreligious Activities

Having concluded that religiously-affiliated and pervasively sectarian institutions are eligible for participation in the VJTA program, we turn to the question of "which criteria ... the VA [may] constitutionally prescribe by regulation for rendering a determination of the nature of the involved activity." Memorandum at 3. If, as noted above, "religious institutions are [not] disabled by the First Amendment from participating in publicly sponsored social welfare programs," *Kendrick*, 487 U.S. at 609, and yet they must carry out their responsibilities in a "lawful, secular manner," *id.* at 612, then government is inevitably charged with the task of distinguishing between that which is nonreligious and that which is religious. Moreover, *Kendrick* makes plain that "the very supervision of the aid to assure that it does not further religion [does not] render[] the statute invalid." *Id.* at 615. The problem for the government therefore is how to distinguish objectively those activities that are religious from those activities that are not.[15]

In reviewing applications to determine whether an activity is "religious," one important objective signpost the VA should consider is whether the activity is also traditionally performed in nonreligious organizations. Such a requirement would not only serve the goal of the job training program by making the veteran more employable generally, it would also say something "objective" about the activity in question. But meeting this requirement is not sufficient by itself to make an activity nonreligious; the activity performed by the veteran must also be scrutinized in its organizational context. To illustrate: a nonreligious organization may employ a person whose responsibility is to ensure that its employees behave in a manner consistent with the goals and values of the organization (*e.g.*, a disciplinary officer of a fraternal organization); such a position in a religiously-

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[14] You have not asked specifically whether the VA may choose to exclude all positions at religious institutions or more narrowly, all positions at pervasively sectarian institutions from the program to avoid the need to distinguish between religious and nonreligious activities. Such a position may seem superficially attractive to avoid running afoul of the Establishment Clause as interpreted by the Supreme Court. Having decided that the Establishment Clause does not prohibit religious institutions from participating in the program, however, we think it appropriate to emphasize, that the language of the statute is unequivocal in excluding only "religious *activities*." Section 7(a)(2) of the VJTA provides that the Administrator "shall approve a proposed program of job training of an employer" unless the program does not meet the criteria set by section 7(b). This language does not vest unfettered discretion in the Administrator, it suggests only that those programs failing to meet the requirements of section 7(b) may be excluded. Veterans seeking training for nonreligious activities by religious institutions are thus presumably entitled by statute to have religious employers reimbursed for training them.

[15] Justice Brennan pointed out the problem inherent in the very enterprise where government seeks to distinguish between such activities in his concurrence in *Corporation of Presiding Bishop v Amos*, 483 U.S 327, 340-46 (1987). He there said

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis.

Id. at 343.

affiliated organization may be too intertwined with the organization's religious tenets to be characterized as nonreligious.

Thus, the degree to which the activity is informed and affected by the religious tenets of the organization might also be a relevant factor. *Amos*, 594 F. Supp. 791, 799 (D. Utah 1984), *rev'd on other grounds*, 483 U.S. 327 (1987) (Court should examine "the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration"). On the other hand, that the activity is mandated by religious tenets is not sufficient by itself to cause that activity to be deemed religious. For example, charity may be required by an organization's religious law, but a position in a religiously-affiliated foundation dispensing the foundation's monies is not, it seems to us, necessarily a religious activity.[16]

The difficulty in distinguishing between religious and nonreligious activities lies in seeking to define that which lies between the two relatively clear ends of a continuum. Thus, while it may seem obvious that activities such as custodial, maintenance and cafeteria services are nonreligious, and that performing sacraments or leading prayer services are overtly religious actions, defining that which lies between is far more difficult.[17] Perhaps the best that can be said is that a religiously-affiliated organization wishing to participate in the job-training program ought to be required to state the specific job or jobs in which the veteran is to be employed, the tasks that job entails, and why it believes the activities in that job can fairly be characterized as nonreligious. This is consistent

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[16] To take a further example, Jewish law enjoins as a religious matter violations of the law of the nation in which the community lives. J.J. Schacter, *Dina De-Malkhuta Dina — A Review*, 1977 Dine' Yisrael Annual 77, 79 ("The Talmudic dictum *dina demalkhuta dina*, the law of the state is law, first formulated by Samuel in the third century C.E. and thereafter accepted as part of Jewish law was understood in the medieval period to be a legal ratification of th[e] existing state of affairs."). Yet to characterize as performing a "religious activity" every lawyer, accountant, auditor, and other individual employed to ensure that a Jewish organization is adhering to the laws of the United States is plainly to ascribe too much to the religious requirement and to ignore the more obvious reason for performing the activity.

[17] The VA has expressed concern about the decision by the Seventh Circuit that placing CETA workers, who were paid by the government, in certain positions in sectarian schools violated the Establishment Clause. *Decker v. O'Donnell*, 661 F.2d 598 (7th Cir. 1980). In that case the court held unconstitutional "[t]he outstationing [by public authorities] of CETA workers in sectarian elementary or secondary schools for the purpose of providing remedial education"; "the placement of CETA workers in instructional positions in summer or recreation or similar programs at sectarian schools"; "instructional positions in adult education programs", "regulation[s] allowing the employment of CETA workers in custodial child care after school hours", the "use of CETA workers in 'diagnostic or therapeutic speech and hearing services'", regulations permitting "CETA employees to provide services relating to the health and safety of the students"; and placement of "CETA workers in '[f]unctions performed with respect to the administration and grading of State-prepared examinations." *O'Donnell*, 661 F.2d at 610-13. The *O'Donnell* court struck down even the regulations "allowing CETA workers to provide 'support services for the administration of federally funded or regulated programs made applicable to religious institutions'"; "placements in cafeteria work or other work directly related in the provision of food services to students"; and "the placement of CETA workers in adjunct custodial or maintenance work related to cafeteria work and health services." *Id.* at 614.

Continued

with the approach taken by the one court that sought to set forth general criteria as to permissible regulations. Thus, as noted in your memorandum, in *Amos* the district court sought to articulate criteria to determine what activity can be classified as religious. *See Amos*, 594 F. Supp. 791 (D. Utah 1984), *rev'd on other grounds*, 483 U.S. 327 (1987). Generally, the district court suggested examining the nexus between the activity and the religious tenets or rituals of the institution.[18] While inevitably lacking somewhat in specificity, these criteria seem to us, as a general matter, worthy of consideration in the formulation of regulations.

The more specific criteria we set forth above are meant only as examples that ought to be considered in promulgating regulations. They are by no means exclusive. We hope that we have here provided sufficient guidance to enable the VA to begin drafting and formulating regulations distinguishing between religious and nonreligious activities. We stand ready to review such regulations prior to their issuance, and to assist in any other appropriate way.

Conclusion

The exclusion of religious activities from the ambit of activities for which the VJTA may fund training does not violate the Free Exercise Clause. The exclusion neither prohibits, impedes nor penalizes anyone seeking to perform a religiously-mandated requirement. Second, the inclusion of the institutions in the program that are religiously-affiliated

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[17] (...continued)
The outcome in *O'Donnell* does not support the argument that these activities became religious merely because they were performed in a pervasively sectarian institution. *O'Donnell* ran afoul of the principle that the "potential for divisive political conflict over the issue of funding" along religious lines may be sufficient to warrant invalidating the program under the Establishment Clause *Id* at 615 That "potential for divisiveness" existed in part because of the nature of the CETA program, which was to give block grants to a designated, finite group of "prim[ary] sponsors" (and their sub-grantees) who were chosen to provide employment to eligible workers. *Id* at 602, 615 This program is thus to be contrasted with the VJTA, which affords any employer meeting the statutory criteria the opportunity to participate in the program Moreover, it is precisely the discretion vested in the government and its grantees under CETA that distinguishes it from the VJTA and the program upheld in *Witters*. As noted above, *Witters* turned on the fact that the beneficiary determined where the money was to go, as is the case with the VJTA. In CETA, the government determined which programs were to receive funds and beneficiaries were encouraged to work for previously-designated institutions This makes CETA a very different program from the one upheld in *Witters* and distinguishes *O'Donnell* from the situation here.

[18] The Supreme Court reversed the district court on the ground that non-profit, church-owned and church-run facilities were exempt from the provisions of title VII prohibiting discrimination on the basis of religion The Court did not address the issue of how best to distinguish between religious and non-religious activities. The *Amos* district court's test is thus unaffected, and seems to us helpful. The court there labeled an activity "religious" if "there is a substantial connection between the activity in question and the religious organization's religious tenets or matters of church administration " *Id.* at 799. However, where "the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent," for an activity to be religious there must be a "substantial relationship between the employee's job and church administration or the religious organization's rituals or tenets " *Id.*

but not pervasively sectarian does not violate the Establishment Clause. Although the question is a closer one, inclusion of pervasively sectarian institutions is also in our view constitutional, so long as the selection of such institution is the result of the genuinely independent and private choice of the veteran. Finally, distinguishing between nonreligious and religious activities, however difficult a task, is here required by statute and is constitutional. Regulations doing so should focus, at a minimum, on the nexus between religious tenets and the job to be undertaken.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Authority of the Environmental Protection Agency to Indemnify Its Employees

The Environmental Protection Agency may use funds appropriated to the agency for "Salaries and Expenses" to indemnify its employees for personal liability arising from actions taken within the scope of their official duties.

February 1, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
ENVIRONMENTAL PROTECTION AGENCY

This responds to your request for the opinion of this Office concerning the authority of the Environmental Protection Agency ("EPA") to indemnify its employees for personal liability arising from actions taken within the scope of their official duties.[1] The memorandum accompanying the request concludes that the EPA may indemnify its employees with funds appropriated to the agency for "Salaries and Expenses."[2] For the reasons stated below, we agree that the EPA may use these appropriated funds to indemnify its employees for judgments and other liability incurred as a result of official actions.

Analysis

As a general rule, an agency may spend a general appropriation to pay any expense that is necessary or incident to the achievement of the underlying objectives for which the appropriation was made.[3] *Principles of Federal*

[1] Letter for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Francis S. Blake, General Counsel, Environmental Protection Agency (Mar. 16, 1988).

[2] Memorandum for Andrew Moran, Assistant General Counsel, General Law and Claims Branch, from Ray E. Spears, Claims Officer, General Law and Claims Branch (Mar. 12, 1988) ("EPA Memorandum").

[3] There are two exceptions to this general rule — that an agency may not use generally appropriated funds if there is a specific appropriation for that purpose or if the use of appropriated funds for that purpose is prohibited by law. *Principles of Federal Appropriations Law* 3-12 (GAO 1st ed 1982), *see also* 3 Op. O.L.C. 9 (1979) In this instance, neither exception applies There is no specific appropriation to the EPA to be used for the indemnification of its employees *See* EPA Memorandum at 2 (laws EPA enforces), Department of Housing and Urban Development — Independent Agencies Appropriations Act, 1989, Pub L No 100-404, 102 Stat. 1014, 1022 (1988) ("1989 Appropriations Act") (EPA's current appropriation). Nor is there any express statutory prohibition on the use of appropriated funds for the indemnification of EPA employees

Appropriations Law 3-12 (GAO 1st ed. 1982).[4] The EPA, therefore, may use a general appropriation to indemnify its employees if the Administrator or another responsible official determines that such an expense is necessary to achieve the mission of the agency. The nature of an agency's responsibilities and the provisions of the law appropriating funds to an agency must be considered together in determining whether it is permissible to use appropriated funds to indemnify employees for personal liability incurred as a result of actions within the scope of an employee's official duties. For example, the special law enforcement duties of the Department of Justice support the use of funds appropriated to the Department for the indemnification of its employees.[5] Likewise, it has long been the policy of the federal government to *defend* employees who are sued in their individual capacity for actions taken within their official responsibilities.[6]

The EPA Memorandum states that it is necessary for the EPA to indemnify its employees because of the chilling effect the possibility of personal liability has on employees:

> EPA employees are required in their official capacities and as part of their official duties to take actions in many areas where there is uncertainty concerning the hazards posed by a particular situation or where the risks among various remedial options is unclear. In this regard, EPA employees have been sued in their individual capacities for such diverse actions as gasoline lead inspections and enforcement of pollution discharged standards. EPA's ability to effectively ensure the protection of the environment depends upon the willingness of its employees to take all required actions. The threat of personal liability against an employee for a decision made or action taken as part of official duties can adversely affect EPA's achievement of its statutory purposes. The threat of personal liability would have a chilling effect on performance of official duties and would serve as a substantial impediment to EPA's successful accomplishment of its mission.

EPA Memorandum at 4-5. Therefore, you conclude that "EPA's ability to indemnify its employees where it determines that the employee was act-

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[4] The Comptroller General is an officer of the legislative branch, *see Bowsher v Synar*, 478 U.S. 714, 727-32 (1986), and, historically, the executive branch has not considered itself bound by the Comptroller General's legal opinions if they conflict with the legal opinions of the Attorney General or the Office of Legal Counsel. Nonetheless, the Comptroller General's opinions can provide guidance on certain technical matters, usually in the budget area. In this instance, the Comptroller General's construction of appropriations law is consistent with our reading of the law.

[5] *See* Statement of Policy Concerning Indemnification of Department of Justice Employees, 51 Fed. Reg. 27,021 (1986) ("DOJ Indemnification Policy").

[6] *See, e.g , Case of Captain Wilkes*, 9 Op Att'y Gen. 51, 52 (1857); *Costs of Suits Against Officers of the Navy*, 5 Op. Att'y Gen. 397 (1851)

ing within the scope of official duties and consistent with statute, regulation and policy, directly contributes to EPA's ability to carry out effectively its varied responsibilities. As such, payment of such judgments is a necessary expense of EPA operations." *Id.* at 8. Therefore, where the Administrator or another responsible official has determined that indemnification is necessary, you believe that funds in EPA's annual general appropriation for "Salaries and Expenses" may be used by the agency to indemnify its employees.

We agree that it would be lawful for the Administrator or another responsible official of EPA to determine that the threat of personal liability stands as a major impediment to the effective enforcement of federal environmental law by EPA employees. "The prospect of personal liability, and even the uncertainty as to what conduct may result in a lawsuit against the employee personally, tend to intimidate all employees, impede creativity and stifle initiative and decisive action." DOJ Indemnification Policy, 51 Fed. Reg. at 27,022. It would be reasonable to determine that an EPA employee might protect his own interest, rather than serving the public interest, because of his concern with the threat of personal liability. This would clearly hinder the EPA in its mission to safeguard the nation's environment. The inhibition of creativity and initiative is especially troublesome in the context of environmental issues, whose resolution depends in significant part on innovative solutions to complicated problems in an area of rapidly increasing scientific knowledge and ever-changing technology. These factors support your judgment that it is necessary for the EPA to be able to protect its employees from the threat of personal liability.

The Comptroller General, as you noted, has agreed with our conclusion that general agency funds may appropriately be used to indemnify agency employees for liability arising out of their official duties in certain instances. For example, the Comptroller General concluded that it was permissible for the FBI to use appropriated funds to indemnify an employee for a contempt fine imposed when the employee, at the direction of the Attorney General, refused to answer questions, 44 Comp. Gen. 312 (1964), and to indemnify three agents and an informant for attorneys' fees assessed in a civil proceeding arising out of a search for illegal weapons which resulted in the shooting of two suspects, 59 Comp. Gen. 489 (1980). Similarly, the General Counsel to the Comptroller General concluded that the Department of the Interior could indemnify three employees who were found personally liable for trespassing because they were acting in the course of official responsibilities which were consistent with agency policy and had been approved by the United States Attorney. B-168571-O.M. (Jan. 27, 1970).[7] Not surprisingly, the Comptroller General recently stated, "It has long been our view that the United

[7] *See Allen v. Merovka*, 382 F.2d 589 (10th Cir. 1967), *Merovka v Allen*, 410 F.2d 1307 (10th Cir. 1969) (describing the events resulting in the liability).

States may bear expenses, including court-imposed sanctions, which a Government employee incurs because of an act done in the discharge of his official duties." 59 Comp. Gen. at 493.

We agree that the EPA may, if such a determination is made, use its general appropriation for "Salaries and Expenses" to indemnify an employee. That appropriation is for "necessary expenses, not otherwise provided for." 1989 Appropriations Act, 102 Stat. at 1022. Once the Administrator or other responsible official has determined that the indemnification of an employee for personal liability arising from an official action is a necessary expense, we believe that the "Salaries and Expenses" appropriation is a lawful source of funds for that purpose. Indeed, the Comptroller General has approved the use of a similar general appropriation for "Salaries and Expenses" to indemnify an employee for a contempt fine. 44 Comp. Gen. at 314 (FBI).

Of course, the EPA may indemnify an employee only for actions that are within the scope of his or her official responsibilities. The determination of whether an expense is necessary to accomplish the purposes of an agency must be made by the agency itself. We can, of course, express no opinion at this point on whether any particular employee actions resulting in personal liability may be indemnified by the EPA.

Conclusion

We believe that you are correct in concluding that the role of the EPA in enforcing federal environmental laws requires agency employees to have the latitude to perform their responsibilities without the fear of personal liability for actions that are found to be within the scope of their employment. Thus, the indemnification of its employees is a necessary expense which the EPA may, in the absence of a specific appropriation for that purpose, fund through its general appropriations. We therefore concur that the annual appropriation to the agency for "Salaries and Expenses" is a lawful source of funds for the indemnification of employees by the EPA.

As the original letter from your Office noted, the next step will be for EPA to promulgate regulations that are consistent with EPA's statutory authority. Perhaps the Department of Justice regulations may serve as a model. It is important to do this in a timely fashion so that EPA's standards are in place before any indemnification is granted. Clear standards that are applied in a consistent fashion will ensure that indemnification is provided in as fair a manner as possible.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Presidential Action on Joint Resolution Disapproving Pay Raise

Under the Federal Salary Act of 1987, a pay raise recommended by the President becomes effective as law unless it is disapproved by a joint resolution "agreed to by the Congress" prior to the end of the 30-day period beginning when the President submits his recommendation. The Act thus requires passage of the joint resolution by both Houses of Congress, but not signature by the President, prior to the end of the period.

The Constitution requires that the joint resolution disapproving the pay raise be presented to the President, and he is entitled to the constitutionally prescribed 10-day period to consider it. If the President signs the joint resolution during this period, the pay raise is disapproved. If the President vetoes the joint resolution (and the veto is not overridden), the pay raise is effective.

With respect to Article III judges, the President's approval of the joint resolution after the 30-day period does not offend the Compensation Clause or section 2 of the joint resolution, since as a practical matter no increase in pay would vest in the judges prior to the expiration of the period.

February 7, 1989

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Pursuant to the Federal Salary Act of 1967, as amended, 2 U.S.C. §§ 351-361 (the "Act"), the President transmitted to the Congress on January 9, 1989, recommendations for the increase in salaries of certain members of the executive, legislative, and judicial branches. Pursuant to 2 U.S.C. § 359(1), this recommendation is to become effective as law "unless [the] recommendation is disapproved by a joint resolution agreed to by the Congress not later than the last day of the 30-day period which begins on the date of [sic] which such recommendations are transmitted to the Congress."

The Senate voted in favor of a resolution of disapproval of the President's recommendations, S.J. Res. 7, 101st Cong., 1st Sess. (1989), on February 2, 1989. *See* 135 Cong. Rec. 1461 (1989). Today, the last day of the thirty-day period following receipt of the President's recommendations, we understand that the House of Representatives either has, or will vote, in favor of S.J. Res. 7, or another resolution of disapproval, which will then be transmitted to the Senate for its approval. Under the Act, the joint resolution must be "agreed to by Congress" within the thirty-day period. The question has arisen whether this joint resolution must also be signed by the President within the thirty-day period.

Primarily, we think this question is answered by the plain language of the Act. By its terms, the Act requires *agreement* by both Houses of Congress prior to the expiration of the thirty-day period, not signature by the President. Thus, by its express terms, the Act is stated as a limitation on Congress, not the President. This interpretation is also supported by the Senate Committee report which, in describing the effect of this language, states: "The Congress will have 30 days to *pass* a joint resolution disapproving those recommendations." S. Rep. No. 210, 99th Cong., lst Sess. 25 (1985) (emphasis added). Putting to one side for the moment the serious constitutional question which would be presented by a purported limitation on the President's constitutionally-defined period of consideration for a joint resolution, had Congress intended to so limit the President, it presumably would have used the term "enacted" rather than "agreed to." As a matter of constitutional law, of course, no joint resolution can be enacted into law without it being presented for the President's signature or its constitutionally-prescribed equivalent.[1] In this regard, the Act speaks of disapproval by a joint resolution of Congress and the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), leaves no doubt that any resolution must be presented to the President pursuant to Article I of the Constitution if it is to be effective as law.

It is because of the constitutional requirement of presentment as affirmed in *Chadha*, however, that we anticipate it will be argued that Congress should be understood as intending to require signature by the President prior to the expiration of the thirty-day period. Indeed, this interpretation of the statute was advanced by both the House and Senate counsel in litigation relating to the last pay raise under the Act, *see Humphrey v. Baker*, 665 F. Supp. 23 (D.D.C. 1987), *aff'd*, 848 F.2d 211 (D.C. Cir.), *cert denied*, 488 U.S. 966 (1988), although neither the district nor appellate court passed on the question. *See* 665 F. Supp. at 30 n.7. For the reason stated above, we do not believe that this argument will prevail in litigation. As already indicated, we think this argument is incorrect because of the literal language of the Act. However, even if one were to admit ambiguity in the Act's meaning, we question whether Congress can by statute deprive the President of the ten-day period of consideration afforded to him by Article I, Section 7 of the Constitution. In short, the Act by its express terms only states a thirty-day limitation applicable to Congress. This thirty-day limitation cannot vitiate either the Constitution's requirement that a joint resolution be presented to the President or the President's ten-day period of consideration.[2]

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[1] Presidential signature is not the only method by which a bill becomes law under Article I of the Constitution In addition, a bill becomes law if (absent an adjournment of Congress) the President does not return to Congress the bill within ten days, or if he does return it with his objection, his objection is overridden by a two-thirds vote of each house U S Const. art. 1, § 7, cl 2. In this memorandum, however, we use "signature" as a shorthand reference for the three methods by which a bill becomes law.

Nonetheless, given the stakes involved, if the President does not sign the joint resolution today within the 30-day period, we believe litigation is likely. Accordingly, as a matter of prudence, if the President wishes to avoid litigation over the pay raise, however unmeritorious, we recommend that he sign the joint resolution of disapproval before midnight tonight.

As we write this, we have not been advised of the exact language of the final enrolled joint resolution. In this regard, we are unaware if it incorporates section 2 of S.J. Res. 7, which contains its own effective date provisions. Section 2(a)(1) of S.J. Res. 7 provided that "if the date of the enactment of this resolution is on or after February 8, 1989, the rates of pay for all offices and positions increased by the recommendations," shall revert to their prior levels. But it adds the proviso in section 2(a)(2)(B) that: "[t]he provisions of [section 1] and [section 2] shall not apply to reduce the rate of pay of any judge or justice appointed pursuant to article III of the Constitution of the United States."

The question raised by section 2 of S.J. Res. 7 is — if the joint resolution is signed by the President, and thus "enacted" into law on or after February 8 (after the thirty-day period)— will Article III judges be entitled to the pay raise by virtue of section 2(a)(2)(B). We think not. Accepting our initial conclusion that the pay raise will not go into effect even if the President signs the disapproval resolution (which is section 1 of S.J. Res. 7) after the thirty-day period has expired, the pay of Article III judges will never have been "increased,"[3] and thus the joint resolution disapproving the pay raise can be applied to Article III judges without "reduc[ing]" their rate of pay as forbidden by section 2(a)(2)(B) of S.J. Res. 7.

In conclusion, the thirty-day limitation in the Act is by its terms applicable only to Congress. Moreover, the Constitution requires that the joint

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[2] This interpretation is not inconsistent with section 359(2), which provides that the effective date of the pay increase in section 359(1) shall be the first day of the first pay period beginning after the close of the thirty-day period. It is true that if the thirty-day period ends just before the beginning of a pay period, the President might not have acted on a joint resolution on the first day of the first pay period after Congress agrees to the joint resolution. But there is no reason a pay increase cannot be retroactive to an earlier date, should the President determine to disapprove the joint resolution.

[3] We understand that the next applicable pay period for Article III judges begins March 1, 1989. Under *United States v. Will*, a judge's salary increase "'vests' for purposes of the Compensation Clause *only when it takes effect* as part of the compensation due and payable to Article III judges " 449 U.S. 200, 229 (1980) (emphasis added). Because section 359(2) of the Act provides that the recommended pay increases do not become effective until the first day of the first pay period after expiration of the thirty days, we read *United States v. Will* to mean that no vesting within the meaning of the Compensation Clause of the Constitution, Article III, Section 1, would occur so long as the judges' raises did not become effective conclusively or were rescinded prior to March 1, 1989.

Even were the judges' pay period not March 1, 1989, but rather a date preceding the date on which the President signed the bill, we doubt that the judges would constitutionally be entitled to receive a raise under the Compensation Clause. While the Act designates the pay period on which the raises are to take effect, this designation must be purely for accounting purposes to be consistent with the Supreme Court's decision in *Chadha*. Consistent with *Chadha*, after the passage of the joint resolution, neither the judges nor anyone else would be entitled to a pay raise unless and until the President vetoed the joint resolution.

resolution be presented to the President, and we believe that the President is entitled to the prescribed ten-day period to consider it. If the President signs the joint resolution during this period, the pay raise is disapproved. If the President vetoes the joint resolution (and the veto is not overridden), the pay raise is effective in accordance with section 359(2) of the Act. With respect to Article III judges, the President's approval of the joint resolution after the thirty-day period does not offend the Compensation Clause or section 2 of S.J. Res. 7, since as a practical matter, we understand no increase in pay would vest in the judges prior to March 1, 1989.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Inspector General Authority to Conduct Regulatory Investigations

The Inspector General Act of 1978, as amended, does not generally vest in the Inspector General of the Department of Labor the authority to conduct investigations pursuant to regulatory statutes administered by the Department of Labor. The Inspector General has an oversight rather than a direct role in investigations conducted pursuant to regulatory statutes: he may investigate the Department's conduct of regulatory investigations, but may not conduct such investigations himself.

The responsibility to conduct regulatory investigations cannot be delegated by the Secretary to the Inspector General pursuant to section 9(a)(2) of the Inspector General Act.

The significant investigative authority granted to Inspectors General under the Inspector General Act includes the authority to investigate recipients of federal funds, such as contractors and grantees, to determine if they are complying with federal laws and regulations and the authority to investigate the policies and actions of the Departments and their employees. This latter authority includes the authority to exercise "oversight" over the investigations that are integral to the programs of the Department.

March 9, 1989

MEMORANDUM OPINION FOR THE SOLICITOR
DEPARTMENT OF LABOR

This memorandum responds to the request of September 23, 1988, as supplemented by a letter of December 5, 1988, for the opinion of this Office as to the scope of the investigative authority of the Inspector General of the Department of Labor under the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978), as thereafter amended (codified as amended at 5 U.S.C. app. §§ 1-9) ("the Act"). Specifically, we were asked to determine whether the authority granted the Inspector General includes the authority to conduct investigations pursuant to statutes that provide the Department with regulatory jurisdiction over private individuals and entities that do not receive federal funds.

As set forth below, we conclude that the Act does not generally vest in the Inspector General authority to conduct investigations pursuant to regulatory statutes administered by the Department of Labor.[1] Rather,

[1] We shall henceforth refer to such investigations as "regulatory investigations." Such investigations generally have as their objective regulatory compliance by private parties. On the other hand, investigations properly within the ambit of the Inspector General generally have as their objective the elimination

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Congress intended the Inspector General to be an objective official free from general regulatory responsibilities who investigated the employees and operations of the Department, as well as its contractors, grantees and other recipients of federal funds, so as to root out waste and fraud. Thus, the Inspector General has an oversight rather than a direct role in investigations conducted pursuant to regulatory statutes: he may investigate the Department's conduct of regulatory investigations but may not conduct such investigations himself.[2]

I. Background

A dispute has arisen between the Solicitor and Inspector General of the Department of Labor as to the types of investigations the Inspector General is authorized to conduct. It is undisputed that the Inspector General is authorized to conduct investigations of the Department's operations, employees, contractors, grantees and other recipients of federal funds. What is disputed is whether the Inspector General is also authorized to conduct investigations pursuant to statutes that grant the Department regulatory authority over individuals and entities outside the Department who do not receive federal funds.

The dispute has precipitated interest beyond the Department of Labor.[3] At issue is the authority of the Inspector General under regulatory

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[1] (.continued)
of waste and fraud in governmental departments, including waste and fraud among its employees, contractors, grantees and other recipients of federal funds As we note below, however, *see infra* note 20, the Inspector General may investigate private parties who do not receive federal funds when they act in collusion with the Department's employees or other recipients of federal funds to avoid regulatory compliance.

[2] When our opinion was first requested in this matter, we attempted to limit our opinion to the specific situation that prompted the dispute between the Solicitor of Labor and the Inspector General *See* Letter for George R Salem, Solicitor of Labor, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel (Oct. 28, 1988); Letter for J. Brian Hyland, Inspector General, Department of Labor, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel (Oct. 28, 1988). Your predecessor replied that the dispute had not arisen from a specific statutory or factual context, but rather from the Inspector General's claim of "general authority to investigate any violation of any statute administered or enforced by the Department." Letter for Douglas W Kmiec, from George R Salem at 1 (Dec 5, 1988) In his response, the Inspector General agreed that the dispute concerned the existence of such general authority Letter for Douglas W. Kmiec, from J. Brian Hyland (Dec 22, 1988) ("Hyland Letter"). Accordingly, while we have made reference to certain specific regulatory schemes (such as the Fair Labor Standards Act) which Mr. Salem offered as paradigmatic examples of statutes giving rise to the general dispute, we have responded to the request with an opinion establishing general principles We would be pleased to give more specific guidance with respect to the scope of the Inspector General's authority in the context of a particular statutory scheme should you or the Inspector General so request.

[3] The Inspector General Act is a generic one in the sense that its core provisions apply to most of the departments and agencies of the federal government. *See* 5 U.S C app. §§ 2(1), 11(2) & 8E Our opinion, therefore, will necessarily have applicability beyond the Department of Labor For this reason, this opinion has been of interest to various Inspectors General in other departments, and in addition to the materials submitted by the Inspector General of the Department of Labor, we have reviewed carefully the letters and memoranda other Inspectors General have submitted to us. Memorandum for Dennis C Whitfield, Deputy Secretary of Labor, from Richard Kusserow, Inspector General, Department of Health and Human Services ("HHS") (Oct. 6, 1988); Letter for Douglas W. Kmiec, Assistant Attorney General,
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statutes such as the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, and the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§ 651-678, which impose restrictions on individuals and entities who are not employees of a Department and who are not contractors, grantees or other recipients of federal funds distributed by the Department.[4] FLSA, for instance, requires that a fixed minimum wage be paid to any covered employee, *id.* § 206, as well as imposing other regulatory requirements such as restricting the work week to 40 hours unless the employee is compensated at not less than one and one half times the regular rate. *Id.* § 207. Similarly, OSHA imposes on employers the duty to furnish a safe workplace and to comply with the safety standards promulgated by the Secretary of Labor under its authority. *Id.* § 654(a).

The Secretary of Labor is the official charged with administering these statutes. That authority includes specific grants of enforcement and investigative authority. *See, e.g., id.* §§ 212(b), 657. The Inspector General, however, believes that the provisions of the Act granting him authority to conduct investigations "relating to the programs" of the Department vest in him general investigative authority under these regulatory statutes. Memorandum for the Deputy Secretary, Department of Labor, from J. Brian Hyland, Inspector General, Department of Labor, *Re: Authority of Inspector General* at 2 (Oct. 17, 1988) ("Hyland Memo").[5] Indeed, he argues that since the Act gives him authority to "supervise" all investigations "relating to programs" of the Department of Labor, he has supervisory authority over the Secretary of Labor with respect to her exercise of her statutory authority to conduct investigations pursuant to the regulatory statutes the Department administers. *Id.* at 7.

The Solicitor disagrees. He views the Inspector General as an auditor and internal investigator for the Department — authorized to investigate the operations of the Department, the conduct of its employees and the Department's contractors, grantees and other recipients of federal funds.[6]

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[3] (. continued)
Office of Legal Counsel, from Charles R. Gillum, Inspector General, Small Business Administration (Nov. 4, 1988), Letter for Douglas W Kmiec, from John W Melchner, Inspector General, Department of Transportation (Dec 1, 1988), Letter for Douglas W Kmiec, from Paul A Adams, Inspector General, Department of Housing and Urban Development (Nov. 30, 1988), Letter for Douglas W Kmiec, from Francis D. DeGeorge, Inspector General, Department of Commerce (Dec 1, 1988)

[4] At our request, the Solicitor provided a detailed description of three investigations undertaken by the Inspector General. This was to clarify for our benefit the nature of the dispute between the Solicitor and the Inspector General We have addressed here the general legal question asked by the Solicitor. We express no opinion as to whether any of these particular investigations was authorized.

[5] The Inspector General does not claim that he has the same enforcement and litigative authority as the Secretary of Labor. For instance, he neither claims authority under the FLSA to impose civil monetary penalties, nor the authority to initiate civil litigation Rather, he claims the authority to conduct regulatory investigations and refer the results to the Department of Justice for civil action or criminal prosecution.

[6] The Solicitor does not question the authority of the Inspector General to conduct investigations relating to organized crime and racketeering to the extent that authority derives from the jurisdiction of the

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II. Discussion

The Act established the Office of Inspector General in the Department of Labor and in the other covered departments. The purpose of the Act, as stated in section 2, is "to create independent and objective units" to "conduct and supervise audits and investigations relating to the programs and operations" of the covered departments, 5 U.S.C. app. § 2(1), and "to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations." *Id.* § 2(2).

Section 4 of the Act provides authority that is correlative to these responsibilities:

> (a) It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established—
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> (1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment;
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> ....
>
> (3) to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations; ....

Id. § 4(a). Furthermore, section 6(a)(2) authorizes the Inspector General "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are [in his judgment] necessary or desirable." *Id.* § 6(a)(2).

Finally, section 9(a)(2) authorizes the transfer of "such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of

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[6] (...continued)
Office of Special Investigations whose functions were specifically transferred to the Inspector General in the Act. 5 U S C. app § 9(a)(1)(G). Various issues relating to the scope of that authority are addressed in an earlier opinion of this Office Memorandum for Stephen S. Trott, Assistant Attorney General, Criminal Division, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re On-Site Inspection of Books and Records in Criminal Investigations of Labor Unions and Employee Benefit Plans* (Dec. 23, 1983)

the [Inspector General] and would, if so transferred, further the purposes of this Act," but adds the caveat: "except that there shall not be transferred to an Inspector General ... program operating responsibilities." *Id.* § 9(a)(2).

The question presented is the meaning of the phrase "relating to the programs and operations" in section 4 and "relating to the administration of the programs and operations" in section 6, as well as similar language elsewhere in the Act.[7] The Act does not define terms such as "investigations" and "programs," nor does the Act expressly address whether the Inspector General is authorized to conduct investigations pursuant to regulatory statutes administered by the Department. But we think the meaning of the statutory language is clear when examined in the context of the structure and legislative history of the Act.

The impetus for the Inspector General Act of 1978 was revelations of significant corruption and waste in the operations of the federal government, and among contractors, grantees and other recipients of federal funds. S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978). Furthermore, Congress concluded that the existing audit and investigative units were inadequate to deal with this problem because they reported to, and were supervised by, the officials whose programs they were to audit and investigate. *Id.* at 5-6; H.R. Rep. No. 584, 95th Cong., 1st Sess. 5 (1977).

The Act addressed both the underlying problem and this organizational defect. The Inspector General was to deal with "fraud, abuse and waste in the operations of Federal departments and agencies and in federally-funded programs." S. Rep. No. 1071 at 4. The Inspector General was to be an objective official reporting directly to the head of the department and not to the program head whose operations were to be audited and investigated. H.R. Rep. No. 584 at 11. This objectivity was to be fostered by a

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[7] In a supplemental letter to us, the Inspector General argues that it is necessary to accept his broad view of his authority lest a situation be created whereby there was no entity investigating a wide-range of criminal offenses under the regulatory jurisdiction of the Department of Labor Letter for Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, from J. Brian Hyland, Inspector General, Department of Labor (Dec 22, 1988). Specifically, he argues that while the Department of Labor may generally have criminal investigative authority over the offenses listed in the labor provisions (title 29 of the U S. Code), it does not, with one specific exception, have criminal investigative authority over the general criminal provision of title 18 *Id.* at 1-2. By contrast, the Inspector General argues that he does possess criminal investigative authority under title 18 *Id* at 2.

The Inspector General's argument is misconceived. We have no doubt that the Inspector General has criminal investigative authority, *see* 5 U S C. app. § 4(d), *United States v Acro Mayflower Transit Co.*, 831 F.2d 1142, 1145 & n 3 (D C. Cir. 1987), but he only has that authority *within the scope* of his statutorily-granted investigative authority It is the scope of that authority that is at issue here

Moreover, we note that it would by no means be anomalous if neither the Secretary of Labor nor the Inspector General had criminal investigative authority over some statutory violation that affected the Department of Labor. The Federal Bureau of Investigation ("FBI") has general criminal investigative authority over all violations of federal law. 28 U.S C § 533(1); 28 C F.R. § 0.85(a) (1989). *See also* 28 U S C § 535. Other departments or agencies have authority to conduct criminal investigations only "when investigative jurisdiction has been assigned by law to such departments and agencies." 28 U S.C. § 533. Thus, it is not unusual for the FBI to have exclusive criminal investigative authority with regard to certain statutory violations.

lack of conflicting policy responsibility: "[T]he legislation gives the [Inspector General] no conflicting policy responsibilities which could divert his attention or divide his time; his sole responsibility is to coordinate auditing and investigating efforts and other policy initiatives designed to promote the economy; efficiency and effectiveness of the programs of the establishment." S. Rep. No. 1071 at 7.

The legislative history of the Act reflects a consistent understanding that the role of the Inspector General was to be that of an investigator who would audit and investigate the operations of the departments and their federally-funded programs. *See, e.g.*, S. Rep. No. 1071 at 27 ("The [Inspector General's] focus is the way in which Federal tax dollars are spent by the agency, both in its internal operations and its federally-funded programs.").[8] The legislative history also rejects the idea that Inspectors General would have the authority to conduct regulatory investigations of the type at issue here. The most comprehensive statement is in the House Report:

> While Inspectors General would have direct responsibility for conducting audits and investigations relating to the effi-

[8] The Inspector General has quoted to us various statements made by Members of Congress during hearings or debates that he asserts support his view that Congress intended that Inspectors General have authority to investigate violations of regulatory statutes administered by their departments. These quotations include general statements to the effect that Inspectors General were to have broad authority to investigate the programs and employees of the departments, *see, e g* , Hyland Memo at 3 (quoting Rep Fountain), as well as general statements that Inspectors General would restore public confidence in government, *see, e g* , *id* at 4 n.8 (quoting Rep. Levitas) None of these quotations provides support for the view that Congress intended to vest the Inspectors General with authority over regulatory investigations

The Inspector General also argues that the hearings made Congress aware that the then-existing Inspectors General were undertaking regulatory investigations under the departments' regulatory statutes, but the evidence he cites does not support his argument For instance, he quotes a report submitted to a Senate Committee at the same time as the Senate was considering the Act in which the Inspector General of the Department of Health, Education and Welfare defined "abuse" as covering "a wide variety of excessive services or program violations, and improper practices," *id* at 4, but there is nothing in the quotation to indicate that the reference to "program violations" meant general regulatory enforcement rather than violations of law committed by department employees or its contractors or employees. Similarly, the Inspector General cites references in the testimony of the non-statutory Inspector General of the Department of Agriculture at the House committee hearings regarding investigations of meat and grain inspections which had been conducted by his office. We have examined the portions of the testimony of the Inspector General and other officials of the Department of Agriculture at these hearings which dealt with these investigations The only relevant colloquy we can find occurred when Representative Jenrette asked the Audit Director of the Department of Agriculture whether the "majority" of these investigations had to do with employees of that Department. The response was: "Yes, I would say most of the time it had to do with some sort of inspection function and inspection employees Also, the plants that had been afforded meat inspection service or meat grading service." *Establishment of Offices of Inspector General· Hearings on H.R. 2819 Before the Subcomm of the House Comm. on Government Operations*, 95th Cong , 1st Sess. at 47 (1977) Representative Jenrette then responded that this was appropriate because "employees of the Department should certainly have oversight . before the citizen on the street," and that the people the taxpayers are paying should be subject to "control" and "investigat[ion]." *Id* We believe, in fact, that the grain inspectors who had been the subjects of these investigations were licensees of the Department of Agriculture not employees. In any event, this testimony hardly provides support for the view that Congress generally understood that conducting regulatory investigations was part of the role of Inspectors General

> ciency and economy of program operations and the prevention and detention of fraud and abuse in such programs, *they would not have such responsibility for audits and investigations constituting an integral part of the programs involved.* Examples of this would be audits conducted by USDA's Packers and Stockyards Administration in the course of its regulation of livestock marketing and *investigations conducted by the Department of Labor as a means of enforcing the Fair Labor Standards Act.* In such cases, the Inspector General would have oversight rather than direct responsibility.

H.R. Rep. No. 584 at 12-13 (emphasis added). *See also* S. Rep. No. 1071 at 27-28.[9]

The statement in the House Report that Inspectors General were to have "oversight" but not "responsibility for audits and investigations constituting an integral part of the program involved" is not surprising because to vest such authority in the Inspectors General would have constituted a fundamental alteration in the departments' regulatory authority. It would have taken away the power to control the investigatory portion of a department's regulatory policy from the official designated by statute or by the Secretary[10] and placed it in an official separate from the regulatory division of the department.[11] As the legislative history makes

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[9] Similarly, Representative Levitas stated

> The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibilities to divide allegiances. The Inspectors General will be responsible for audits and investigations only
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> ....
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> Moreover, the Offices of Inspector General would not be a new "layer of bureaucracy" to plague the public. They would deal exclusively with the internal operations of the departments and agencies Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.

124 Cong. Rec. 10,405 (1978).

[10] For instance, as we have noted before, the Secretary of Labor is expressly provided with authority to engage in investigations to assure compliance with the health and safety regulations of OSHA. *See* 29 U.S.C. § 657

[11] The Inspector General argues, however, that no "policy" considerations would be implicated by his having supervisory authority over the regulatory investigations of the Department. While conceding that "[d]ecisions regarding the emphasis, focus, and type [civil, criminal, administrative] of program enforcement, and the best use of available program resources, can have substantive 'policy' ramifications," he states that "these considerations have little or no bearing when potential criminal violations are involved," and that it is toward uncovering such criminal violations that he intends to direct his efforts. Hyland Memo at 8. The Inspector General's argument fails to recognize that whether to choose criminal over civil remedies is one of the classic "policy" choices that a regulator must make.

The Inspector General also argues that his investigative activity implicates no "policy" concerns because he will refer cases to the Department of Justice, which will make the final decision as to whether to file criminal charges. Hyland Letter at 2-3 It is true that the Department of Justice has the final say over whether criminal charges will be filed. 28 U.S.C. §§ 516, 519 But it is equally true that the Department of Justice is responsive to the policy judgments of the referring agencies, and will, within the limits of available resources, generally follow the wishes of the referring agency as to questions such as the appropriate balance between criminal and civil enforcement.

clear, however, it was not the intention of Congress to make such a fundamental change in the regulatory structure of the departments and agencies of the federal government. Rather, Congress was concerned with waste of federal funds and the need for an independent official who could review the employees and operations of federal agencies.

The statement in the House Report that Inspectors General were not to conduct investigations "constituting an integral part of the programs involved" is also dictated by the nature of the Inspector General's role. The purpose of creating an Inspector General was to have an official in the department who would not have responsibility for the operations of the department and would thus be free to investigate and criticize. If the Inspector General undertakes investigations under the department's regulatory statutes, he could not perform this role. One of the Inspector General's functions is to criticize regulatory investigative policy, a function he cannot perform if it is his responsibility to set and implement that policy.

The Inspector General, for instance, indicates that he disagrees with the current regulatory investigative policy of OSHA which he views as illustrating "an ingrained philosophy of enforcement that subordinates and trivializes the investigation and prosecution of significant criminal felony violations in favor of civil and administrative remedies and petty criminal offenses (e.g., misdemeanors)." Hyland letter at 4. We would expect therefore that the Inspector General might discharge his statutory "oversight" duty by preparing a report for the Secretary and Congress detailing this criticism of OSHA's regulatory investigative policies. *See* 5 U.S.C. app. § 5. However, once the Inspector General assumes authority over OSHA's regulatory investigative activity — as under his interpretation of the statutory language he is bound to do[12] — he would become an official responsible for implementing policy. Thus, with regard to the regulatory investigations the Inspector General would be undertaking, there would be no truly objective person to investigate claims of misbehavior and abuse. The purpose of the Act is not only to protect the taxpayers' money, but also to serve as a check on mistreatment or abuse of the general public by government employees. If the Inspector General, however, is conducting and supervising regulatory investigations of the department, the very evil that Congress wanted to avoid by establishing an objective Inspector General would be created: namely, the responsible official would be charged with auditing and investigating his own office.

In sum, we think that the legislative history and structure of the Act provides compelling evidence that in granting the Inspector General authority to "conduct and supervise audits and investigations relating to

[12] Specifically, the Inspector General argues that the statutory mandate in section 4(a)(1) that the Inspector General is "to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of" the department vests *supervisory* power in him over all investigations conducted by the Department of Labor, including investigations such as those conducted under OSHA that are integral to the regulatory enforcement of the program. Hyland Memo at 7.

the programs and operations" of the department, 5 U.S.C. app. § 2(1), Congress did not intend to grant the Inspector General authority to conduct, in the words of the House Report, "investigations constituting an integral part of the programs involved." Rather, the Inspector General's authority with respect to investigations pursuant to the Department's regulatory statutes is, again in the words of the House Report, one of "oversight." We therefore conclude that investigations undertaken pursuant to the Department of Labor's regulatory statutes, such as FLSA and the OSHA, are not the type authorized by the Act.

We also conclude that this type of regulatory investigative authority cannot be delegated by the Secretary to the Inspector General under section 9(a)(2) of the Act.[13] Section 9(a)(2) authorizes the Secretary to transfer additional functions to the Inspector General but only if they are "properly related" to the functions of the Inspector General and would "further the purposes of this Act." It specifically forbids the transfer of "program operating responsibilities" to the Inspector General. Whether or not the conduct of investigations pursuant to regulatory statutes constitutes "program operating responsibilities" within the meaning of the Act, such investigative authority, as outlined above, is inconsistent with structure and purpose of the Act and cannot be said to be "properly related" to the Inspector General's functions, nor could the transfer of these functions to the Inspector General be said to "further the purpose of the Act."[14] Thus, if the Secretary and the Inspector General believe that there is a need for the Inspector General to undertake particular types of regulatory investigations, they should seek from Congress specific amendments of the Act.[15]

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[13] We do not address whether any other statute provides the Secretary with authority to delegate such functions to the Inspector General Nor do we address how any such provision should be reconciled with the Act's express prohibition on the transfer of "program operating responsibilities" to an Inspector General.

Moreover, while we do not agree that section 9(a)(2) provides authority to delegate the conduct of regulatory investigations to the Inspector General of Health and Human Services, *see* Memorandum for Dennis C Whitfield, Deputy Secretary of Labor, from Richard P. Kusserow, Inspector General, Department of Health and Human Services at 6-7 (Oct. 6, 1988), we believe that the Inspector General may possess authority to conduct certain investigations into the programs he references (such as Medicare) as part of his responsibility under the Act to investigate regulatory compliance by recipients of federal funds We have not been asked, however, to review any specific statutes under the jurisdiction of the Secretary of HHS and thus do not address this question.

[14] We also disagree with the Inspector General that he can assume criminal investigative authority by means of a Memorandum of Understanding ("MOU") with the FBI. As this Office has previously stated, the Attorney General does not have the authority to delegate his criminal investigative authority under 28 U S C § 533 to other departments or agencies of the government *See, e.g., Department of Labor Jurisdiction to Investigate Certain Criminal Matters*, 10 Op. O.L.C. 130, 132-33 (1986). An MOU with the FBI is only appropriate where the department or agency already has criminal investigative authority concurrent with that of the FBI. *Id.* at 133

Accordingly, insofar as any MOU purports to provide the Inspector General with criminal investigative authority not specifically granted by statute, it should be revised. On the other hand, the Department of Justice may deputize officials in other agencies, including investigators assigned to an Inspector General's office, to enforce the criminal law Of course, criminal investigations by deputized officials in other agencies remain under the supervision of the Department of Justice.

Our conclusions here are consistent with the decision of the district court in *United States v. Montgomery County Crisis Center*, 676 F. Supp. 98 (D. Md. 1987).[16] In this case, the Inspector General of the Department of Defense had issued a subpoena to a community counseling center seeking production of documents relating to telephone calls made by a member of the United States Navy who was allegedly suicidal and who had allegedly disclosed classified information during the telephone calls. In holding the subpoena to be outside the scope of the Inspector General's authority, the court pointed to a number of factors including privacy concerns, no one of which was necessarily dispositive. *Id.* at 99. Three of the factors the court pointed to, however, are relevant here. The court stated:

> First the "investigation" to which the subpoena relates concerns a security matter, not one involving alleged fraud, inefficiency or waste — the prevention of which is the Inspector General's clearest statutory charge.
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> Second, the "investigation" is not even ostensibly related to a general programmatic review but is limited to tracking down the source of one alleged security breach.
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> ....
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> [In addition,] although the Inspector General is authorized to issue subpoenas to carry out all of his "functions assigned by ... [law]," the language of the Senate Committee Report on the 1978 Inspector General Act makes clear that in granting him subpoena power Congress was focusing upon obtaining records necessary to audit and investigate the expenditure of federal funds.

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[15] The Act itself contains what appears to be at least one specific exception in the authorization of the transfer of the Office of Special Investigations in the Department of Labor to the Inspector General. *See supra* note 6. In 1988, there was also an attempt to transfer the Office of Investigations at the Nuclear Regulatory Commission ("NRC") to the new office of the Inspector General of NRC, but that attempt did not succeed. *See infra* note 19.

[16] The conclusion we reach here is also consistent with an earlier opinion of this Office *Authority of the State Department Office of Security to Investigate Passport and Visa Fraud*, 8 Op. O.L.C. 175 (1984). In this opinion we considered among other questions whether the Inspector General of the Department of State had authority only to investigate "passport and visa malfeasance" under 18 U.S.C. §§ 1542-1546 (malfeasance or criminal activity on the part of Department of State employees in obtaining passports or visas for themselves or others) or whether he also could investigate "passport and visa fraud" under 18 U.S.C. § 1541 (criminal deceit in passport or visa acquisition by persons other than Department of State employees). At that time, the authority of the Inspector General of the Department of State derived from the Foreign Service Act of 1980, 22 U.S.C. § 3929 (The Department of State was first brought within the ambit of the Act by Pub. L. No. 99-399, 100 Stat. 867 (1986).) The Foreign Service Act, however, had been "patterned" after the Inspector General Act of 1978 and explicitly incorporated

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Id. While *Montgomery Crisis Center* involved a different type of investigation than those at issue here, the court's analysis of the Inspector General's statutory investigative authority supports the conclusions we have reached.

We also note that the legislative history of the recent amendments to the Act, Pub. L. No. 100-504, 102 Stat. 2515 (1988) (to be codified at 5 U.S.C. app.), which extended its coverage to a number of other Departments, including the Treasury Department and the Department of Justice, as well as extending the Inspector General concept to 33 other "designated federal entities," displays an understanding of the authority of the Inspector General that is fully consistent with the conclusions we have reached in this opinion. For instance, the House Report responded to concerns that extending the Act to the Department of Justice would interfere with the Department's investigative and law enforcement functions in the following language:

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[16] (. continued)
the portions of the Act granting investigative authority. Thus, we looked to the structure and legislative history of the Act for guidance in determining the scope of the investigative authority possessed by the Inspector General under the Foreign Service Act. 8 Op. O.L.C at 177-78 Our conclusion was that legislative history of the Act "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 " *Id.* at 178. Ultimately we concluded that Inspector Generals did not have authority to investigate "passport and visa fraud," *i.e.*, fraud not involving employees of the Department of State. *Id* at 179

Our opinion is also consistent with various judicial decisions upholding the subpoena power of Inspectors General in cases involving investigations of contractor or grantee fraud. *See, e g., United States v. Westinghouse Elec Corp.*, 788 F2d 164 (3d Cir. 1986) (Inspector General of Department of Defense investigation of defense contractor), *United States Dep't of Hous and Urban Dev v. Sutton*, 68 B R. 89 (E.D. Mo. 1986) (Inspector General of HUD investigation of properties insured by HUD) The only judicial opinion that we are aware of that is possibly inconsistent with our opinion is an unreported district court opinion that was supplied to us by the Inspector General, *United States v H P. Connor* (Civ. No. 85-4638, D N J , Dec. 9, 1985). This decision involved the enforcement of a subpoena issued by the Inspector General in the course of an investigation of alleged Davis-Bacon Act violations. In an opinion enforcing the subpoena, the court stated "No argument can be made that this investigation is beyond the Inspector General's statutory grant." Slip Op. at 6. There is no citation or reasoning to support this statement, and it is unclear from the opinion whether this issue was even argued We think the issue of whether the Inspector General of the Labor Department has general authority to investigate all federal contractors under the Davis-Bacon Act is more complex than the district court's opinion reveals.

The Davis-Bacon Act requires federal contractors to pay a minimum wage (established by reference to prevailing wages in the community) 40 U.S.C. § 276(a). The Secretary of Labor is expressly given authority to conduct investigations to assure compliance with these requirements *See* Reorg. Plan No. 14 of 1950, 5 U S.C. app at 1261. In order to assure compliance with the Davis-Bacon Act, we understand the Secretary of Labor may investigate not only contractors of the Department of Labor but any federal contractor To the extent this is true, investigations of contractors outside the Department of Labor seem akin to regulatory investigations because they are unrelated to waste and fraud in the operations of the Department of Labor itself or among its employees, contractors or grantees Thus, there is a substantial question whether it is appropriate for the Inspector General of the Department of Labor to conduct general investigations of Davis-Bacon Act compliance by federal contractors outside the Department of Labor. Before rendering an opinion on the scope of the authority of the Inspector General of the Department of Labor to conduct investigations pursuant to the Davis-Bacon Act, however, we would want your views and those of the Inspector General on how this issue should be resolved in light of the general principles set out in this opinion and the specific provisions of the Davis-Bacon Act

> A simple extension of the 1978 act to include the Department of Justice would not result in a direct and significant distortion and diffusion of the Attorney General's responsibilities to investigate, prosecute, or to institute suit when necessary to uphold Federal law. The investigation and prosecution of suspected violations of Federal law and the conduct of litigation are parts of the basic mission or program functions of the Department of Justice. The 1978 act does not authorize inspectors general to engage in program functions and, in fact specifically prohibits the assignment of such responsibilities to an inspector general.

H.R. Rep. No. 771, 100th Cong., 2d Sess. 9 (1988).

Similarly, the House Report described the provisions of the proposed bill (to be codified as section 8E of the Act) which extended the Inspector General concept[17] to 33 other federal entities as requiring "that multiple audit and investigative units in an agency (*except for units carrying out audits or investigations as an integral part of the program of the agency*) be consolidated into a single Office of Inspector General ... who would report directly to the agency head and to the Congress." *Id.* at 14 (emphasis added).[18] This statement is followed almost immediately by the statement that these newly-created "inspectors general would have the same authorities and responsibilities as those provided in the 1978 act." *Id.* at 15. It is also significant that a provision in the Senate bill that would have transferred to the newly-created Office of the Inspector General at the Nuclear Regulatory Commission the office that conducted the Commission's regulatory investigations was dropped after objections were raised by several Senators.[19]

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[17] The principal difference between the Inspectors General at these 33 entities and the Inspectors General in the other departments and agencies is that the former are appointed, and removable, by the head of the agency or entities rather than by the President *See* 5 U.S C. app. § 8E(c).

[18] This quotation is from the Committee report describing the bill that was passed by the House, and the relevant provisions of which were adopted by the House-Senate conference and enacted into law. An earlier version of the bill introduced in the House, *see* 134 Cong. Rec. 3013 (1988), but never voted on, as well as the bill passed by the Senate, *see* 134 Cong Rec. 612 (1988), included a definition of the "audit units" that were to be established in the other federal establishments that tracks the quoted language in the Committee report A comparison of the two versions of the House bill indicates that the definition was dropped as part of a simplification of the structure of the bill whereby the concept of the Inspector General was incorporated by reference rather than being defined There is nothing in the House debates to suggest that the deletion of this definition from the earlier version of the bill was intended to have substantive effect. This is confirmed by the Conference Report, which in describing the reconciliation of the relevant portions of the House and Senate bills does not indicate that the deletion of the definition of "audit unit" from the Senate bill was understood to have any substantive consequences. *See* 134 Cong. Rec 27,283 (1988)

[19] The bill as introduced in the Senate provided for the transfer to the newly-created Office of the Inspector General at the Nuclear Regulatory Commission not only the personnel and functions of the Office of Internal Audit which performed "the typical IG functions — that is, internal audit and investigations," 134 Cong Rec 616 (1988) (statement of Sen. Glenn), but also the functions of the Office of

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Finally, in light of the genuine concern expressed to us by some Inspectors General, we think it worthwhile to set out briefly the significant investigatory authority that is granted to Inspectors General under the Act. Without purporting to provide a complete description of the nature and scope of these authorities, we simply note that the Inspector General: (1) has authority to investigate recipients of federal funds, such as contractors and grantees, to determine if they are complying with federal laws and regulations,[20] and (2) can investigate the policies and actions of the Departments and their employees.[21] Of significance here, this latter authority includes the authority to exercise "oversight" over the investigations that are integral to the programs of the Department. Thus, the Inspector General has the authority to review regulatory inves-

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[19] (continued)
Investigations ("OI"), which conducted program investigations of NRC licensees The Senate Report described the transfer of OI to the Inspector General as "consistent" with the Act S Rep. No. 150, 100th Cong., 1st Sess. 18 (1987). When the bill was reported from the Committee to the full Senate, however, there was objection to the transfer of OI to the Office of the Inspector General on the ground that it would interfere with the authority of the Commission to perform its regulatory functions resulting from its loss of control of the investigative unit which conducted investigations integral to the Commission's regulatory mission. 134 Cong Rec. 616 (1988) As a result, the Committee Chairman, Senator Glenn, agreed to drop the transfer of OI to the Office of the Inspector General from the bill *Id*

[20] Thus, our opinion should not be understood as suggesting that the Inspector General does not have authority to conduct investigations that are *external* to the Department He clearly has that authority in the case of federal contractors, grantees and other recipients of federal funds, as well as authority to investigate individuals or entities that are alleged to be involved with employees of the Department in cases involving employee misconduct or other activities involving fraud, waste and abuse. For instance, the Inspector General would clearly be able to undertake investigations into the conduct of a corporation that paid bribes to an employee of the Department of Labor to overlook violations of OSHA regulations.

[21] The Solicitor of Labor does not challenge the exercise of such authority by the Inspector General:

> [T]he Inspector General of DOL and I are in full agreement that if the IG's office has reason to believe that some sort of misfeasance or malfeasance by DOL personnel has occurred, the IG's Office is fully authorized to investigate such possible misconduct, whether or not the investigation of a program violation is also involved. Secondly, the investigations to which this question is directed do *not* include any which might be directed against a recipient of funds from the Department, whether those funds have been obtained by means of lawful or unlawful activity, so long as the investigation is directed at activities which occurred in connection with the receipt or use of the DOL funds.

Letter for Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from George Salem, Solicitor of Labor, at 2 (Dec. 5, 1988). The Inspector General brought to our attention a 1981 letter from the Criminal Division of the Department of Justice The letter was in response to an inquiry from the General Counsel of the Department of Health and Human Services as to the authority of the Inspector General to investigate violations of the Food and Drug Act The relevant portion of the letter states·

> We are of the opinion that the legislation establishing the Inspectors General was generally not intended to replace the regulatory function of an agency such as FDA to investigate possible violations of the Act However, we also feel that as part of the IG's general oversight responsibilities, he is authorized to investigate allegations of improprieties within the programs of his department or agency. Therefore, we can envision situations where FDA and/or the IG will be investigating alleged violations of the Act

Letter for Juan A. del Real, General Counsel, HHS, from D Lowell Jensen, Assistant Attorney General, Criminal Division (Dec. 10, 1981) The Inspector General suggests that this letter supports his view that

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tigative activities of the Department of Labor, and to report his criticism and findings to the head of the department and Congress. All we conclude here is that the Act does not give the Inspector General the authority to assume these regulatory investigative responsibilities himself.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

[21] (...continued)
he has authority to conduct regulatory investigations. We find nothing in this letter inconsistent with our conclusion here. Like the Criminal Division in 1981, we believe that the Inspector General is authorized to investigate "allegations of improprieties within the programs of his department" and thus we too can envision situations where the Inspector General of HHS would investigate alleged violations of the Food and Drug Act. An obvious example of such a situation would be when there were allegations that employees of the Food and Drug Administration had been bribed to approve a drug for sale to the public.

Issuance of Passports to Aliens to Facilitate "Sting" Operation by State Department Inspector General

The Department of State has authority to issue passports to aliens for the purpose of facilitating a "sting" operation conducted by the Department of State Inspector General.

March 13, 1989

MEMORANDUM OPINION FOR THE LEGAL ADVISOR
DEPARTMENT OF STATE

This responds to your request as to whether the Department of State has the authority "to issue U.S. passports to aliens to facilitate U.S. law enforcement and intelligence operations."[1] You have previously advised the Deputy Secretary of State that in your opinion "there were no legal constraints to the issuance of U.S. passports to aliens to facilitate a Department of State Inspector General 'sting' operation." Letter at 1. Contrary to that view, the Bureau of Consular Affairs ("CA") at the Department of State appears to take the position that it is prohibited by 22 U.S.C. § 212, among other statutes, from issuing passports to those who do not owe their allegiance to the United States, even to facilitate law enforcement efforts.[2] CA also relies in part on a statement in a 1977 OLC opinion permitting "false statements by CIA employees to obtain passports in alias and the use of passports so obtained, where necessary to their otherwise lawful functions."[3] That opinion went on to

[1] Letter for Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from Abraham D Sofaer, The Legal Advisor, Department of State at 1 (Feb. 11, 1989) ("Letter"). Although the stated question concerns issuing U S passports to aliens for both law enforcement and intelligence operations, we here address only the use of alias passports to aliens in law enforcement operations. As we understand it, the purpose of the Inspector General's investigation is to detect the "subornation of a U.S. consular officer and a large network of fake passport brokers." Action Memorandum for the Deputy Secretary of State, from Sherman M Funk and Abraham D. Sofaer, *Re Passports for IG Investigation* at 1 (Sept. 20, 1988) ("Action Memorandum") A technical violation of the law by the sovereign in order to enforce the law seems to us a different question than violation of the law to achieve unstated intelligence objectives. Because the goal of the proposed "sting" operation is quite plainly to enforce the law, we address that question only. Should you wish us also to address the question of the legality of the use of such passports in intelligence operations, we will undertake to answer this question, which appears to be one of first impression for us.

[2] Memorandum for Judge Abraham D Sofaer, from Joan M Clark, *Re. Request for a Legal Opinion From the Department of Justice*, attached to Letter at Tab 2

[3] Letter for Anthony A. Lapham, General Counsel, Central Intelligence Agency, from John M Harmon, Acting Assistant Attorney General, Office of Legal Counsel at 13 (Mar 24, 1977) ("Harmon Opinion").

state, however, that "[o]nly United States nationals ... may obtain passports." *Id.*[4]

We believe that the reasoning of a previous opinion of this Office permits the issuance of passports to facilitate an IG sting operation. *See Visa Fraud Investigation*, 8 Op. O.L.C. 284 (1984). That opinion concludes that the United States officials may issue visas to aliens statutorily ineligible to receive them in order to facilitate undercover operations for enforcement of our criminal laws. The statements from other OLC opinions on which CA relies are taken out of context and do not in fact address the question of whether passports can be issued to aliens for law enforcement purposes. Accordingly, we do not believe that there is a conflict between the 1984 Opinion and any prior opinion of this Office.

In 1984, this Office opined that "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." 8 Op. O.L.C. at 284. That judgment was based upon the rule, well-recognized by courts, 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, and when the action does not otherwise violate the Constitution." *Id.* at 287 (footnotes omitted).

The prohibition at issue here is similar to the one discussed in the 1984 Opinion. There, where the purpose was to investigate an unlawful conspiracy to circumvent U.S. visa restrictions, we said the Department of State could issue a visa to a woman who was not an American citizen despite its knowledge that the marriage making her eligible for a visa was a sham. We said that the law banning consular officers from issuing visas to aliens that the officer "knows or has reason to believe ... [are] ineligible," 8 U.S.C. § 1201(g)(3), did not bar the issuance of the visa to facilitate an effort to enforce the visa laws of the United States. 8 Op. O.L.C. at 288. Similarly, 22 U.S.C. § 212 makes it unlawful to give a passport to one who does not owe his allegiance to the United States.[5] On its face, this would prevent State Department officials from giving a passport to an alien. But here, the alien is to be granted the passport — as was the case in the oper-

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[4] CA relies as well on a prefatory statement in another 1977 OLC opinion. *See infra* note 7.

[5] If a passport is characterized as a message to another government as to its holder's status, all decisions regarding passports (as opposed to naturalization) may fall within the exclusive domain of the President. This is due to the President's role as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States v Curtiss-Wright Export Corp.*, 299 U S 304, 319 (1936) (quoting 10 Annals of Cong 613 (1800) (Rep Marshall)) *See* Letter from Thomas Jefferson, Secretary of State, to Citizen Genet, November 22, 1793, 9 *Writings of Thomas Jefferson, 1789-1726* at 256 (Andrew A Lipscomb ed., Mem. ed. 1904) *quoted in* Edward S Corwin, *The President· Office and Powers 1787-1984* at 208 (5th ed 1984) (The President is "the only channel of communication between the United States and foreign nations "). Thus there is an argument (the validity of which we need not determine) that Congress may not restrict by statute the issuance of passports by the President or subordinates acting at his direction

ation approved in the 1984 opinion — to ensure that the passport laws of the United States are respected. This action, then, is consistent with the underlying purpose of the statute insofar as the short-term, controlled issuance of passports to aliens[6] is actually to ensure that passports are being issued as a matter of general practice only to those statutorily entitled to receive them. The issuance of the passports here may thus be said to be necessary to what is the functional equivalent of a legal audit of a consular official.

We need not restate at great length the discussion of the caselaw and the analysis set forth in the 1984 Opinion, for it stands on its own and accurately reflects the views of this Office. It also accurately reflects the current law, best summarized by Judge Easterbrook in *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). Upholding a conviction of Cook County judge who had accepted a bribe offered by an undercover government agent, Judge Easterbrook wrote that "[i]n the pursuit of crime the Government is not confined to behavior suitable for the drawing room. It may use decoys, and provide the essential tools of the offense," *id.* at 1529 (citations omitted). Other courts agree that the government may technically transgress the law in order to enforce it. *See, e.g., United States v. Citro*, 842 F.2d 1149 (9th Cir.) (government may supply counterfeit credit cards to uncover counterfeit credit card scheme), *cert. denied*, 488 U.S. 866 (1988); *United States v. Valona*, 834 F.2d 1334 (7th Cir. 1987) (government agent may supply cocaine to uncover drug distribution racket); *United States v. Milam*, 817 F.2d 1113 (4th Cir. 1987) (government agents may sell counterfeit currency to uncover scheme to distribute such currency); *Shaw v. Winters*, 796 F.2d 1124, 1125 (9th Cir. 1986) (police officer may sell stolen food stamps to uncover fencing operation, stating "Government agents ... may supply the contraband which is at the heart of the offense"), *cert. denied*, 481 U.S. 1015 (1987).

In addition, we do not believe that the 1984 Opinion contradicts the two previous OLC opinions on which CA relies. The question whether passports may lawfully be issued to aliens was not presented to the Office for decision in the Harmon Opinion. The "problem areas" identified by the FBI involved the "use [by the CIA] of forged birth certificates and false statements to obtain U.S. passports," Harmon Opinion at 1, not whether passports could be issued to aliens. The sentence CA rests on — that "[o]nly United States nationals ... may obtain passports," *id.* at 13 — accurately stated the relevant statutes, but neither considered nor discussed whether legitimate law enforcement objectives under controlled circumstances necessitate a technical departure from those statutes.[7]

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[6] We assume, therefore, that upon the successful completion of the sting operation the passports will be returned, or if not possible, that consular officials be notified not to accept them

In conclusion, we agree with you that CA may issue the passport requested by the Inspector General of the State Department for their limited and controlled use in the sting operation under the stated conditions — namely, that the Inspector General "work closely with CA to safeguard the passports, and to ensure strict compliance with CA's procedural requirements."[8]

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

[7] The second OLC opinion CA rests upon, issued in 1977 to the FBI on the use of government documents for undercover purposes, began by stating "[w]e assume for purposes of this opinion that only United States nationals acquire passports in alias in this manner." Memorandum for Clarence M. Kelley, Director, Federal Bureau of Investigation, from John M Harmon, Acting Assistant Attorney General, Office of Legal Counsel at 1 (Feb 17, 1977) It is evident that this brief statement, made in the nature of an introduction, was intended only to state the Office's understanding of the scope of the request. The opinion was simply following the standard practice (followed in this memorandum as well) of setting forth at the beginning the question to be answered. The statement cannot be viewed as dispositive — or even persuasive — to the question now before us because the issue of whether passports could be given to aliens was not there presented or discussed

[8] Action Memorandum at 1. We have considered the issue presented with this limitation in mind. We do not here address the question of whether these passports may issue other than in compliance with CA's procedural requirements and without adequate safeguards.

Whether the Office of Special Counsel for Immigration Related Unfair Employment Practices is Empowered to Challenge the Constitutionality of State Statutes

The statutory exemption for "discrimination ... otherwise required in order to comply with law, regulation, or executive order" excludes from the scope of the Office of Special Counsel's jurisdiction all discriminatory activity based on state law.

March 16, 1989

MEMORANDUM OPINION FOR THE SPECIAL COUNSEL FOR IMMIGRATION RELATED UNFAIR EMPLOYMENT PRACTICES

You have asked for our opinion on whether the Office of Special Counsel for Immigration Related Unfair Employment Practices may challenge discrimination on the basis of citizenship status that is committed pursuant to state law or whether such conduct is exempted from your jurisdiction pursuant to the exception found in 8 U.S.C. § 1324b(a)(2)(C).[1] We believe that the language "discrimination ... otherwise required in order to comply with law, regulation, or executive order" was intended to exclude from the scope of the jurisdiction of your Office all discriminatory activity based on state law.

We have reached this conclusion based on the plain language of the statute that action taken pursuant to any "law, regulation, or executive order" of the state or federal government is exempted from the definition of "unfair immigration-related employment practice." This reading of the language is bolstered by the fact that since state statutes are generally presumed to be constitutional, the drafters of the exception would ordinarily have assumed that the "laws" referred to would be presumed to be constitutional until actually held to be otherwise. *See, e.g., Salsburg v. Maryland*, 346 U.S. 545, 553 (1954) ("The presumption of reasonableness is with the State.")(footnote omitted); *Davis v. Department of Labor*, 317 U.S. 249, 256 (1942) ("Faced with this factual problem we must give great — indeed, presumptive — weight to the conclusions ... to the state

[1]Memorandum for Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, from Lawrence J. Siskind, Special Counsel, Office of Special Counsel for Immigration Related Unfair Employment Practices (Feb. 22, 1988) ("Memorandum").

statutes themselves."); *Atchison, T. & S. F. R.R. v. Matthews*, 174 U.S. 96, 104 (1899) ("It is ... a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power.").[2] Thus, we believe Representative Frank's reference to "valid" laws must be understood in light of a state law's presumed validity. 130 Cong. Rec. 15,938 (1984). Of course, this presumption of validity and the limitation on your jurisdiction would not apply where the particular state law had been invalidated or found unconstitutional.[3]

Disregarding the plain language of the statute in order to permit the Office of Special Counsel to challenge action taken pursuant to state law would also raise more complex issues, some of constitutional dimension. In this regard, considerable doubt exists whether administrative law judges ("ALJ") can determine the constitutionality of state statutes or are precluded from doing so by Article III of the Constitution. In assessing whether the assignment of particular duties to a non-Article III body unconstitutionally infringes upon the prerogatives of the judicial branch, the Court has been especially wary about authorizing the assignment to non-Article III tribunals of state law questions, *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), and constitutional questions, *Johnson v. Robison*, 415 U.S. 361, 369 (1974). Under your memorandum, however, an ALJ would be making determinations about both. Where that is the case an Article III court must exercise the firmest control over the non-Article III tribunal.

That control is missing here. Review of the ALJ decision is only in the court of appeals. It is not said to be de novo, and the court of appeals has nothing to review other than the "cold record." *United States v. Raddatz*, 447 U.S. 667, 679-80 (1980) (distinguishing between "an appellate court's review of a *nisi prius* judge in a trial on the merits" and "a special master's findings or actions of an administrative tribunal on findings of a hearing officer"). In *Raddatz*, the Supreme Court upheld a magistrate's factual determinations in a constitutional proceeding only because the magistrate was subject to the "broad discretion" of the district court

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[2]We are also fortified in this conclusion by the fact that the use of the word "law" in the exception in section 1324b(a)(2)(C) is similar to its use in other jurisdictional statutes. For example, 28 U S C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the . laws . of the United States " Yet there is no doubt that an action to challenge an unconstitutional law is one "arising under" the laws of the United States.

[3]Where a particular state law has not been found unconstitutional, but you believe the state law is, under analogous Supreme Court precedent, arguably unconstitutional on its face or as applied, we recommend that you bring this concern to the attention of the Assistant Attorney General for Civil Rights for a discussion of whether federal litigation, a denial of federal benefits or some other appropriate action should be taken in light of the constitutional doubts presented at that time. This Office, of course, would be pleased to assist you or Civil Rights in evaluating these constitutional questions as they arise.

judge "to accept, reject, or modify the magistrate's proposed findings." *Id.* at 680. Had the proceeding not "[been] 'constantly subject to the court's control,'" *id.* at 682 (quoting *Crowell v. Benson*, 285 U.S. 22 (1932)), the Court would have found that the statutory procedure did not "strike[] the proper balance between the demands of due process and the constraints of Art. III." *Id.* at 683-84. Stated another way, "'[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.'" *Id.* at 682 (quoting *Crowell*, 285 U.S. at 60).

Were the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1983) ("IRCA") to be read as giving ALJs the authority to make determinations as to the constitutionality of state law, the established procedures might well fall short of the requirements set forth in *Raddatz*. The facts upon which the determination of the constitutionality of a state statute would be based would be found by a non-Article III official. Those facts could then be reviewed only by a court of appeals, which review is not even (unlike the procedures reviewed in *Raddatz*) designated as "de novo." This ill-comports with the respect due state statutes in our federal system. *See, e.g., Salsburg v. Maryland*; *Davis v. Department of Labor*; *Atchison, T. & S. F. R.R. v. Matthews*. Moreover, in the event an ALJ found a challenged statute constitutional, an individual claiming that the state law is unconstitutional would, on appeal — especially in an as-applied challenge — be deprived of the opportunity to have an Article III court assess in the first instance the alleged facts upon which his claim is based. This *Raddatz* forbids.

CFTC v. Schor, 478 U.S. 833 (1986), highlights the differences between the circumstances when a non-Article III tribunal may decide certain questions and the situation at issue here. In *Schor*, the Supreme Court held that a non-Article III tribunal could entertain state law counterclaims even though the only review was by a court of appeals. The Court based this decision on a number of important factors. First, Mr. Schor consciously chose the speed and inexpense of the administrative procedure to vindicate his right to reparations, thus choosing to have his claim adjudicated before a non-Article III court. The state whose law would be challenged by the Special Counsel would not appear voluntarily. Moreover, the other factors considered by the *Schor* Court in assessing whether the adjudication of the constitutionality of the state statute "in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch," 478 U.S. at 851, illustrate the constitutional problems raised by ALJ review of constitutional questions. The *Schor* Court looked to (1) "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts"; (2) "conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; (3) "the origins and

importance of the right to be adjudicated"; and (4) "the concerns that drove Congress to depart from the requirements of Article III." *Id.* (citing *Thomas*, 473 U.S. at 587, 589-93); *Northern Pipeline*, 458 U.S. at 84-86.

Turning to the first two considerations, the essential attributes of judicial power are not sufficiently reserved to an Article III court. This is illustrated by looking to the "converse": whether ALJs are here vested with powers "normally vested only in Article III courts." Determining the constitutionality of a state statute is one of the most important of all Article III functions. It leads to precisely the kinds of determinations that are "normally vested only in Article III courts", *Schor*, 478 U.S. at 851, and would take the ALJ well beyond the "particularized area of law" which non-Article III tribunals may well be able to handle. *Id.* at 852.[4]

Permitting such determinations by an ALJ would also run counter to the strong tradition that constitutional issues should not be resolved in administrative proceedings.[5] Administrative agencies are often said to "have no power to pass upon the constitutionality of administrative or legislative action." *Zeigler Coal Co. v. Marshall*, 502 F. Supp. 1326, 1330 (S.D. Ill. 1980).[6]

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[4]This is illustrated by the likely response to a challenge by the Special Counsel The state (or state official) will assert that the citizenship requirements were established by "law." This would require the ALJ first to construe the state law, something about which even Article III courts normally defer to state courts. *See, e.g , Hortonville J S D. No 1 v Hortonville Ed Ass'n*, 426 U.S 482, 488 (1976) ("We are, of course, bound to accept the interpretation of Wisconsin law by the highest court of the State ") (citing cases), *Mullaney v Wilbur*, 421 U.S 684, 691 (1975) ("This Court, however, repeatedly has held that state courts are the ultimate expositors of state law.") (citing cases) Next, the ALJ would have to decide whether the statute accords with the state's constitution *Cf Kizzier Chevrolet Co v General Motors Corp* , 705 F2d 322, 329 (8th Cir), *cert denied*, 464 U.S. 847 (1983) ("Where state law supplies the rule of decision, it is the duty of federal courts to ascertain and apply that law.") Then, the ALJ will have to determine whether under the Supreme Court's jurisprudence, the citizenship requirement is justified Finally, the ALJ will have to determine whether the individual state official is immune from the civil penalty portion of the judgment under the common-law doctrine of official immunity He would further have to determine whether he can require the state (by enjoining the state official) to hire the individual. 8 U S C § 1324b(g)(2)(B)(iii) and (iv).

[5]Although your Memorandum only raises the issue of state laws, your reading of the statute would also require us to resolve the issue of whether the Special Counsel could challenge as unconstitutional not only state laws but also federal laws, regulations, and executive orders. 8 U S.C § 1324b(a)(2)(C) (discrimination compelled by any "law, regulation, or executive order") If the Special Counsel could bring such a challenge to federal laws, regulations, or executive orders, this would raise substantial difficulties For ALJs to be vested with the authority to adjudicate the constitutionality of federal statutes would plainly be contrary to the oft-made Supreme Court pronouncement, alluded to above, that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies " *Johnson v Robison*, 415 U.S 361, 368 (1974) (quoting *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 242 (1968)) (Harlan, J , concurring in result) Moreover, for ALJs to decide the constitutionality of federal executive orders and regulations would raise two severe constitutional problems. First, the unitary executive established by the Constitution in Article II forbids one of the President's subordinates to challenge in court the constitutionality of an executive order. Second, it would also test the limits of Article III's "case or controversy" requirement to suggest that the Special Counsel (assuming the ALJ concurred) could challenge in court the regulations of another part of the executive branch

[6]Whether or not this is true — and we note in passing that the authority of an administrative agency to pass upon the constitutionality of state and federal legislation may well differ — we are hesitant to impute to Congress a desire to vest in the ALJs created by IRCA the power to find a state law unconstitutional when that is no where alluded to in the statute or legislative history.

We raise these issues above only to illustrate the dilemmas presented if the plain meaning of the statute is disregarded.[7] We do not think Congress would have left these complex and difficult issues unaddressed, and this too, favors adherence to the plain language of the statute. We have therefore concluded that discrimination because of citizenship status that is required in order to comply with state law is excepted from the definition of an unfair immigration-related practice within the meaning of 8 U.S.C. § 1324b.

That said, we note Mr. Elhajomar is not without remedies. He may challenge the validity of the Hawaii law in state or federal court. The Department could assist him, if it chose, through a Civil Rights Division amicus brief or by intervening in such a proceeding. Alternatively, the Department might take steps to terminate federal monies unless the constitutional concern was rectified. For these reasons, as suggested earlier, we believe you should raise any arguable unconstitutionality of a state law with the Civil Rights Division. However, Congress has chosen to exempt discrimination based on citizenship status that is required by "law, regulation, or executive order" from the meaning of "unfair immigration-related employment" practices and we believe that language must govern. 8 U.S.C. § 1324b(a). Therefore, the Special Counsel may not use IRCA to challenge action taken pursuant to state law.

DOUGLAS W. KMIEC
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Office of Legal Counsel

[7]In addition, a reading at odds with the plain meaning would mean that although the Special Counsel could sue a state, the complainant would probably be barred by the Eleventh Amendment. The Eleventh Amendment would not preclude a suit by the Special Counsel against a state, for the Special Counsel is not suing as "a Citizen of another State." Moreover, the Court has held that the Eleventh Amendment does not bar suits by the federal government against a State. *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) However, the statute also provides for a private right of action if the Special Counsel does not act on a matter. 8 U.S.C. § 1324b(d)(2) It would be, nevertheless, problematic for Mr Elhajomar to be permitted to sue a state in his individual capacity

Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations

Long-established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of executive privilege, require that in the absence of extraordinary circumstances an Inspector General must decline to provide confidential information about an open criminal investigation in response to a request pursuant to Congress' oversight authority

The reporting provisions of the Inspector General Act do not require Inspectors General to disseminate to Congress confidential information pertaining to open criminal investigations.

March 24, 1989

MEMORANDUM OPINION FOR THE CHAIRMAN
INVESTIGATIONS/LAW ENFORCEMENT COMMITTEE
PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY

Introduction and Summary

This memorandum is in response to your request for the opinion of this Office on the obligations of Inspectors General ("IGs") with respect to congressional requests for confidential information about open criminal investigations. Specifically, you have asked this Office to advise you as to the obligations of the IGs with respect to (1) requests based on Congress' oversight authority and (2) requests based on the reporting requirements of the Inspector General Act of 1978 ("the Act"), Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified at 5 U.S.C. app. 3).[1]

As discussed below, when pursuant to its oversight authority Congress seeks to obtain from an IG confidential information about an open criminal investigation, established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of executive privilege, require that the IG decline to provide the information, absent extraordinary circumstances. With respect to congressional requests based on the congressional reporting requirements of the Act, we have concluded as a matter of statutory construction that Congress did not intend those provisions to require production of confi-

[1] On March 8, 1989, Larry Elston of your staff orally confirmed to Paul Colborn of this Office that these are the questions on which you seek our opinion

dential information about open criminal investigations. Accordingly, IGs are under no obligation under the Act to disseminate confidential law enforcement information.

I. Congressional Requests Based on Oversight Authority

The decision on how to respond to a congressional request for information from an IG based on Congress' oversight authority requires the weighing of a number of factors arising out of the separation of powers between the executive and legislative branches. The principal factors to be weighed are the nature of Congress' oversight interest in the information and the interest of the executive branch in maintaining confidentiality for the information.

A. Congress' Oversight Authority

The constitutional role of Congress is to adopt general legislation that will be implemented — "executed" — by the executive branch. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). The courts have recognized that this general legislative interest gives Congress investigatory authority. Each House of Congress has power, "through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function "has long been held to be a legitimate use by Congress of its power to investigate," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975), provided that the investigation is "related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States*, 354 U.S. 178, 187 (1957). The inquiry must pertain to subjects "on which legislation could be had." *McGrain v. Daugherty*, 273 U.S. at 177.

In short, Congress' oversight authority

> is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.
>
> Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters *which are within the exclusive province of one of the other branches of the Government.*

Barenblatt v. United States, 360 U.S. 109, 111-12 (1959) (emphasis added).

The execution of the law is one of the functions that the Constitution makes the exclusive province of the executive branch. Article II, Section 1 provides that "the executive Power shall be vested in a President of the United States of America." Article II, Section 3 imposes on the President the corresponding duty to "take Care that the Laws be faithfully executed."[2] In particular, criminal prosecution is an exclusively executive branch responsibility. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *United States v. Nixon*, 418 U.S. 683, 693 (1974). Accordingly, neither the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the executive branch by directing it to prosecute particular individuals.[3] Indeed, in addition to these general constitutional provisions on executive power, the Framers specifically demonstrated their intention that Congress not be involved in prosecutorial decisions or in questions regarding the criminal liability of specific individuals by including in the Constitution a prohibition against the enactment of bills of attainder. U.S. Const. art. I, § 9, cl. 3. *See United States v. Lovett*, 328 U.S. 303, 317-18 (1946); *INS v. Chadha*, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring).

On the other hand, Congress' oversight authority does extend to the evaluation of the general functioning of the Inspector General Act and relevant criminal statutes, as well as inquiring into potential fraud, waste and abuse in the executive branch. Such evaluations may be seen to be necessary to determine whether the statutes should be amended or new legislation passed. *See Watkins v. United States*, 354 U.S. at 187. Given the general judicial reluctance to look behind congressional assertions of legislative purpose, an assertion that Congress needed the information for such evaluations would likely be deemed sufficient in most cases to meet the threshold requirement for congressional inquiry. This general legislative interest, however, does not provide a compelling justification

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[2] One of the fundamental rationales for the separation of powers is that the power to enact laws and the power to execute laws must be separated in order to forestall tyranny As James Madison stated in Federalist No 47

> The reasons on which Montesquieu grounds his maxim [that the legislative, executive and judicial departments should be separate and distinct] 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"

The Federalist No 47, at 303 (James Madison) (Clinton Rossiter ed., 1961).

[3] *See Heckler v Chaney*, 470 U.S at 832 ("[T]he decision of a prosecutor in the Executive Branch not to indict ... has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed'"), *United States v Nixon*, 418 U S. at 693 ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.")

for looking into particular ongoing cases.[4] Accordingly, we do not believe that as a general matter it should weigh heavily against the substantial executive branch interest in the confidentiality of law enforcement information. We discuss that interest next.

B. Executive Privilege

Assuming that Congress has a legitimate legislative purpose for its oversight inquiry, the executive branch's interest in keeping the information confidential must be assessed. This subject is usually discussed in terms of "executive privilege," and we will use that convention here.[5] Executive privilege is constitutionally based. To be sure, the Constitution nowhere expressly states that the President, or the executive branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution, has been asserted by numerous Presidents from the earliest days of our Nation, and has been explicitly recognized by the Supreme Court. *United States v. Nixon*, 418 U.S. at 705-06. There are three generally-recognized components of executive privilege: state secrets, law enforcement, and deliberative process. Since congressional requests for information from IGs will generally implicate only the law enforcement component of executive privilege, we will limit our discussion to that component.

It is well established and understood that the executive branch has generally limited congressional access to confidential law enforcement information in order to prevent legislative pressures from impermissibly influencing its prosecutorial decisions. As noted above, the executive branch's duty to protect its prosecutorial discretion from congressional interference derives ultimately from Article II, which places the power to enforce the laws exclusively in the executive branch. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is some danger that congressional pressures will influence, or will be perceived to influence, the course of the investigation. Accordingly, the policy and practice of the executive branch throughout our Nation's history has been to decline, except in extraordinary circumstances, to provide committees of Congress with access to,

[4] For instance, Congress' interest in evaluating the functioning of a criminal statute presumably can be satisfied by numerical or statistical analysis of closed cases that had been prosecuted under the statute, or (at most) by an analysis of the closed cases themselves.

[5] The question, however, is not strictly speaking just one of executive privilege. While the considerations that support the concept and assertion of executive privilege apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena, in responding to a congressional request for information, the executive branch is not necessarily bound by the limits of executive privilege.

or copies of, open law enforcement files. No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files.[6]

Attorney General Robert H. Jackson well articulated the basic position:

> 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).

Other grounds for objecting to the disclosure of law enforcement files include the potential damage to proper law enforcement that would be caused by the revelation of sensitive techniques, methods, or strategy; concern over the safety of confidential informants and the chilling effect on other sources of information; sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law; and well-founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process.[7] *See generally Congressional Subpoenas of Department of Justice Investigative Files*, 8 Op. O.L.C. 252, 262-66 (1984).

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[6] *See generally Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op O L.C. 31 (1982) (regarding request for open law enforcement investigative files of the Environmental Protection Agency); Memorandum for the Deputy Attorney General from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re. Refusals by Executive Branch to Provide Documents from Open Criminal Investigative Files to Congress* (Oct. 30, 1984).

[7] In addition, potential targets of enforcement actions are entitled to protection from premature disclosure of investigative information It has been held that there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." *Delaney v United States*, 199 F2d 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*

C. Accommodation with Congress

The executive branch should make every effort to accommodate requests that are within Congress' legitimate oversight authority, while remaining faithful to its duty to protect confidential information.[8] *See generally United States v. AT&T*, 567 F.2d 121, 127-30 (D.C. Cir. 1977); *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981) ("The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.").

The nature of the accommodation required in responding to a congressional request for information clearly depends on the balance of interests between the Executive and Congress. For its part, Congress must be able to articulate its need for the particular materials — to "point[] to ... specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and to show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731, 733 (D.C. Cir. 1974). The more generalized the executive branch interest in withholding the disputed information, the more likely it is that this interest will yield to a specific, articulated need related to the effective performance by Congress of its legislative functions. Conversely, the more specific the need for confidentiality, and the less specific the articulated need of Congress for the information, the more likely it is that the Executive's need for confidentiality will prevail. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 446-55 (1977) (discussion of balance of

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[8] President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" states:

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

Only rarely do congressional requests for information result in a subpoena of an executive branch official or in other congressional action. In most cases the informal process of negotiation and accommodation recognized by the courts, and mandated for the executive branch by President Reagan's 1982 memorandum, is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee. At that point, it would be necessary to consider asking the President to assert executive privilege. Under President Reagan's memorandum, executive privilege cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President. We have no reason to believe that President Bush envisions a different procedure.

interests); *United States v. Nixon*, 418 U.S. at 707-13 (same); *United States v. AT&T*, 567 F.2d at 130-33 (same).

In light of the limited and general congressional interest in ongoing criminal investigations and the specific and compelling executive branch interest in protecting the confidentiality of such investigations, the executive branch has generally declined to make any accommodation for congressional committees with respect to open cases: that is, it has consistently refused to provide confidential information. However, on occasion after an investigation has been closed, and after weighing the interests present in the particular case, the executive branch has briefed Congress on prosecutorial decisions and has disclosed some details of the underlying investigation.[9]

In conclusion, although in the absence of a concrete factual setting we cannot analyze the case for withholding any particular document or information in response to a congressional oversight request, we can advise that as a general matter Congress has a limited oversight interest in the conduct of an ongoing criminal investigation and the executive branch has a strong interest in preserving the confidentiality of such investigations. Accordingly, in light of established executive branch policy and practice, and absent extraordinary circumstances, an IG should not provide Congress with confidential information concerning an open criminal investigation.

II. Congressional Requests Based on the Inspector General Act

The second question raised by your opinion request is whether the reporting provisions of the Inspector General Act require that IGs provide Congress with confidential information on open criminal investigations that is not normally shared with Congress under established executive branch policy and practice with respect to oversight requests. We believe that both the text and legislative history of these provisions demonstrate that they do not impose such a requirement.

[9] Once an investigation has been closed without further prosecution, some of the considerations previously discussed lose their force Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution, likewise, if no prosecution will result, concerns about the effects of undue pretrial publicity on a jury would disappear. Still, such records are not automatically disclosed to Congress. Obviously, much of the information in a closed criminal enforcement file — such as unpublished details of allegations against particular individuals and details that would reveal confidential sources and investigative techniques and methods — would continue to need protection

In addition, the executive branch has a long-term institutional interest in maintaining the confidentiality of the prosecutorial decisionmaking process The Supreme Court has recognized that "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. It is therefore important to weigh the potential "chilling effect" of a disclosure of details of the prosecutorial deliberative process in a closed case against the immediate needs of Congress

The Act establishes a number of congressional reporting requirements with respect to the activities of the IGs. Most generally, section 4(a)(5) requires each IG

> to keep the head of [the agency within which his office is established] and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such [agency], to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.

Section 5(a) requires each IG to prepare semi-annual reports summarizing the activities of his office, and section 5(b) requires that the head of the IG's agency submit these reports to the appropriate committees or subcommittees of Congress within 30 days of receiving them. Section 5(d) requires each IG to

> report immediately to the head of the [agency] whenever the [IG] becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such [agency]. The head of the [agency] shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the agency containing any comments such head deems appropriate.

Finally, section 5(e) provides in subsection (1) that none of the reporting requirements "shall be construed to authorize the public disclosure" of certain information, while also providing in subsection (3) that neither the reporting requirements nor any other provision of the Act "shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof."

In our judgment, nothing in the text of these provisions provides that confidential law enforcement materials pertaining to ongoing cases must be transmitted to Congress. To the contrary, the statutory scheme set out in section 5 of the Act merely envisions that the periodic reports from each IG to Congress will be a general "description" and "summary" of the work of the IG. This view of section 5 is supported by the Act's legislative history. In proposing the congressional reporting requirements that were ultimately enacted into law,[10] the Senate committee made it clear that it did not contemplate that reports from the IGs would be so specific that

confidential investigative information would fall within the scope of the report and, in any event, it was not intended that such information would be required. For example, with respect to section 5(a)(4)'s requirement that semi-annual reports contain "a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted," the committee indicated:

> By using the word "summary" in subsection (a)(4), the committee intends that Congress would be given an overview of those matters which have been referred to prosecutive authorities. It would be sufficient, for instance, for an [IG] at HUD to include in his report the fact that he had referred 230 cases of fraud in FHA programs to the Justice Department for further investigation and prosecution. It would be highly improper and often a violation of due process for an IG's report to list the names of those under investigation or to describe them with sufficient precision to enable the identities of the targets to be easily ascertained. However, once prosecutions and convictions have resulted, the IG could certainly list those cases, if he deems such a listing appropriate.

S. Rep. No. 1071 at 30.

The committee noted that section 5(b)'s requirement that semi-annual reports be submitted to Congress "contemplates that the IG's reports will ordinarily be transmitted to Congress by the agency head *without alteration or deletion.*" *Id.* at 31 (emphasis added). The committee went on to stress, however, that

> nothing in this section authorizes or permits an [IG] to disregard the obligations of law which fall upon all citizens and with special force upon Government officials. The Justice Department has expressed concern that since an [IG] is to report on matters involving possible violations of criminal law, his report might contain information relating to the identity of informants, the privacy interest of people under investigations, or other matters which would impede law

[10] The Act was originally considered by the House of Representatives as H.R. 8588, which contained similar reporting requires to those of the Senate bill *Compare* House version, sections 3-4, 124 Cong Rec. 10,399 (1978), *with* Senate version, sections 4-5, 124 Cong. Rec 32,029-30 (1978). The legislative history regarding the House provisions is much less extensive than that for the Senate provisions. *See generally* H.R. Rep. No. 584, 95th Cong., lst Sess 13-14 (1977) H R 8588 passed the House, but failed in the Senate, which considered instead a substitute bill reported from the Senate Committee on Governmental Affairs *See* 124 Cong Rec. 30,949 (1978), S. Rep. No. 1071, 95th Cong., 2d Sess (1978) The House accepted the substitute Senate bill and it was enacted into law

> enforcement investigations. *As noted above, the committee does not envision that a report by the [IG] would contain this degree of specificity. In any event, however, the intent of the legislation is that the [IG] in preparing his reports, must observe the requirements of law which exist today under common law, statutes, and the Constitution, with respect to law enforcement investigations....*
>
> The committee recognizes, however, that in rare circumstances the [IG], through inadvertence or design, may include in his report materials of this sort which should not be disclosed even to the Congress. The inclusion of such materials in an [IG's] report may put a conscientious agency head in a serious bind. The obligation of an agency head is to help the President "faithfully execute the laws." Faithful execution of this legislation entails the timely transmittal, without alteration or deletion, of an [IG's] report to Congress. However, *a conflict of responsibilities may arise when the agency head concludes that the [IG's] report contains material, disclosure of which is improper under the law. In this kind of rare case, section 5(b) is not intended to prohibit the agency head from deleting the materials in question.*[11]

Id. at 31-32 (emphasis added).[12]

The committee also made it clear that the same principles apply with equal force to the requirement of section 5(d) that the IG reports to agency heads on "particularly serious or flagrant problems" also be submitted to Congress. In stating with respect to this section that "as in subsection (b), the agency head has no general authority or right to delete or alter certain provisions of the report" *id.* at 33, the committee clearly

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[11] "In the rare cases in which alterations or deletions have been made, the committee envisions that an agency head's comments on an [IG's] report would indicate to the Congress that alterations or deletions had been made, give a description of the materials altered or deleted, and the reasons therefore " *Id* at 32.

[12] In addition to thus stating its intention with respect to the confidentiality of law enforcement information, the committee also expressed its understanding that section 5(b) cannot override executive privilege with respect to deliberative process information

> [T]he committee is aware that the Supreme Court has, in certain contexts, recognized the President's constitutional privilege for confidential communications or for information related to the national security, diplomatic affairs, and military secrets *Insofar as this privilege is constitutionally based, the committee recognizes that subsection 5(b) cannot override it In view of the uncertain nature of the law in this area, the committee intends that subsection 5(b) will neither accept nor reject any particular view of Presidential privilege but only preserve for the President the opportunity to assert privilege where he deems it necessary.* The committee intends that these questions should be left for resolution on a case-by-case basis as they arise in the course of implementing this legislation

Id. at 32 (emphasis added) (citations omitted)

implied that the agency head retained the ability — as in the "rare case" identified with respect to subsection (b) — to delete "materials ... which should not be disclosed even to the Congress." *Id.* at 32.

Conclusion

Long-established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of executive privilege, require that in the absence of extraordinary circumstances an IG must decline to provide confidential information about an open criminal investigation in response to a request pursuant to Congress' oversight authority. With respect to congressional requests based on the reporting requirements of the Inspector General Act, we similarly conclude that the reporting provisions of the Inspector General Act do not require IGs to disseminate confidential information pertaining to open criminal investigations.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Cost of Living Allowances for Employees on Pay Retention

The Office of Personnel Management is required by its own regulations to base cost-of-living allowances for employees receiving retained pay on their higher retained rate of pay, rather than on the maximum rate of the grade.

March 24, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT

This is in response to your request of April 18, 1988, for the opinion of this office concerning cost-of-living allowance ("COLA") computations for certain employees who are on pay retention. For the reasons below, we agree with the conclusion reached by your Office that employees on pay retention are entitled to have their COLA computed on the basis of their higher retained rate of pay, rather than on the maximum pay rate of the grade of the position to which the employee was reduced.

We begin by observing that the provision of COLAs to certain eligible government employees is authorized by 5 U.S.C. § 5941. That statute provides, in relevant part:

> (a) Appropriations or funds available to an Executive agency ... for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances to these employees.

The purpose of the allowance is to compensate employees subject to high living costs and difficult environmental conditions. The allowance, however, "may not exceed 25 percent of the rate of basic pay." 5 U.S.C. § 5941. Responsibility for the actual manner of its calculation and payment is left to the President. "Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies." *Id.* The President has delegated his responsibility under this statute to the Office of Personnel Management ("OPM"). Exec. Order No. 10000, 3 C.F.R. 792 (1943-1948).

Pursuant to its authority, OPM has promulgated regulations, codified at 5 C.F.R. pt. 591, Subpart B, which provide for the award of COLAs. The most important provision is section 591.210, which states that "[t]he allowance and differential authorized for each location shall be converted to an hourly rate, *based on the employee's basic rate of pay*, and shall be paid only for those hours during which the employee receives basic pay" (emphasis added). Because agency rules and regulations that implement statutory discretion have the force of law, OPM must comply with its own regulations, or amend them. *See United States v. Mersky*, 361 U.S. 431, 438 (1960). Thus, OPM is legally required to calculate employee COLAs on the basis of their "basic rate of pay." It is plain that OPM's regulation is within the ambit of discretion provided by section 5941. Indeed, support for OPM's determination that COLAs should be based on an employee's rate of basic pay can be drawn from section 5941 itself, which sets the ceiling for COLAs in terms of basic pay.[1] Given the clear obligation to base COLAs on the employee's "basic rate of pay," we turn then to the determination of what the "basic rate of pay" is for an employee receiving retained pay under 5 U.S.C. § 5363.

We believe that OPM is required under its own regulations to calculate the COLAs for such employees in this manner because of the definition of basic rate of pay contained in OPM's regulations, which, as we discussed previously, OPM is obliged to obey. In 5 C.F.R. § 591.201(i) the phrase "rate of basic pay" is defined to mean "the rate of pay fixed by statute for the position held by an individual, before any deductions and exclusive of additional pay of any kind, such as overtime pay, night differential, extra pay for work on holidays, or allowances and differentials." Using this definition, we believe it is clear that the retained rate of pay received by eligible employees pursuant to 5 U.S.C. § 5363 is indeed the "rate of pay fixed by statute for the position held by (that employee)." 5 C.F.R. § 591.201(i). As a result, we are compelled to conclude that the retained rate of pay received by certain eligible employees constitutes their "basic rate of pay" for the purpose of calculating COLAs. Moreover, retained pay is not of the same nature as the types of additional pay excluded from the definition of "rate of basic pay." Unlike the "additional pay" described in section 591.201(i), which all have to do with the timing, locale or amount of work being performed in the current job, retained pay reflects the employee's past work experience, and does not in any way reflect the work being done in the current position. Therefore, we believe that OPM must, pursuant to section 591.210(a) and the definition of "rate of basic pay" found in section 591.201(i), compute eligible employees' COLAs on their higher retained pay rate.

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[1] We need not address whether it would be appropriate under section 5941 to choose a base line other than the rate of basic pay by which to calculate COLAs.

Finally, 5 U.S.C. § 5363, the provision which defines the manner in which pay retention is calculated, makes clear this amount is a form of basic pay. This section provides in relevant part:

> (a) Any employee — [eligible for pay retention]
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> ...
>
> *is entitled to basic pay* at a rate equal to (A) the employee's allowable former rate of basic pay, plus (B) 50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay if such allowable former rate exceeds such maximum rate for such grade.

(emphasis added). Thus, under this statute, the higher retained rate of pay received by certain eligible employees does constitute "basic pay."

In sum, we agree with the conclusion reached by the Office of General Counsel that OPM is obligated to compute the COLAs for employees receiving retained pay on their higher retained rate of pay, rather than on the maximum rate of the grade.[2] Whatever discretion section 5941 confers with respect to the awarding of COLAs, the regulations promulgated to implement that statute require that OPM compute COLAs "based on the employee's basic rate of pay." For employees receiving retained pay, their "basic pay" is their rate of retained pay.

JOHN O. McGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

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[2] We have reviewed the contrary opinions of the Comptroller General on this matter and find them unpersuasive In an unpublished opinion, B-175124, 1976 WL 10210 at *2 (C.G. June 2, 1976), which served as the basis for at least one later opinion, the Comptroller General found that COLAs must be "computed on basis of the rate of pay fixed by statute for the position held, rather than on basis of saved salary." The only justification offered for this result was that 5 C.F.R. § 591.202 authorized COLAs as a percent of the "rate of basic pay." While the regulations do provide that COLAs are to be calculated as a percent of "basic pay," the Comptroller General's opinion does not address the central question of whether an employee's retained rate of pay is in fact basic pay As we observed previously, however, the retained rate of pay provided by section 5363 is in fact the rate of basic pay fixed by statute for certain eligible employees A more recent opinion of the Comptroller General, which reaches the same result as the 1976 opinion, does little more than cite the earlier opinion to justify its conclusion that COLAs authorized by section 5941 are to be computed on the basic rate of pay for the grade, rather than on the employee's full retained pay rate. *See* B-206028, 1982 WL 27659 (C.G Dec 14, 1982) (unpublished). Because this opinion does not add to the analysis of the 1976 opinion, we believe it should be similarly disregarded as failing to analyze the central question: whether retained pay constitutes basic pay. Finally, we note that because the Comptroller General is an officer of the legislative branch, *Bowsher v. Synar*, 478 U S 714, 727-32 (1986), the executive branch is not bound by the Comptroller General's legal opinions.

Use of the National Guard to Support Drug Interdiction Efforts in the District of Columbia

Use of the District of Columbia National Guard, in its militia status, to support local drug law enforcement efforts is not prohibited by the Posse Comitatus Act.

The activity may receive funding from the Secretary of Defense under section 1105 of the Defense Authorization Act if the President, as Commander-in-Chief of the District of Columbia National Guard, requests such financial assistance.

Executive Order 11485 assigns the Attorney General the responsibility of establishing, in consultation with the Secretary of Defense, the law enforcement policies to be observed by the National Guard in these circumstances, but it does not assign the Attorney General any responsibility with respect to the policy decision of whether the National Guard should be assigned to the described use or any supervision and control responsibility for the implementation of such a decision

April 4, 1989

MEMORANDUM OPINION FOR THE ACTING ASSOCIATE ATTORNEY GENERAL

This memorandum responds to the request of your Office[1] for our opinion with respect to the use of the District of Columbia National Guard ("National Guard"), in its militia status (*i.e.*, not in federal service), to support the drug law enforcement efforts of the District of Columbia Metropolitan Police.[2] You have raised the following specific questions: (1) Is this use of the National Guard prohibited under the Posse Comitatus Act? (2) May the Secretary of Defense provide funds to support the use, pursuant to section 1105 of the National Defense Authorization Act, Fiscal Year 1989 ("Defense Authorization Act")? (3)

[1] Memorandum to Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from Margaret C Love, Deputy Associate Attorney General, *Re Use of the National Guard to Support Drug Interdiction Efforts in the District of Columbia* (Mar 21, 1989), as supplemented by Memorandum to Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, from Margaret C. Love, Deputy Associate Attorney General, *Re· Use of the National Guard to Support Drug Interdiction Efforts in the District of Columbia* (Mar. 23, 1989)

[2] We have been informed by the Department of Defense that "[t]he D C. National Guard, like the State and Territorial National Guards, may normally be called into federal service for civil law enforcement purposes only pursuant to 10 U S C. §§ 3500, 8500, 331, 332 or 333. The D.C. National Guard plan, currently under review by the Department of Justice, does not propose to call the D C. National Guard into federal service " Letter to John O McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, from Robert L Gilliat, Assistant General Counsel (Personnel & Health Policy), Department of Defense (Mar 31, 1989).

What are the Attorney General's responsibilities in these circumstances under section 2 of Executive Order 11485?

As discussed below, we have concluded that the described use of the District of Columbia National Guard is not prohibited by the Posse Comitatus Act because that Act does not apply to a National Guard acting as a militia and because, even if that Act did so apply, the use has been authorized by an Act of Congress. Congress has authorized the use in sections 39-104 and 39-602 of the D.C. Code. The activity may receive funding from the Secretary of Defense under section 1105 of the Defense Authorization Act if the President, as Commander-in-Chief of the District of Columbia National Guard, requests such financial assistance.[3] Finally, Executive Order 11485 assigns the Attorney General the responsibility of establishing, in consultation with the Secretary of Defense, the law enforcement policies to be observed by the National Guard in these circumstances, but it does not assign the Attorney General any responsibility with respect to the policy decision of whether the National Guard should be assigned to the described use or any supervision and control responsibility for the implementation of such a decision.

Discussion

1. Posse Comitatus Act

Application of the Posse Comitatus Act to a National Guard depends on whether that National Guard is acting in its status as militia for the particular State or territory or the District of Columbia, or rather has been called into federal service by the President. Under the Posse Comitatus Act, the use of the Army or the Air Force to execute the laws is prohibited "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385. Since by its terms the Posse Comitatus Act applies only to the use of the Army or the Air Force, it applies to a National Guard only when it has been put into federal service as part of the Army or Air Force.[4] Since the described use for the District of Columbia National Guard would be for it in its militia rather than federal service capacity, it is not prohibited by the Posse Comitatus Act.

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[3] For purposes of this provision authorizing financial assistance to National Guards in their militia capacity upon the request of State Governors, the President stands in the position of a Governor

[4] This Department has long recognized that the Posse Comitatus Act does not apply to a National Guard in its militia status *See, e.g.*, Letter for Charles J Zwick, Director, Bureau of the Budget, from Warren Christopher, Deputy Attorney General at 2 (June 4, 1968) (stating, in the context of supporting use of the District of Columbia National Guard in militia status rather than federal status to control civil disturbances, that "the Posse Comitatus Act ... prohibits placing *federalized* Guardsmen at the disposal of civilian law-enforcement officers to assist the latter in executing the laws") (emphasis added). That the Posse Comitatus Act is limited in this way is also recognized in Congress *See, e.g.*, National Defense Authorization Act Conference Report, H.R. Conf. Rep. No. 753, 100th Cong., 2d Sess 453 (1988) ("When not in federal service, the National Guard is not subject to the Posse Comitatus Act.").

Moreover, even if the Posse Comitatus Act applied to the described use, it would not prohibit the use because it is authorized by an Act of Congress: Act of March 1, 1889, ch. 328, 25 Stat. 772, which enacted the D.C. Code. Section 39-602 of the D.C. Code authorizes the Commanding General of the National Guard to "order out any portion of the National Guard for such drills, inspections, parades, escort, or other duties, as he may deem proper." The authorization to order out the Guard for "other duties, as he may deem proper" has long been viewed as broad enough to include law enforcement activities.[5] In 1963, for example, this Office interpreted section 39-602 to authorize

> the President to request or urge the commanding general to use the National Guard in support of activities of the District of Columbia police whenever he feels that the welfare, safety, or interest of the public would be served thereby.

Schlei Opinion, at 3. This natural reading of section 39-602 is especially appropriate in light of section 39-104 of the Code, which makes it clear that the National Guard, acting as militia, may be "called ... to aid the civil authorities in the execution of the laws." Relying on section 39-602, the National Guard has been used in its militia capacity to support law enforcement activities of the District of Columbia Metropolitan Police, both in the course of presidential inaugurations and in the case of large demonstrations. *See, e.g.*, Letter for Michael P.W. Stone, Under Secretary of the Army, from Harold G. Christensen, Deputy Attorney General (Jan. 13, 1989) (1989 inauguration), and letters cited therein (prior inaugurations); Memorandum for the Deputy Attorney General, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Law Relating to Civil Disturbances* at 5-6 (Jan. 6, 1975) ("Lawton Opinion") (demonstrations).[6]

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[5] *See, e g* , Memorandum for the Assistant Attorney General, Civil Division, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re· Authority to use the National Guard of the District of Columbia to supplement civilian police force activities during a massive demonstration or parade in the District of Columbia* at 2 (July 30, 1963) ("Schlei Opinion") (section 39-602's "language is broad enough to be construed as authorizing the commanding general to use the National Guard to support activities of the civilian police force during any massive demonstration or parade in the District"), Memorandum for the Assistant Attorney General, Civil Division, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re· Memorandum concerning the amenability of members of the National Guard of the District of Columbia to courts-martial or other disciplinary action for failure to participate in formations ordered pursuant to Section 44 of the Act of March 1, 1889* at 2 (Aug. 9, 1963) ("[T]he term 'other duties' can be reasonably interpreted as including activities in aid of civil authorities ")

[6] Although there is adequate statutory authority in this case, and we therefore need not reach the question, since the President is Commander-in-Chief of the District of Columbia National Guard in its militia status (D.C. Code § 39-109), and since the D.C. Code is federal law, this use of the National Guard might also be supported on the basis of the President's inherent constitutional authority to use any forces at his command to carry out the laws. *See In Re Neagle*, 135 U.S 1 (1890).

2. Funding Authority under the Defense Authorization Act

Section 1105(a)(1) of the Defense Authorization Act authorizes

> the Secretary of Defense to provide to the Governor of a State who submits a plan to the Secretary under paragraph (2) sufficient funds for the pay, allowances, clothing, subsistence, gratuities, travel, and related expenses of personnel of the National Guard of such State used — (A) for the purpose of drug interdiction and enforcement operations; and (B) for the operation and maintenance of the equipment and facilities of the National Guard of such State used for such purposes.

Pub. L. No. 100-456, 102 Stat. 2047 (1988). Since the described use of the District of Columbia National Guard is for drug law enforcement purposes, the Defense Authorization Act would thus clearly authorize federal funding for the use if that National Guard is eligible for the funding to the same extent as are State National Guards. For the reasons set forth below, we believe that it is.

"The President of the United States shall be the Commander-in-Chief of the militia of the District of Columbia." D.C. Code § 39-109. This Office has consistently taken the position that "the President ... stands in a relation to the D.C. National Guard that is similar to the relation obtaining between the Governors of the several States and their respective State National Guard units."[7] Thus, we believe it is reasonable to interpret section 1105 of the Defense Authorization Act to authorize the President to request financial support for the District of Columbia National Guard to the same extent as Governors may request such support for their State National Guards.

Not only may section 1105 be interpreted to equate the President with a Governor, it may also be interpreted to equate the District of Columbia with a State for purposes of this statute. "This Office has consistently taken the position that the District is a State within the meaning of chapter 15 of Title 10 [which authorizes federalizing the National Guards or using the armed forces to aid State governments or enforce federal authority], even though not so defined ...." Lawton Opinion, at 5. The rationale for thus treating the District of Columbia as a State in the National Guard context was explained with reference to the President

[7] Memorandum for Warren Christopher, Deputy Attorney General, from Martin F. Richman, First Assistant, Office of Legal Counsel, *Re. Use of D C. National Guardsmen to Aid in Policing Anti-War Demonstrations in the District of Columbia and at the Pentagon* at 2 (Oct 13, 1967) ("Richman Opinion"). *See also* Schlei Opinion, at 3 ("[T]he President performs the same function with respect to the District of Columbia National Guard as the Governors of the several States serve with respect to their respective State organizations.").

calling the National Guard for the District into federal service under 10 U.S.C. § 332. Relying on *Geofroy v. Riggs*, 133 U.S. 258 (1890), the Office reasoned as follows:

> The District of Columbia is not considered as being a "State" in the Constitutional sense.[8] However, the District has been held to be a State for purposes of a treaty which accorded to certain aliens the right to hold property in all "States" of the Union. The Supreme Court adopted this construction [in *Geofroy*] because of the unreasonable result that would have followed if a distinction had been drawn between the District and the States for purposes of the treaty. Similarly, if an Act of Congress generally applies in every "State" without reference to the Constitutional limitations of this term, and if a reasonable construction requires that the District be considered as on the same footing with all the States for purposes of the Act, the Court's opinion in the *Geofroy* case indicates that the District would be held to be a "State" for those purposes.
>
> The evident purpose of 10 U.S.C. 332 is to enable the President to use Federal troops, if necessary, "to enforce the laws of the United States" in any part of the country where their execution is obstructed. By any reasonable interpretation of this provision, its protective reach must be regarded as extending to the District of Columbia, where *all* the laws are laws of the United States. It is therefore concluded that the reference in section 332 to disturbances "in any State" would include disturbances in the District of Columbia.

Richman Opinion, at 3-5 (citations and footnotes omitted). This reasoning supporting the conclusion that the District of Columbia should be viewed as a "State" for purposes of the statute authorizing the domestic use of the armed forces also supports the conclusion that the District be viewed as a State for purposes of section 1105 of the Defense Authorization Act.

In the terms of the Richman Opinion, "a reasonable construction [of section 1105] requires that the District be considered as on the same footing with all the States for purposes of the [section]." *Id.* at 4.[9] It is rea-

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[8] Nor, absent constitutional amendment, could it be. Letter for James C Miller, III, Director, Office of Management and Budget, from John R Bolton, Assistant Attorney General, Office of Legislative Affairs, at 2-4 (Apr. 8, 1987).

[9] Even in the absence of the Richman Opinion, we would be inclined to conclude that the District of Columbia should be treated as a State for purposes of section 1105 The rule of construction in *Geofroy*

Continued

sonable to read section 1105 to be authorizing assistance to all National Guards in their militia status, including the National Guard for the District of Columbia. As is evident from its title, the general purpose of the section was an "enhanced drug interdiction and enforcement role for the National Guard." 102 Stat. 2047. Nothing in the section or its legislative history indicates that the National Guard of the District of Columbia was intended to be excluded. Indeed, the conferees who agreed to this section stated their "intent ... that priority be given to those plans which (a) involve areas of the greatest need in terms of drug interdiction and (b) are most likely to be effective." H.R. Conf. Rep. No. 753, 100th Cong., 2d Sess. 453 (1988). The decision to use the National Guard in the District of Columbia would certainly appear to represent a determination that the District is such a high priority area.

Accordingly, we conclude that, as Commander-in-Chief of the National Guard for the District of Columbia in its militia status, the President stands in the position of a Governor of a State and, pursuant to section 1105 of the Defense Authorization Act, may request funding by the Secretary of Defense by submitting a plan for the use of the National Guard to assist the drug law enforcement activities of the District of Columbia Metropolitan Police.[10]

3. Attorney General Responsibility under Executive Order 11485

Section 2 of Executive Order 11485 ("Supervision and Control of the National Guard of the District of Columbia"), October 1, 1969, 3 C.F.R. 814, (1966-1970), provides that

> The Attorney General is responsible for: (1) advising the President with respect to the alternatives available pursuant to law for the use of the National Guard to aid the civil authorities of the District of Columbia; and (2) for establishing after consultation with the Secretary of Defense law enforcement policies to be observed by the military forces in the event the National Guard is used in its militia status to aid civil authorities of the District of Columbia.

While it is evident that clause (1) of section 2 does no more than reiterate in this specific context the Attorney General's established authority as

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[9] (. continued)
is a venerable one and Congress may be presumed to have notice of it. Accordingly, in light of the fact that there is no evident congressional intent to exclude the District from the ambit of section 1105, we believe Congress must have understood that the District would be included within that section

[10] We understand that the Mayor of the District of Columbia has submitted such a plan. However, since under our interpretation of section 1105 it is the President who must request financial assistance and submit a plan, the President's plan may, but need not, be based on the plan submitted by the Mayor.

legal advisor to the President, you have asked for our interpretation of the authority being given the Attorney General under clause (2).

By its express terms the Executive Order provides that it is the Attorney General who has the responsibility for establishing the law enforcement policies that the National Guard must abide by when it is used in its militia capacity to aid the civil authorities of the District of Columbia. The Attorney General must consult with the Secretary of Defense concerning what those policies should be, but it is clearly the Attorney General who is to determine the policies. Thus, while the Order does not assign any responsibility to the Attorney General with respect to deciding the policy question of whether the National Guard is to be used to assist the District's civil authorities, once that decision has been made, the Attorney General has the authority to establish the governing law enforcement policies. Moreover, while we believe it is reasonable to infer from the Order that the Attorney General has authority to monitor the use of the National Guard in these circumstances in order to determine whether the law enforcement policies are in fact being observed, section 1 of the Order makes it clear that the actual supervision and control of the National Guard in these circumstances is the responsibility of the Secretary of Defense.

Conclusion

The described use of the National Guard is not prohibited by the Posse Comitatus Act because that Act does not apply to a National Guard acting as a militia and because, even if that Act did so apply, such a use has been authorized by sections 39-104 and 39-602 of the D.C. Code. The activity may receive funding from the Secretary of Defense under section 1105 of the Defense Authorization Act if the President, as Commander-in-Chief of the National Guard, requests such financial assistance. Finally, Executive Order 11485 assigns the Attorney General the responsibility of establishing, in consultation with the Secretary of Defense, the law enforcement policies to be observed by the National Guard in these circumstances, but it does not assign the Attorney General any responsibility with respect to the policy decision of whether the National Guard should be assigned to the described use or any supervision and control responsibility for the implementation of such a decision.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim

The Judgment Fund is not available for suits that do not seek to require the government to make direct payments of money to individuals, but merely would require the government to take actions that result in the expenditure of government funds.

The Judgment Fund is available: (1) for the payment of final "money judgments" (but not for "non-money judgments") whose payment is not "otherwise provided for"; (2) for the payment of tort settlements covered by statutory provisions listed in 31 U.S.C. § 1304(a); and (3) for the payment of non-tort settlements authorized by the Attorney General or his designee, whose payment is not "otherwise provided for," if and only if the cause of action that gave rise to the settlement could have resulted in a final money judgment.

April 14, 1989

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

This memorandum responds to your request[1] for the opinion of this Office concerning the availability of the permanent appropriation established pursuant to 31 U.S.C. § 1304 ("the Judgment Fund") for the payment of judgments or settlements not involving "money judgment" claims, *i.e.*, "cases that are not framed in typical money damages terms [that] may nevertheless, at bottom, seek the expenditure of money by the government and are capable of compromise on that basis." Civil Memorandum at 1. We conclude: (1) that final judgments whose payment is not "otherwise provided for"[2] are payable from the Judgment Fund if

[1] Memorandum for Douglas W Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, from John R Bolton, Assistant Attorney General, Civil Division, *Re: Use of the Judgment Fund for Settlement of Cases or Payment of Judgments that Do Not Involve a "Money Judgment" Claim* (July 21, 1988) ("Civil Memorandum")

[2] We reaffirm this Office's traditional position that a payment is "otherwise provided for" in two different situations. First, when a statute provides that particular kinds of judgments are to be paid from agency appropriations, the "otherwise provided for" criterion is satisfied with respect to judgments and settlements. Second, judgments or settlements incurred by agencies in the course of certain "business-type" programs are also "otherwise provided for." *See* Memorandum for D Lowell Jensen, Acting Deputy Attorney General, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel at 7-11 (Feb. 24, 1984); Memorandum for Abraham D Sofaer, Legal Adviser, Department of State, from Charles J Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Judgment Fund to Pay Compromise Settlement of Iranian Claim* at 4-5 (Feb. 16, 1988) The Comptroller General also has endorsed this two-pronged test for determining whether a payment is "otherwise provided for." *See* General

Continued

they require the government to make direct payments of money to individuals, but not if they merely require the government to take actions that result in the expenditure of government funds; (2) that a settlement is payable from the Judgment Fund if it involves a tort claim statutorily recognized in 31 U.S.C. § 1304(a), and its "payment is not otherwise provided for"; and (3) that a non-tort settlement is payable from the Judgment Fund under 28 U.S.C. § 2414 only if the litigation giving rise to the settlement could have required the direct payment of money by the government, had it resulted in a final judgment.

I. Analysis

We start as always with the plain language of the statutory text at issue. The Judgment Fund statute, 31 U.S.C. § 1304, provides in pertinent part:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when —
>
> (1) payment is not otherwise provided for;
> (2) payment is certified by the Comptroller General; and
> (3) the judgment, award, or settlement is payable —
>
> (A) under section 2414, 2517, 2672, or 2677 of title 28;
> (B) under section 3723 of this title;
> (C) under a decision of a board of contract appeals; or
> (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473).

Section 1304 thus imposes three requirements that must be met before the Judgment Fund may be utilized. First, the judgment must be payable pursuant to one of a number of specified sections of the U.S. Code.

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[2] (...continued)
Accounting Office, *Principles of Federal Appropriations Law* 12-14 (1982) (describing first test) ("GAO Manual"), 62 Comp Gen. 12, 14 (1982) (describing second test) (Although the opinions of the Comptroller General, an agent of Congress, are not binding on the executive branch, we regularly consult these opinions for their informational and analytic value)

Second, there must not be another source of funds available to pay the judgment. Finally, payment of the judgment must be certified by the Comptroller General.

The final requirement — the necessity of certification by the Comptroller General — does not appear to impose any additional substantive requirements on access to the judgment fund. The Comptroller General's certification apparently follows from satisfaction of the other two requirements and completion of the necessary paperwork.[3] Thus, we need only determine whether the first condition precludes the payment of non-money judgment claims from the Judgment Fund. (The second condition is analyzed in note 1, *supra.*)

Two distinct categories of claims are payable from the Judgment Fund: final judgments and settlements. We examine those categories in turn.

A. Final Judgments

As indicated above, 31 U.S.C. § 1304(a) plainly states that "[n]ecessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs ... when ... the judgment, award, or settlement is payable" under any one of a specified list of statutory provisions. The primary statutory provision[4] in that list that applies to final judgments is the first paragraph of 28 U.S.C. § 2414, which states (emphasis added):

> Except as provided by the Contract Disputes Act of 1978, *payment of final judgments* rendered by a district court or the Court of International Trade against the United States shall be made on settlements by the General Accounting Office. *Payment of final judgments* rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.

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[3] GAO itself takes this position, stating that the requirement of certification by the Comptroller General "is an essentially ministerial function and does not contemplate review of the merits of a particular judgment B-129227 (Dec. 22, 1960); *see also* 22 Comp. Dec. 520 (1916), 8 Comp Gen 603, 605 (1929) " GAO Manual, *supra* note 2, at 12-2. Indeed, we believe that were the requirement of certification to be other than a ministerial function it would raise serious questions under the Supreme Court's holding in *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress cannot constitutionally assign to the Comptroller General, an arm of Congress, the duty of executing the laws)

[4] Two other provisions authorize the payment of final judgments in specific types of cases, *viz* , 28 U.S.C. § 2517 (authorizing the payment of final judgments rendered by the United States Claims Court against the United States); and 31 U S.C. § 1304(a)(3)(C) (authorizing the payment of final judgments under "decision[s] of ... board[s] of contract appeals").

Since section 2414 encompasses "*payment of final judgments*," by definition it only provides for disbursements from the Judgment Fund for judgments that are *payable, i.e.*, judgments that, by their terms, require the United States to pay specified sums of money to certain parties.[5] Applying this principle, final judgments that impose costs on the government, but do not require the United States to make specific cash disbursements, would appear to fall *outside* the scope of section 2414. Thus, for example, final judgments that required the United States to furnish subsidized housing,[6] or that required the United States to correct structural defects in housing,[7] would not be eligible for payment from the Judgment Fund (even though they might impose readily ascertainable money costs), because they would not require the United States to make cash payments to individuals. In sum, under our analysis, final court judgments against the United States that require *anything other than* the direct payment of specified sums of money may not be paid from the Judgment Fund.[8]

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[5] The legislative history of section 2414 supports this conclusion, which is drawn from the plain meaning of the statute. At the time the Judgment Fund statute was originally enacted in 1956 (Supplemental Appropriation Act of 1957, Pub. L. No 84-814, § 1302, 70 Stat. 678, 694 (1956)), section 2414 only covered final judgments rendered by a federal district court When the first paragraph of section 2414 was revised in 1961 to authorize the payment of judgments rendered by state and foreign courts (previously that paragraph had only authorized the payment of federal court judgments), and the payment of settlements, the House and Senate Judiciary Committee Reports dealing with that revision favorably incorporated by reference a Justice Department letter that discussed the use of the Judgment Fund to pay judgments. With respect to judgments, that letter stated in pertinent part:

> Prior to the enactment of the [judgment fund statute], . a large percentage of the judgments rendered against the United States were payable only upon the enactment of specific appropriations legislation for that purpose The enactment of that statute has materially reduced the administrative and legislative burdens involved in effecting the payments of judgments ... and it has substantially shortened the interval of the time between the entry of judgments and their satisfaction The legislation has both reduced the interest charges accruing upon judgments against the United States and the irritations inevitably associated with the delays occasioned by the former method of payment. The attached draft bill would .. provide a corresponding simplification in the procedures for the payment of judgments of State and foreign courts ..

S. Rep No 733, 87th Cong., 1st Sess 1-2 (1961), *reprinted in* 1961 U.S.C.C A N 2439, 2439; H.R. Rep. No 428, 87th Cong., 1st Sess 2 (1961).

In short, this discussion manifests an understanding that the Judgment Fund was designed to effect payments of final judgments without the need for the enactment of *specific appropriations* bills, and to prevent the *accrual of interest* on unpaid final judgments That understanding, which centers solely on *monetary* judgments (judgments that previously required specific appropriations and on which interest could accrue), supports the conclusion that the Judgment Fund is to be tapped for final judgments requiring the United States to pay specified sums of money Our interpretation squares with both the Civil Division's view and the Comptroller General's view of the legislative history. *See* Memorandum for Michael Jay Singer, Assistant Director, Appellate Staff, Civil Division, from Irene M. Solet, Attorney, Appellate Staff, *Re: Possible Use of the "Judgment Fund" For Payment of a Settlement in Garrett v City of Hamtramck* at 2 (July 12, 1988) ("Solet Memorandum") ("Congress contemplated that the fund would be used for money judgments"), B-193323, 1980 WL 17186 (C G), at *3 (Jan 31, 1980) (the judgment fund was "established for the purpose of paying *money judgments* against the United States") (emphasis added)

[6] *See* Solet Memorandum, *supra* note 5, at 3.

[7] *See* B-193323, discussed in Solet Memorandum, *supra* note 5, at 2-3.

[8] Judgments rendered by the United States Claims Court (which are money judgments) and by boards of contract appeals are also specifically made payable from the Judgment Fund. *See supra* note 4

B. Settlements

Several statutory provisions found in the Judgment Fund statute provide for the payment of settlements, including 28 U.S.C. § 2672 (authorizing the settlement of "any claim for money damages" against the United States for torts committed by the employee of any federal agency while acting within the scope of his employment); 28 U.S.C. § 2677 (authorizing the Attorney General to "arbitrate, compromise, or settle any claim cognizable under" 28 U.S.C. § 1346(b), the jurisdictional provision that allows courts to hear tort claims for money damages against the United States); and 31 U.S.C. § 3723 (authorizing agency heads to settle small tort claims for damage or loss to private property due to a federal officer's or employee's negligence). In addition, the Judgment Fund is available for the payment of the "excess of an amount payable from the appropriations of an agency for a meritorious claim under 10 U.S.C. §§ 2733-2734" (authorizing the Secretaries of military departments to settle tort claims arising out of the actions of their employees, at home or abroad), 32 U.S.C. § 715 (authorizing the Secretary of the Army or the Secretary of the Air Force to settle certain tort claims arising out of certain actions by members of the Army or Air National Guard), and 42 U.S.C. § 2473 (authorizing the NASA Administrator to settle certain tort claims arising out of NASA's activities). In short, 31 U.S.C. § 1304(a) contains a variety of specific provisions authorizing the payment of a variety of tort settlements from the Judgment Fund. The primary provision authorizing the payment of settlements from the Judgment Fund, is, however, 28 U.S.C. § 2414, the third paragraph of which provides:

> Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.[9]

In short, under the third paragraph of section 2414, compromise settlements of suits against the United States, its agencies, or officials, made by the Attorney General or any person he authorizes, "shall be settled and

[9] The second paragraph of section 2414, not reproduced in this memorandum, is not relevant to the questions addressed herein That paragraph merely specifies that the Attorney General's decision not to appeal a court judgment renders it final.

paid *in a manner similar to judgments in like causes.*" (Emphasis added.) By its very terms, this paragraph contemplates that the manner of payment for a settlement approved by the Attorney General or his designee turns upon the manner in which a "judgment[] in [a] like cause[]" would have been paid. Since the term "like cause[]" is not statutorily defined,[10] and its meaning is not self-evident, we turn to the principle of statutory construction that statutory provisions "relating to the same person or thing or having a common purpose" are in "pari materia [and] are to be construed together," *i.e.*, in a consistent manner. Black's Law Dictionary 711 (5th ed. 1979).[11] Applying this principle, we turn to the first paragraph of section 2414 (which shares with the third paragraph the "common purpose" of delineating the availability of the Judgment Fund) to gain insight into the manner in which judgments are to be paid. As previously discussed, the first paragraph makes it plain that final judgments requiring the direct payment of money are payable from the Judgment Fund, while non-money judgments must be paid from other sources. Accordingly, it is logical to infer that the reference to the "manner (of payment) similar to judgments in like causes" in the third paragraph of section 2414 is a shorthand term for linking the payment of a settlement to the payment either of a money judgment or of a non-money judgment. Employing this logic, if the underlying "cause[]" of a settlement could have led to a money judgment, had no settlement been reached, then the settlement, similar to the judgment, is payable from the Judgment Fund. On the other hand, if the underlying "cause[]" would have led to a non-money judgment, then the settlement, similar to the judgment, is not payable from the Judgment Fund. It therefore follows that, in determining whether a proposed settlement is payable from the Judgment Fund, the Attorney General or his designee should examine the underlying cause of action, and decide whether the rendering of a final judgment against the United States under such a cause would have required a payment from the Judgment Fund.

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[10] The only congressional discussion of the phrase referring to "like causes" is a brief reference in the Senate and House Judiciary Committee Reports reiterating the plain statutory language H R Rep. No. 428, *supra* note 5, at 3 ("compromises effected by the Attorney General or any person authorized by him shall be settled and paid in the same manner as judgments in like causes"), S. Rep. No 733, *reprinted in* 1961 U S.C C A.N. at 2441, *supra* note 5, at 3 (same).

[11] The federal courts have recognized that when statutes are in pari materia they should be construed consistently, if at all possible *See, e.g., Haig v. Agee*, 453 U S. 280, 300-01 (1981) (statute making it unlawful to travel abroad without a passport even in peacetime must be read in pari materia with — *i e.*, in a manner harmonious with — the Passport Act), *FAIC Securities, Inc v. United States*, 768 F.2d 352, 363 (D C. Cir 1985) (National Housing Act and Federal Insurance Corporation Act are in pari materia since they share "the common purpose of insuring funds placed in depository institutions," and, therefore, "the two statutes .. cannot be construed to reach different results"); *United States v Stauffer Chemical Co* , 684 F.2d 1174, 1184, 1188 (6th Cir 1982), *cert granted*, 460 U.S. 1080 (1983), *aff'd*, 464 U.S 165 (1984) (provisions in pari materia "should be given the same meaning . section 114 of the Clean Air Act and section 308 of the Clean Water Act are in *pari materia*, and (therefore) should be interpreted the same way").

Our conclusion that section 2414 only authorizes Judgment Fund disbursements for settlements of causes that could have resulted in money judgments is consistent with the historical development of the Judgment Fund statute. When the Judgment Fund statute was enacted in 1956, only the payment of money judgments was provided for, *see supra* note 5. Had Congress wished to provide for the payment from the Judgment Fund of all settlements when it amended the Judgment Fund statute in 1961, presumably it would specifically have so indicated. Its failure to do so supports the conclusion that in extending the Judgment Fund statute to reach settlements, Congress believed it was only bringing within that statute's ambit settlements of causes that could have resulted in Judgment Fund disbursements, had such causes resulted in final money judgments, rather than settlements.

Finally, any conclusion that would permit the Judgment Fund to pay out settlements in cases in which it would not pay out judgments would provide agencies with an incentive to urge settlement of cases in order to avoid payment from agency funds. We would not lightly attribute to Congress an intent to create a structure that might encourage settlements that would not otherwise be in the interest of the United States.

II. Conclusion

For the foregoing reasons, we conclude that the Judgment Fund is available: (1) for the payment of final "money judgments" (but not "non-money judgments") whose payment is not "otherwise provided for"; (2) for the payment of tort settlements covered by statutory provisions listed in 31 U.S.C. § 1304(a); and (3) for the payment of non-tort settlements authorized by the Attorney General or his designee, whose payment is "not otherwise provided for," if and only if the cause of action that gave rise to the settlement could have resulted in a final money judgment.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Scope of the Environmental Protection Agency's Discretion to Adopt Any One of Three Alternative Interpretations of the Mitchell-Conte Amendment to the Clean Air Act

Based on *Chevron U S.A. Inc. v Natural Resources Defense Counsel, Inc.*, the Environmental Protection Agency has the discretion to adopt any one of three alternative EPA-suggested interpretations of the 1988 Mitchell-Conte Amendment to the Clean Air Act.

April 14, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

This memorandum responds to your request of November 8, 1988[1], that this Office resolve a dispute between the Office of Management and Budget ("OMB") and the Environmental Protection Agency ("EPA") as to whether EPA has the discretion to adopt any one of three alternative EPA-suggested interpretations of the Mitchell-Conte Amendment. EPA argues that it possesses such authority, while OMB argues that only the first of the three suggested interpretations is legally permissible. For the reasons set forth below, we conclude that EPA does possess the authority to adopt either the second or third alternative interpretation, in addition to the first interpretation.

I. Background[2]

The Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 1, 84 Stat. 1676 ("CAA") directed EPA to establish primary and secondary National

[1] Letter for Hon. Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from Alan Charles Raul, General Counsel, Office of Managment and Budget (Nov 8, 1988) ("OMB Letter").

[2] The following background discussion is derived in large part from EPA, State Implementation Plans; Attainment Status Designations; Proposed Rulemaking and Policy, 53 Fed. Reg. 20,722, 20,734 (1988) (codified at 40 C F.R pt 81) We do not address at length the question whether constitutional issues are raised by the regulatory structure established pursuant to section 107 of the Clean Air Act, under which state officials prepare lists of areas failing to meet ambient air quality standards — lists that EPA employs as the basis for the imposition of regulatory strictures under the Clean Air Act. *Cf Buckley v Valeo*, 424 U.S. 1, 140-41 (1976) (only Officers of the United States, appointed in the manner provided for in the Appointments Clause of the Constitution, Article II, Section 2, Clause 2, may constitutionally exercise "significant authority pursuant to the laws of the United States")

Ambient Air Quality Standards ("NAAQS") to protect the public health and the public welfare, respectively. Under these amendments, the states were directed to develop and adopt State Implementation Plans ("SIPs") to attain and maintain the NAAQS. Specifically, section 110(a) of the CAA required the states to develop and adopt SIPs that would attain the NAAQS in most areas by 1975, with some extensions until 1977, pursuant to section 110(e) of the CAA.

Section 107(d) of the CAA Amendments of 1977, § 197(d), 91 Stat. 685, 687-89 (codified at 42 U.S.C. § 7407(d)) ("section 107(d)"), required that each state identify all areas within its boundaries that had not attained the NAAQS by August 7, 1977. The EPA was required to promulgate these lists within 60 days, with such modifications as EPA deemed necessary and after giving the states notice and opportunity to comment. The EPA promulgated most of these designations on March 3, 1978. Attainment Status Designations, 43 Fed. Reg. 8962 (1978) (codified at 40 C.F.R. pt. 81). Part D of the CAA, 42 U.S.C. §§ 7501-7508 ("Part D"), required that those areas designated as "nonattainment" in 1978 submit SIP revisions by January 1, 1979 that demonstrated attainment of the NAAQS by December 31, 1982. EPA could approve a state's application for an extension of the attainment deadline until December 31, 1987, upon a proper demonstration that attainment of the NAAQS was not possible by the December 1982 deadline, despite the use of all "reasonably available" measures.

EPA initially took the position that it could modify an area's promulgated designation at any time when warranted by evidence of nonattainment of the NAAQS, not only upon review of the affected state's original recommendations. However, in *Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303 (7th Cir. 1983), the U.S. Court of Appeals for the Seventh Circuit held that EPA could not unilaterally modify an air quality area designation under section 107(d) after having promulgated statutorily-required designation lists, unless the concerned state had requested such a modification. EPA subsequently, as a matter of practice, acquiesced in the reasoning of *Bethlehem Steel* in all states, not just those in the Seventh Circuit. 53 Fed. Reg. at 20,724. Consistent with such acquiescence, absent a request from the affected state, EPA did not redesignate as nonattainment an area which had originally been designated as attainment or unclassifiable, regardless of the evidence of violation of the NAAQS. *Id.*

In November 1987, EPA announced it would develop a program to address the likelihood that many areas of the country would not attain the NAAQS for ozone and carbon monoxide by the statutorily-required CAA deadline of December 31, 1987. State Implementation Plans; Approval of Post-1987 Ozone and Carbon Monoxide Plan Revisions for Areas Not Attaining the National Ambient Air Quality Standards; Notice, 52 Fed. Reg. 45,044 (1987). Among the matters EPA proposed for comment was the issuance of calls to the states for revised SIPs in any geographical location

where recent monitoring data showed violations, irrespective of the area's past designation as attainment or nonattainment. EPA also proposed adjusting the boundaries of nonattainment areas to add all counties in a metropolitan statistical area ("MSA") or a consolidated MSA ("CMSA"), whether the areas being annexed to the preexisting nonattainment area showed violations or not. *Id.* at 45,044, 45,054-55.

In January 1988, Congress enacted the Mitchell-Conte Amendment ("MCA") to the Fiscal 1988 Continuing Resolution, Pub. L. No. 100-202, 101 Stat. 1329, 1329-199 (1987). The bulk of the MCA temporarily prohibits (during the period prior to August 31, 1988) the EPA from imposing CAA "restriction[s] or prohibition[s] on construction, permitting, or funding" of industrial facilities in geographic areas that have not attained specified clean air standards by December 31, 1987. The last sentence of the MCA reads:

> Prior to August 31, 1988 the Administrator of the Environmental Protection Agency shall evaluate air quality data and make determinations with respect to which areas throughout the nation have attained, or failed to attain, either or both of the national primary ambient air quality standards referred to in subsection (a) *and shall take appropriate steps to designate those areas failing to attain either or both of such standards as nonattainment areas within the meaning of part D of title I of the Clean Air Act.*

Id. (emphasis added).

On June 6, 1988, the EPA issued a notice of proposed rulemaking setting forth three alternative interpretations ("alternative interpretations") of the MCA's last sentence: (1) EPA could identify those areas that failed to obtain the ozone or carbon monoxide NAAQS (the subsection (a) NAAQS) by December 31, 1987, but not attach any regulatory consequences to such factual determinations, 53 Fed. Reg. at 20,725; (2) EPA could unilaterally (without a request by the affected state) redesignate as nonattainment those areas that failed to attain either one of the two NAAQS, regardless of their current designations, with the redesignations imposing regulatory obligations under Part D, *id.* at 20,725-26; and (3) EPA could unilaterally redesignate as nonattainment only those areas that are currently designated as attainment but that in fact failed to attain the NAAQS, with the redesignations imposing regulatory Part D obligations, *id.* at 20,726.[3] The third interpretation differs from the second only

[3] EPA stated that under the second alternative interpretation, the MCA would be construed as overriding *Bethlehem Steel. Id* at 20,725-26 That is not precisely correct since the Seventh Circuit was not inter-

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"insofar as EPA would not attach ... (regulatory Part D) consequences to confirmation of the nonattainment status of areas already designated as nonattainment." *Id.* at 20,726-27.

OMB subsequently took the position that only the first of the three alternatives set forth above constitutes a permissible construction of the MCA's last sentence within the meaning of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (where a statute is silent or ambiguous as to a particular issue, and congressional intent cannot be ascertained, a reviewing court may not disturb an agency's "reasonable" interpretation of the statutory provision in question). The EPA General Counsel's Office disagreed, contending that all three interpretations satisfied *Chevron's* "reasonableness" criterion. OMB requested that the Office of Legal Counsel resolve this dispute. *See* OMB Letter at 2.

II. Discussion

A. Reasonable Construction of the MCA's Last Sentence

In order to assess this question, we first briefly examine section 107(d). Section 107(d) deals with the designation of nonattainment areas in the following fashion. For the purposes of imposing CAA regulatory obligations "under part D," section 107(d)(1) requires each state to submit to the EPA Administrator a list of nonattainment areas, *viz.*, a list "identifying those air quality regions, or portions thereof, ... in such State which on [August 7, 1977]" do not meet certain specified air quality standards.[4] "Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary. Whenever the Administrator proposes to modify a list submitted by a State, he shall notify the State and request all available data relating to such region or portion, and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate." § 107(d)(2). Moreover, "[a] State may from time to time review, and as appropriate revise and resubmit, the list required under this subsection. The Administrator shall consider and promulgate such revised list in accordance with this subsection." § 107(d)(5). Finally, for management reasons, the states may from time to

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[3] (.. continued)
preting the MCA. In other words the time limits and state participation features Judge Posner found applicable under the Clean Air Act still obtain in all cases brought under section 107(d), except that, as we discuss *infra*, with respect to the two NAAQS that are also the subject of the MCA, the EPA has additional unilateral authority not subject to the time and State-initiation requirements of section 107(d) *Cf* David P Currie, *Air Pollution Federal Law and Analysis* § 6.04 at 6-12 (1981) Adoption of the third alternative interpretation should be similarly understood.

[4] Those standards, enumerated in 42 U.S C § 7407(d)(1)(A)-(E), are identified as benchmarks for nonattainment status in 42 U.S.C. § 7501(2)

time redesignate air quality control regions (the regions within which attainment is evaluated) within their borders, subject to the approval of the Administrator. § 107(e).

In *Bethlehem Steel*, the Seventh Circuit construed section 107(d)(2) as not authorizing EPA unilaterally to modify a list of state-submitted nonattainment designations *after* the initial sixty day period following submittal had run. The court found that the term "*[w]henever* the Administrator proposes to modify a list submitted by a State" merely referred to EPA's authority to modify a state's list "in every instance" EPA might choose *within* the initial sixty day notification period — not as suggesting that EPA should be able to modify a list at any future point in time. 723 F.2d at 1305 (emphasis added). Nevertheless, as we discuss below, we do not believe *Bethlehem Steel* is dispositive of the issue whether EPA has additional unilateral authority under the MCA.

In evaluating the MCA, we start as always with the language of the statutory text. The MCA's last sentence requires that EPA's Administrator "make determinations with respect to which areas throughout the nation have attained, or failed to attain, either or both of" two specified NAAQS (for ozone and carbon monoxide). In light of those determinations, the Administrator "*shall evaluate* air quality data *and make determinations* with respect to which areas throughout the nation have attained, or failed to attain, [specified NAAQS] ... *and shall take appropriate steps to designate* those areas failing to attain either or both of such [NAAQS] as nonattainment areas within the meaning of part D of title I of the Clean Air Act." 101 Stat. at 1329-199 (emphasis added).

Neither the MCA nor its legislative history[5] expressly addresses what is

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[5] Two isolated congressional statements regarding the MCA's last sentence are, under traditional norms of statutory construction, not dispositive of the statute's meaning.

First, the isolated statement by Representative Dingell (the only floor statement bearing directly on the MCA's last sentence) that the MCA "make[s] a significant change in the Clean Air Act," 133 Cong. Rec 34,026 (1987), is "entitled to little, if any, weight" in discerning legislative intent, because Representative Dingell was arguing against the MCA. *Selective Serv Sys. v Minnesota Pub. Interest Research Group*, 468 U.S. 841, 855-56 n.14 (1984); *see National Woodwork Mfgs Ass'n v. NLRB*, 386 U.S 612, 639-40 (1967), *NLRB v Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U S. 58, 66 (1964); *Schwegmann Bros. v. Calvert Distillers Corp* , 341 U S. 384, 394-95 (1951). *See also* Comp. Gen Op B-208593 6 at 5 (1988), (such comments "do not constitute an authoritative expression of congressional intent," since his remarks were made against the MCA and "were not part of a colloquy with the amendment's sponsor")

Second, as EPA points out, Senator Mitchell's *post-enactment* letter of August 5, 1988 to the EPA Administrator, "stat[ing] that the Mitchell-Conte Amendment was intended to override *Bethlehem Steel* and EPA's policy permanently discharging Part D obligations upon EPA's approval of a Part D SIP," has "little value as legislative history" Letter for Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, from Lawrence J. Jensen, General Counsel, EPA, at 4 (Jan 13, 1989) ("EPA Letter") Post-enactment statements made by individual legislators or congressional committees lack legal force, because at best they are evidence only of what individual legislators' intentions may have been *See, e g , Regional Rail Reorganization Cases*, 419 U S. 102, 132 (1974) (post-enactment statements "'represent only the personal views of ... legislators,'" and "however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage"); *TVA v. Hill*, 437 U S. 153, 193 (1978); 2A Sutherland, Statutory Construction 48 16 (Sands ed. 1973).

meant by the term "tak[ing] appropriate steps to designate,"[6] and this term is not self-explanatory. Nevertheless, since no mention is expressly made of a state role in the MCA's last sentence, since Part D — which is not premised on a state role — is expressly referenced in the MCA rather than Part A which contains the state role construed in *Bethlehem Steel*, and since even absent the MCA there was a reasonable argument that the EPA had unilateral authority,[7] we believe it would not be unreasonable for EPA to interpret the MCA language to authorize the EPA unilaterally to "take appropriate steps" — to make nonattainment designations with respect to the two specified NAAQS without a request from the states. That the existence of unilateral EPA authority to make these specific nonattainment designations could reasonably be deemed consistent with the MCA's last sentence is also supported by the initial part of that sentence, which plainly directs EPA, on its own, to evaluate air quality data and make determinations of attainment or nonattainment. The making of unilateral nonattainment designations could reasonably be viewed as an action logically following on the heels of EPA's evaluation of data and making of air quality determinations for the two NAAQS.

Finally, we also note that an interpretation of the MCA which authorizes EPA to make nonattainment designations unilaterally without first having to rely on action by the states avoids a constitutionally problematic result. *Cf. Buckley v. Valeo*, 424 U.S. 1, 126, 140-41 (1976) (only Officers of the United States, appointed in the manner provided for in the Appointments Clause of the Constitution, may constitutionally exercise "significant authority pursuant to the laws of the United States"). Accordingly, the second and third interpretations are in harmony with the principle of statutory construction that a statute should be read in a manner that avoids constitutional prob-

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[6] 101 Stat. at 1329-199. The term "nonattainment area" is, in contrast, precisely defined in the first section of Part D of title I of the CAA, 42 U.S.C. § 7501(2). Accordingly, the MCA's reference to "nonattainment areas within the meaning of part D of title I" should be read as specifying that provision.

[7] Prior to *Bethlehem Steel*, EPA took the position that it could modify a designation at any time when warranted by evidence of nonattainment of NAAQS. EPA relied upon section 171(2) of the CAA ("section 171"), 42 U.S.C. § 7501(2), which states that "[t]he term 'nonattainment area' ... includes any area identified under" section 107(d). According to EPA, "the verb 'include' suggests that EPA's redesignation authority covers not only areas for which the state has requested a nonattainment designation pursuant to CAA section 107(d), but also areas for which the state has not requested such a designation." 53 Fed. Reg. 20,724 (1988). EPA's position was supported by a prominent environmental law scholar, Professor David Currie. David P. Currie, *Air Pollution: Federal Law and Analysis* § 6.04, at 6-12 (1981) (citing a subsequently superseded EPA regulation, 40 C.F.R. § 81.300, as providing that EPA can unilaterally initiate changes in designations, and stating that "it is up to the EPA to designate any (nonattainment areas) the states have not listed"). While the Seventh Circuit in *Bethlehem Steel* stated that "there is no indication that Congress intended section 171, a definitional provision, to nullify the time limits in section 107(d)," 723 F.2d at 1307, Professor Currie has ably pointed out that "[t]he difficulty with this argument is its assumption that the time limit in question was meant to restrict the EPA's obligation to apply the nonattainment provision to *all* nonattainment areas, which merely 'include' those listed pursuant to state proposals under Sec. 107(d)." Currie, *supra*, 1988 Cumulative Supplement Sec. 6.04, at 78. We need not, and do not, answer this dispute over the proper interpretation of section 107(d). It is enough to note that the MCA can reasonably be interpreted to give EPA unilateral designation authority with respect to two specific NAAQS.

lems. *See, e.g., Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982).

B. EPA's Three Alternative Interpretations

We now examine EPA's three alternative interpretations in light of the preceding discussion of the MCA's last sentence. The first interpretation would merely require EPA to identify those areas that failed to obtain the NAAQS, without unilaterally attaching any regulatory consequences. This interpretation, which would allow EPA to notify the states of its findings that the area is one of nonattainment, comports with the understanding of section 107(d) expressed in *Bethlehem Steel*, under which the imposition of Part D obligations would occur only after the states had submitted lists to EPA and EPA had promulgated such lists.

Under the second and third interpretations, EPA would designate areas as nonattainment — designations that would impose Part D regulatory requirements[8]— without first receiving lists from the states. These interpretations are in harmony with the suggested interpretation of the MCA's last sentence discussed above. Accordingly, we are of the opinion that the second and third interpretations are defensible under the Supreme Court's *Chevron* standard, which calls for deference to an agency's "reasonable" interpretations of the statute it administers.[9]

III. Conclusion

All three of EPA's alternative interpretations of the MCA's last sentence are "reasonable," within the meaning of the Supreme Court's holding in

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[8] Under the second interpretation, Part D consequences would attach to all areas designated as nonattainment; under the third interpretation, Part D consequences would only attach to those areas that had not previously been designated as nonattainment. *See* text following note 2, *supra*

[9] OMB argues that EPA's second and third interpretations should be rejected, since they "would effectively repeal the Clean Air Act (CAA) provisions that reserve to the States the primary role for designating 'nonattainment areas,'" and therefore would violate the rule of statutory construction that repeals by implication are disfavored OMB Letter at 1 We reject OMB's premise, however, that the second and third interpretations necessarily would work an implied repeal of section 107(d). As previously discussed, the provisions of Part D of the CAA, section 171, at least as referenced by the MCA, may reasonably be read as giving EPA authority to designate areas that is *independent of and additional to* the section 107(d) process The second and third interpretations in no way preclude EPA from promulgating designations in response to lists submitted by the states; they merely suggest an alternative procedure for making designations with respect to two particular NAAQS, in addition to that procedure enumerated in section 107(d) We also find wanting OMB's argument that the second and third interpretations run afoul "of the repeated statements in the legislative history that the [Mitchell-Conte] Amendment simply 'freezes the status quo' until Congress can undertake a more comprehensive review of the Clean Air Act." OMB Letter at 2 As EPA correctly points out, however, all of the statements that refer to "freez[ing] the status quo ... concern a provision [set forth in the first part of the MCA] temporarily suspending EPA's authority to impose Clean Air Act sanctions in connection with nonattainment of the ozone or carbon monoxide NAAQS; none addresses [the last sentence of the MCA, which sets forth] the Mitchell-Conte Amendment's redesignation provision " EPA Letter, *supra* note 3, at 4. We fully agree with EPA's point that the references to "freez[ing] the status quo," which were not directed at the MCA's last sentence, do not bear on the interpretation of that sentence.

Chevron. Accordingly, since EPA is the agency which administers the CAA as amended by the MCA, we defer to EPA's judgment on which of its alternative interpretations to adopt.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Authority to Decline Compensation for Service on the National Council of Arts

The Anti-Deficiency Act does not prohibit a member of the National Council of the Arts from serving without compensation.

April 18, 1989

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for the opinion of this Office whether the Chairperson of the National Council of Arts ("Council") may, at the request of a member of that Council, allow only such member to serve on the Council at zero compensation.[1] For reasons set forth below, we conclude that the Anti-Deficiency Act, 31 U.S.C. § 1342, does not prohibit the member from serving on the Council without compensation.

Analysis

The Anti-Deficiency Act provides:

> An officer or employee of the United States government ... may not accept voluntary services for [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.

31 U.S.C. § 1342. This Office considered the application of the Anti-Deficiency Act to noncompensated services most recently in the context of the authority of Independent Counsel Lawrence Walsh to appoint Professor Laurence Tribe as a Special Counsel without compensation. *See* Memorandum for Francis A. Keating II, Acting Associate Attorney General, from Michael Carvin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Independent Counsel's Authority to Accept Voluntary Services - Appointment of Laurence W. Tribe* (May 19, 1988). We relied on Attorney General Wickersham's authoritative opinion construing the Anti-

[1] Memorandum for Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, from C Boyden Gray, Counsel to the President, *Re Compensation of Members of the National Council on the Arts* (Apr. 14, 1989)

Deficiency Act to permit a retired Army officer to serve without compensation as superintendent of an Indian school. The Attorney General wrote:

> [I]t seems plain that the words "voluntary service" were not intended to be synonymous with "gratuitous service" and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. In their ordinary and normal meaning these words refer to services intruded by a private person as a "volunteer" and not rendered pursuant to any prior contract or obligation ....

30 Op. Att'y Gen. 51, 52 (1913). We concluded Professor Tribe could serve as a Special Counsel on a noncompensated (*i.e.*, "gratuitous") basis because he had been appointed to an official position of public accountability pursuant to a statute that requires no minimum compensation but merely states a maximum compensation.

Under the interpretation of the Anti-Deficiency Act articulated by Attorney General Wickersham and since followed by this Office, permissible noncompensated service has two elements. First, the service must be rendered "in an official capacity under regular appointment to an office." 30 Op. Att'y Gen. at 52. Second, the office must be "otherwise permitted by law to be nonsalaried." *Id.*[2] Permission for a position to be nonsalaried may be inferred if there is no specific statutory rate of compensation for an office, but only a maximum. Thus, if the level of compensation for an office is entirely discretionary, or if it has only a fixed maximum and no minimum, salary for that office may be set at zero.

The twenty-six members of the Council are appointed to a regular office by the President with the advice and consent of the Senate. 20 U.S.C. § 955(b). As such, the members of the Council serve "in an official capacity under regular appointment to an office" and therefore satisfy the first element of permissible noncompensated service under the Anti-Deficiency Act. They also satisfy the second element. Members of the Council "shall receive compensation at a rate to be fixed by the Chairperson but not to exceed the per diem equivalent of the rate authorized for grade GS-18." 20 U.S.C. § 955(e). This is a statutory maximum rate which, under our prior interpretations of the Anti-Deficiency Act, establishes that the position is permitted to be non-salaried. Accordingly, the Anti-Deficiency Act does not prohibit a member of the National Council of the Arts from serving without compensation, or more precisely, to serve with compensation fixed at zero.

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[2] Of course, if Congress has expressly authorized acceptance of voluntary services notwithstanding the Anti-Deficiency Act, it is not necessary to infer any authority to accept noncompensated services from an interpretation of the intended scope of the Act.

The only objection to this conclusion would attach special significance to that fact that the members of the Council are to be compensated at *a* rate fixed by the Chairperson of the Council. It may be suggested that this language required that each member of the Council must be compensated at the same rate. We disagree. First, the language itself does not mandate this result: it does not provide that the members of the Council shall be compensated at a single rate or that the discretion of the Chairperson is constrained to fixing a single rate. The emphasis on the word "a" is unwarranted in the context of the entire provision. Moreover, the legislative history rebuts any argument that the provision authorizing the Chairperson to establish "a rate" of compensation restricts the Chairperson to selecting one rate for all appointees. The predecessor statute provided:

> Members of the Council, *and persons appointed to assist the Council in making its studies*, while attending meetings of the Council, or while engaged in duties related to such meetings, or while engaged in the conduct of studies authorized by this title, shall receive compensation at a rate to be fixed by the Chairman, but not exceeding $75 per diem ....

National Arts and Cultural Development Act of 1964, Pub. L. No. 88-579, § 8, 78 Stat. 905, 907 (emphasis added). If the provision authorizing "compensation at a rate to be fixed by the Chairperson" limits the Chairperson to establishing one rate, then the predecessor statute required Members of the Council *and their staff* to be paid at the same rate. We cannot believe that Congress intended this unusual result, and because the plain language of the statute does not demand this construction, we reject it. We also believe a court would defer to an agency interpretation that the statute authorizes the Chairperson of the Council to establish different rates of compensation for different members. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Conclusion

The members of the National Council on the Arts are officials who are appointed by the President and who may be compensated at a rate which is established by the Chairperson of the Council pursuant to a statute which specifies a statutory maximum, but no minimum. Therefore, in light of this Department's prior interpretations of the Anti-Deficiency Act, a member of the Council may serve without compensation.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Prepayment Authority Under the Rural Electrification Act of 1936

Section 306A of the Rural Electrification Act of 1936, as amended, which authorizes borrowers of Federal Financing Banking loans to prepay those loans if private capital is used to replace the loan, does not preclude prepayment with funds obtained by means other than refinanced loans secured by existing Rural Electrification Act loan guarantees. In particular, prepayment may be made from internally generated funds.

Section 306A does not authorize the issuance of regulations creating a priority in favor of borrowers who agree to prepay such loans with internally generated funds.

May 2, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

This memorandum responds to your request of February 8, 1989, for the opinion of this Office concerning the proper construction of section 306A of the Rural Electrification Act of 1936 (the "RE Act"), as amended, 7 U.S.C. § 936a. This section authorizes borrowers of Federal Financing Bank ("FFB")[1] loans guaranteed by the Rural Electrification Administration ("REA") to prepay the loans if, inter alia, "private capital, with the existing [REA] loan guarantee, is used to replace the loan." 7 U.S.C. § 936a(a)(2). You have asked whether section 306A permits a borrower to prepay an FFB loan only if the borrower uses the proceeds of an REA-guaranteed private refinancing loan to do so, or whether the statute also authorizes prepayment with private capital generated by means other than an REA-guaranteed refinancing loan, such as with internally generated funds. The General Counsels of the Department of Agriculture and the Office of Management and Budget ("OMB") have joined in your request for an opinion on this issue. *See* Letter for Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from Christopher Hicks, General Counsel, Department of Agriculture, (Feb. 9, 1989).

In addition, at the oral request of your Office and the Offices of the General Counsels of the Department of Agriculture and OMB, we have examined the legality of section 1786.6 of REA's draft regulations imple-

[1] The FFB is an instrumentality and wholly-owned corporation of the United States 12 U.S C. §§ 2281-2296

menting the most recent amendments to section 306A (the "Draft 1989 REA Regulations"), which would, with respect to $300 million of the $500 million of prepayment authority, create a priority in favor of borrowers who agree to prepay their FFB loans with internally generated funds, rather than use privately refinanced loans backed by existing REA guarantees.[2]

For the reasons set forth below, we have concluded that section 306A does not preclude prepayment with funds obtained by means other than refinanced loans secured by existing REA loan guarantees. We have also determined that the priority scheme proposed in the Draft 1989 REA Regulations would be inconsistent with Congress' intent to provide for FFB loan prepayment through private capital, irrespective of the manner in which the capital is generated.

I. BACKGROUND

Section 306 of the RE Act, 7 U.S.C. § 936, authorizes the Administrator of REA to guarantee loans made by any legally organized lending agency. FFB is such an agency. 12 U.S.C. §§ 2281-2296. Under FFB's program of lending to rural electric and telephone cooperatives, each borrower agrees in its promissory note that its FFB loan or any advance thereunder may be prepaid by paying, in most cases, the "market value" of such loan or advance. *See* Letter for Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from Mark Sullivan III, at 1 n.5 (Feb. 8, 1989). The market value requirement is intended to preserve for the FFB the yield on each loan it makes.

Beginning in July 1986, Congress enacted a series of statutory provisions permitting some borrowers of FFB loans guaranteed by REA to prepay such loans by paying the "par value" of the loan (its outstanding principal balance plus accrued interest, if any), rather than the higher "market value". On July 2, 1986, Congress enacted the first such FFB loan prepayment measure as part of the Urgent Supplemental Appropriations Act, 1986, Pub. L. No. 99-349, 100 Stat. 710, 713-14 (the "1986 Supplemental Appropriations Act"). An undesignated paragraph in that Act provided that an FFB borrower may prepay its loan by paying the outstanding principal balance due "using private capital with the existing loan guarantee." 100 Stat. at 713. To qualify for par prepayment under this provision, a borrower was required to certify that its prepayment would result in "substantial savings to its customers" or "lessen the threat of bankruptcy of the borrower." *Id.* The Secretary of the Treasury was authorized to disapprove any prepayments which, in his opinion, would adversely affect the operation of the FFB. *Id.* at 713-14.

[2] The Agriculture Department has predicted that, as a result of this priority, non-distressed borrowers seeking to prepay using REA-guaranteed private refinancings would be precluded from prepaying any of their FFB loans. Draft 1989 REA Regulations at 14-15.

On October 21, 1986, Congress continued this prepayment program by enacting the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), Pub. L. No. 99-509, 100 Stat. 1874. Section 1011 of this Act substantially adopted the earlier prepayment provision, and with slight modification made it a permanent part of the RE Act, as section 306A. 100 Stat. at 1875-76.

Subsection (a)(2) of new section 306A provides, in pertinent part, that a borrower may prepay its FFB loan "if ... private capital, with the existing loan guarantee, is used to replace the loan." The borrower must certify that any savings resulting from prepayment will be "passed on to its customers or used to improve the financial strength of the borrower in cases of financial hardship." 7 U.S.C. § 936a(a)(3). Subsection (c) of the new section 306A limited the Treasury Secretary's authority to disapprove prepayments to amounts in excess of $2.0175 billion in aggregate principal prepayments in fiscal year 1987.[3]

On December 22, 1987, Congress adopted the Fiscal Year 1988 Continuing Resolution, Pub. L. No. 100-202, 101 Stat. 1329, 1329-356 to 357 (1987), which included the "Rural Development, Agriculture, and Related Agencies Appropriations Act, 1988" (the "FY 1988 Appropriations Act"). Section 633 of this Act authorized further prepayments pursuant to section 306A of the RE Act and further curtailed the Treasury Secretary's authority to disapprove prepayments by providing that such authority could only be exercised after an aggregate of $2.5 billion in FFB loans had been prepaid. This enactment made no amendment to the language of subsection (a) of section 306A.

Later the same day, Congress enacted the Omnibus Budget Reconciliation Act of 1987 ("OBRA 1987"), Pub. L. No. 100-203, 101 Stat. 1330, 1330-20. Section 1401 of OBRA 1987 contained essentially the same authorization for additional FFB prepayments contained in the FY 1988 Appropriations Act and, like the 1988 Act, made no amendments to section 306A(a) of the RE Act. Whereas the FY 1988 Appropriation Act had, as permanent legislation, excepted from the Treasury Secretary's disapproval authority prepayment amounts up to an aggregate of $2.5 billion, OBRA 1987 provided that, for fiscal year 1988, prepayments in excess of a $2.0 billion aggregate were subject to disapproval by the Secretary.[4]

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[3] It has been represented to us by the interested agencies that this figure represented Congress' estimate of the amount of high-interest FFB loans held by financially distressed borrowers. Similarly, in subsection (d)(2) of OBRA 1986 Congress required REA to establish "eligibility criteria to ensure that any loan prepayment activity be directed to those cooperative borrowers in greatest need of the benefits associated with prepayment." 7 U.S.C. § 936a(d)(2) In its next enactment, an undesignated paragraph of the Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 429, Congress permanently suspended the operation of section 306A(d)

[4] Sections 1401(b)(1) & (2) also established new priorities for prepayment: first, certain borrowers already determined to be eligible prior to OBRA 1987's enactment, followed by borrowers in the order in which they were prepared to disburse funds to the FFB to complete prepayment. 101 Stat. at 1330-20 This priority provision expired at the end of fiscal year 1988.

Since the FY 1988 Appropriations Act permanently authorized $2.5 billion of section 306A prepayments not subject to the Treasury Department's approval, and OBRA 1987, in effect, limited the amount of par prepayments authorized in fiscal year 1988 to $2.0 billion, there remained authorization to make additional prepayments not subject to the Treasury Secretary's approval in an amount not in excess of $500 million at any time after the end of fiscal year 1988.

On October 1, 1988, Congress enacted the Fiscal Year 1989 Rural Development, Agriculture, and Related Agencies Appropriations Act (the "FY 1989 Agriculture Appropriations Act"), Pub. L. No. 100-460, 102 Stat. 2229 (1988). Section 637 of that Act, 102 Stat. at 2264, required that REA allocate $150 million of the remaining $500 million prepayment authority under section 306A to borrowers in REA's telephone loan program and $350 million to borrowers in REA's electric loan program. REA circulated the Draft 1989 REA Regulations to implement the statutory allocation between the REA telephone loan program and the REA electric loan program. Subsection (d) of section 1786.4 of the Draft 1989 REA Regulations would authorize borrowers to use "Internally Generated Funds without a guarantee" to prepay FFB loans. Section 1786.3(a) of the regulations would define "Internally Generated Funds" as "money belonging to the borrower other than (1) proceeds of loans made or guaranteed under the RE Act or (2) funds on deposit in the cash construction trustee account."

Section 1786.6(a) of the regulations would establish a priority for processing applications for par prepayments. This subsection provides that the Administrator of REA will give a preference in processing prepayment applications to those applications from borrowers agreeing to use Internally Generated Funds to prepay their FFB loans. This preference will extend over all other prepayment applications except those applications submitted by "Financially Distressed Borrowers." Section 1786.6(a)(1).[5] REA states in the commentary appended to its regulations that it

> believes that the amount of prepayment applications received from financially distressed electric borrowers and from other electric and telephone borrowers wishing to utilize Internally Generated Funds in connection with a prepayment, [sic] will exceed the $500 million available for prepayment without the approval of the Secretary of the Treasury.

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[5] Section 1786.3(a) of the Draft 1989 REA Regulations defines "Financially Distressed Borrowers" as follows

> "Financially Distressed Borrower" means an REA-financed electric system determined by the Administrator to be either (i) in default or near default on interest or principal payments due on loans made or guaranteed under the RE Act, and which is making a good faith effort to increase rates and reduce costs to avoid default, or (ii) participating in a work out or debt restructuring plan with REA, either as the borrower being restructured or as a borrower providing assistance as part of the work out or restructuring

Draft 1989 REA Regulations at 14-15. Because the Treasury Secretary has apparently determined to disapprove any applications exceeding $500 million in aggregate prepayments, the Draft 1989 REA Regulations could effectively preclude some borrowers from prepaying their FFB loans with the proceeds of a new loan from private sources backed by an existing REA guarantee.

II. USE OF INTERNALLY GENERATED FUNDS

By its terms, section 306A(a)(2) authorizes an FFB borrower to prepay its loan "if ... private capital, with the existing loan guarantee, is used to replace the loan." 7 U.S.C. § 936a(2). The dispute between the Departments of Agriculture and the Treasury centers on the meaning of the phrase "with the existing loan guarantee." The Treasury Department reads this phrase as a restriction on the kind of private capital that an FFB borrower can use to prepay its loan. It argues that the phrase requires that a borrower seeking to prepay an FFB loan replace the FFB loan with a privately refinanced loan secured by the borrower's REA guarantee. In other words, the Treasury Department maintains that under section 306A an FFB borrower is authorized to use only REA-guaranteed refinanced loan proceeds to prepay its FFB loan and is prohibited from using, in whole or in part, any other form of private capital.

The Department of Agriculture argues that Congress intended a borrower to be able to prepay its FFB loan with any form of private capital, however generated or secured. The Agriculture Department contends that the clause "with the existing loan guarantee" was included in section 306A merely to ensure that a borrower would be permitted to use its existing REA guarantee *if and to the extent* needed to secure private refinancing. Under this construction, an FFB borrower is not compelled to rely exclusively, or even at all, on refinanced loans to prepay its FFB loan, but may prepay with any combination of loan proceeds and internally generated funds, and whether or not the capital is guaranteed by REA.

We believe that neither of the proffered interpretations is dictated by the statutory language. This is not a case where the "plain meaning" of the statute compels acceptance of one construction over the other. Given the ambiguity in the statutory language itself, we must resort to other indicia of Congress' intent — here, principally, the legislative history, the circumstances surrounding enactment of the statute, and the statute's overall purpose and internal logic.

Congress enacted section 306A during a period of sharply declining interest rates. *See, e.g.*, 132 Cong. Rec. 12,678 (1986) (statement of Sen. Burdick). It was concerned that the high rates that had been charged on FFB loans in prior, inflationary years were contributing to a weakening of the rural economy. *See, e.g., id.* at 12,680 (statement of Sen. Johnston). Its obvious purpose was to provide through section 306A relief to rural coop-

eratives and their customers by permitting such cooperatives to prepay their high-interest FFB loans without penalty. The right to prepay, however, was explicitly conditioned on the use of "private capital," not additional public funds. *See, e.g., id.*; *id.* at 12,682 (statement of Sen. Andrews).

As the legislative history shows, at the time of enactment of section 306A, Congress assumed that most, if not all, borrowers would have to depend, in whole or at least in part, on private refinancing loans to prepay their FFB loans.[6] This assumption is also evident in the statutory requirement that a borrower certify that its prepayment would "result in substantial savings to its customers or *lessen the threat of bankruptcy to the borrower.*" 1986 Supplemental Appropriation Act, 100 Stat. at 713 (emphasis added). Congress also recognized that such needy borrowers would have difficulty obtaining advantageous private loans unless they could use as security their existing REA guarantees. Indeed, without the REA guarantees, needy borrowers would be effectively precluded from availing themselves of the section 306A prepayment opportunity.[7]

Congress' overall design was thus to give FFB borrowers the right to prepay their FFB loans with private capital, but to make that right meaningful by permitting them to use their existing REA guarantees to raise private funds. This broad relief was animated by two explicit congressional objectives — to strengthen the financial condition of the cooperatives themselves, and to pass cost savings through to the cooperative's customers. *See supra* p. 117 (discussing certification requirements in 1986 Supplemental Appropriations Act).

Given these congressional objectives, we think that the better interpretation is that Congress simply meant to ensure in section 306A that borrowers could use their existing REA guarantees *if they wished, and to the extent necessary*, to secure private refinancing. Congress meant to *permit* borrowers to use their existing REA guarantees to the extent needed to secure private capital; it did not *command* that borrowers pre-

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[6] *See, e.g.*, 132 Cong Rec. 15,838 (1986) (statement of Sen. Cochran), *id* at 12,683 (statement of Sen. Domenici); *id.* at 12,678 (statement of Sen Burdick) Similar references appear in discussions of several of the later enactments *See, e g* , H.R. Rep. No. 195, 100th Cong., lst Sess 79 (1987) (discussing the 1987 Supplemental Appropriations Act); H R Rep No 391, 100th Cong., lst Sess. pt. 1, at 17 (1987) (discussing OBRA 1987). Indeed, both Departments have represented to us that all FFB borrowers prepaying their FFB loans to date have prepaid using the proceeds of new loans obtained from private sources, and all such private loans have been guaranteed by the Administrator of REA using the existing guarantees.

[7] As the Agriculture Department notes, there were a number of reasons why Congress might have thought it necessary to include a directive to REA to provide guarantees to borrowers prepaying with refinancing proceeds Congress may have supplied the mandate out of a belief that it was unclear in the absence of such language that REA would even have had the authority to transfer such guarantees, *see* 7 U S C §§ 904, 936; *see also* Letter for Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, from Christopher Hicks, General Counsel, Department of Agriculture at 10 and n 35 (Feb 9, 1989). Moreover, a mandate would have appeared necessary because both the Administration's objections to the prepayment program and OMB's proscription of blanket guarantees of private refinancings gave Congress no reason to expect that REA would exercise any statutory discretion to transfer existing guarantees. *See* OMB Circular A-70 at 8, ¶ 10(b)(4) (rev Aug. 24, 1984).

pay their FFB loans exclusively with refinancing proceeds. The prepositional phrase "with the existing loan guarantee" was included to effect only this intent.

This construction of the section is fully supported by the language of the statute itself. By its terms, subsection (a)(2) requires that "private capital" be used to replace the FFB loan. The term "capital" encompasses many kinds of private funds, including debt, equity, and internally generated funds. There is nothing in the subsection expressly limiting this otherwise broad term to refinance proceeds. Had Congress intended the phrase "with the existing loan guarantees" to require use of refinancing proceeds exclusively, we believe it almost certainly would have coupled this language with a term of limitation, such as "loan proceeds," rather than with the inclusive term "private capital."

We also find support for this interpretation in the fact that the phrase "with the existing loan guarantee" was set off by commas when section 306A was made a permanent part of the RE Act by OBRA 1986. Had Congress meant to limit the private capital that may be used to capital obtained by refinance, presumably it would have left the clause without commas, as it originally stood in the first prepayment provision in the 1986 Supplemental Appropriations Act. This amendment plainly strengthens the inference that Congress intended to give the term "private capital" its widest possible interpretation and not to limit it by a requirement that the capital be secured through refinancing.

In sum, we believe it is entirely natural to read the statutory phrase "with the existing loan guarantee" as meaning simply that, when a borrower chooses to rely on refinancing for all or part of the "private capital" used for prepayment, the borrower may secure that refinancing "with the existing loan guarantee."

This reading of subsection (a)(2) is supported by the legislative history. The Senate Appropriations Committee Report on the initial prepayment provision in the 1986 Supplemental Appropriation states:

> [B]orrowers [could] prepay any or all loans with the [FFB], by payment of the full amount of the unpaid principal balance on such loan advances.... REA borrowers may prepay these FFB loans only if they use private sector capital to make these prepayments. Existing REA guarantees on loans to be prepaid will also guarantee loans from private capital sources for like amounts used for these prepayments.

S. Rep. No. 301, 99th Cong., 2d Sess. 19 (1986). The language and structure of this passage strongly suggest that Congress intended the only condition to prepayment to be use of "private sector capital." Here, as in the statute itself, there is no suggestion that the only permissible form of private capital is loan proceeds. If Congress intended to impose the twin

requirements that private capital be used and that that capital be obtained through refinancing, it is only reasonable that it would have said so in the second sentence quoted above. The fact that the private capital requirement and the REA guarantee carry over are addressed in separate sentences, and as separate, unrelated thoughts, further suggests that the latter was not intended as a limitation on the former but rather as a separate mandate. Last, both the sequence and deliberate separation of the second and third sentences clearly suggest both that Congress regarded "loans from private capital sources" as but one of any number of forms of "private sector capital," and that these loans were the particular form of capital that must be eligible for REA guarantees.[8]

Finally, we believe that the Department of Agriculture's construction is consistent with Congress' overall design in enacting section 306A. Congress' express purposes were to improve the financial condition of cooperatives and to achieve savings for the cooperatives' customers. Requiring private refinancing as the only permissible form of prepayment would not appear to advance either of these goals. On the other hand, permitting a cooperative to use internally generated funds as part of its prepayment would effectuate the statute's purpose, yielding, in many cases, greater benefits of the kind sought by Congress.

We acknowledge that the Department of the Treasury's interpretation of subsection (a)(2) is by no means frivolous. On balance, however, we think it is less plausible. First, the Treasury Department has offered and we can discern no reason why Congress, given its broad remedial purposes, would have imposed a requirement that borrowers use refinancing as the exclusive means of prepayment. REA does not benefit financially or otherwise by guaranteeing such private sector loans; in fact, it is burdened to the extent of the contingent liabilities. *See* Letter for Benedict S. Cohen, Senior Counsel, Department of Justice, from Terence M. Brady, Deputy Assistant General Counsel, Department of Agriculture at 3 (Apr. 6, 1989). Nor does FFB benefit by any such requirement. More important, as noted above, such a limitation seems at odds with Congress' articulated objectives of strengthening the financial condition of cooperatives and passing benefits through to the cooperatives' customers, since prepayment through refinancing would obviously be more costly to borrowers.

Additionally, the Treasury's construction would produce anomalous results. Even under its interpretation, an FFB borrower that wanted to use internally generated funds to prepay its loan could do so. The bor-

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[8] Section 637 of the FY 1989 Agriculture Appropriations Act does not purport to amend the existing language of section 306A(a) of the RE Act with which we are here concerned Both Departments, however, have directed us to the Conference Report accompanying the bill ultimately enacted as the FY 1989 Agriculture Appropriations Act, which contains language purporting to interpret that provision *See* H.R Conf. Rep No. 990, 100th Cong., 2d Sess. 38 (1988). As you have noted, such legislative statements subsequent to a statutory enactment cannot legitimately be relied upon in interpreting that prior enactment. *See generally Consumer Prod Safety Comm'n v GTE Sylvania, Inc* , 447 U S. 102, 117-18 & n.13 (1980).

rower would simply use its REA guarantee to borrow funds from a private lender, prepay its FFB loan, and then immediately prepay the new private sector loan with internally generated funds. And borrowers that are prosperous enough to prepay with internally generated capital would be required to take out unneeded loans, backed by unneeded REA guarantees, before being permitted to use their capital for prepayment.

We have considered the possibility that Congress might have intended to require refinancing as a form of "means test" for prepayment — that is, as a means of ensuring that only financially distressed borrowers were permitted to prepay. This supposition, however, seems untenable for at least two reasons. First, in the context of this very prepayment program, Congress has showed that, when it wished to target prepayment provisions to financially distressed borrowers, it did so explicitly. *See* 1986 Supplemental Appropriations Act, 100 Stat. at 713-14 (undesignated paragraph); section 1011 of OBRA 1986, 100 Stat. at 1875-76. It is thus unlikely Congress would have relied on such indirect if not ambiguous means to effectuate the same purpose it elsewhere was accomplishing explicitly in the same program. Second, the statute would be ineffectual as a means test. As noted above, a requirement that prepayment be made only by means of REA-guaranteed refinancings would not ensure that only distressed borrowers participated in the program. Prosperous borrowers could simply take out REA-guaranteed loans from private lenders to prepay the FFB and then use internally generated capital to prepay the private loan. *See* Draft 1989 REA Regulations at 10-11 (1989).

III. THE REGULATORY PRIORITY

As noted above, as a result of several enactments modifying section 306A of the RE Act, *see supra*, Part I at 117-19, only $500 million in FFB loans may be prepaid pursuant to section 306A without the approval of the Secretary of the Treasury. By statute, $350 million of this prepayment authority is reserved for rural electric cooperatives, and $150 million for telephone cooperatives. *See* Section 637 of the FY 1989 Agriculture Appropriations Act, 102 Stat. at 2264. It is our understanding that the Secretary has determined to withhold his approval of any prepayments exceeding $500 million in aggregate.

Draft Department of Agriculture regulations currently before OMB would set aside for "Financially Distressed Borrowers"[9] $200 million of the $350 million statutorily allocated for electrical cooperatives, and would give processing priority to the applications of such borrowers. Section 1786.6(a). With respect to the remaining $150 million of the $350 million allocated for prepayments by electrical cooperatives and the $150 million allocated for prepayment by telephone cooperatives, the regula-

[9] *See supra* note 5

tions would give processing priority to the applications of borrowers who agree to prepay with "Internally Generated Funds," defined as "money belonging to the borrower other than: (1) proceeds of loans made or guaranteed under the RE Act or (2) funds on deposit in the cash construction trustee account." Sections 1786.6(a); 1786.3(a). The Department of Agriculture has predicted that prepayment applications by financially distressed borrowers and borrowers using internally generated cash will exceed in the aggregate the $500 million prepayment authorization not subject to the Treasury Secretary's approval. *See* Draft 1989 REA Regulations at 14-15. Because the Secretary has determined to disapprove applications exceeding $500 million in aggregate, the priorities established by REA could determine whether some borrowers are permitted to prepay.[10] You have asked us whether this priority is statutorily permissible. We believe that it is not.

The only borrower-specific requirement of section 306A(a)(2), as we conclude *supra*, is that prepayment be by use of "private capital." Congress expressed no preference in the statute or its legislative history for any particular means of prepayment; it did not prefer prepayment by internally generated funds over funds generated through means of REA-guaranteed refinancing, or vice versa.

In the face of statutory language equally permitting payment both by internally generated funds and by the proceeds of REA-guaranteed refinancings, and a mandate to REA to carry over upon request REA guarantees to refinancing loans from private lenders, we think that imposition of a preference disadvantaging those who choose to use REA guarantees would indeed be inconsistent with the statute. We find such a preference especially troubling where, as here, by operation of the preference it is possible that some distressed borrowers, who were among the principal beneficiaries of the prepayment program, might be precluded from prepayment, given REA's prediction that the $500 million available for prepayment without the approval of the Secretary of the Treasury will easily be exhausted. Draft 1989 REA Regulations at 14-15.

In the commentary section of the draft regulations, the Agriculture Department explains that the prepayment priority for Internally Generated Funds, inter alia, "encourages borrowers to privatize, reduces potential future impacts on the Revolving Fund, ... make[s] it possible for all borrowers who apply to make such a prepayment to participate in the program without significantly increasing administrative burden on REA[; and] [i]n addition ... ensures that [the] amount of existing prepayment authority not requiring the Secretary of the Treasury['s] approval will be

[10] In the commentary appended to the regulations REA has noted its intention that "[i]n the event that during the application period REA does not receive prepayment applications totaling $150 million from electric borrowers desiring to use Internally Generated Funds or $150 million from telephone borrowers desiring to use Internally Generated Funds REA intends to issued [sic] amended regulations establishing new priority criteria and a new application period." *See* Draft 1989 REA Regulations at 14-15

used in an economically efficient manner maximizing the benefits to all borrowers." Draft 1989 REA Regulations at 17-18.

In an additional submission to us, the Department of Agriculture has further argued that the priority is justified because it would have the following effects: lower costs to borrowers; faster prepayments; participation by a larger number of borrowers; reduced regulatory burdens for borrowers and an associated diminished risk to REA; strengthening of the Revolving Fund; and a reduction of the administrative burden upon REA. Memorandum for Benedict S. Cohen, Senior Counsel, Department of Justice, from Terence M. Brady, Deputy Assistant General Counsel, Department of Agriculture (Apr. 6, 1989). While all these administrative efficiencies of the prioritization may be laudable, we do not think that they are sufficient to sustain regulations incompatible with the statute and its purposes.

This is not to say that any regulatory prioritization of prepayment offers would be impermissible. It is doubtful, for example, that a prioritization based either upon date of filing or upon readiness to prepay would be inconsistent with the statute.[11] Either requirement would be neutral as to the borrowers eligible for prepayment and the means by which they would make prepayment. Nor, we think, would a reasonable accommodation of distressed borrowers, such as that evidenced by the $200 million set aside for distressed electrical cooperatives, be prohibited, given Congress' particular concern for borrowers in financial hardship. *See supra* text pp. 121. But any regulation that either distinguishes among borrowers based upon the particular means of prepayment, or that gives priority to non-distressed over distressed borrowers, except consistently with later enactments,[12] would likely be suspect given the congressional intent discussed above.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

[11] In 1987 Congress itself established a priority based upon the order in which applicants for prepayment were prepared to disburse funds to the Treasury. *See* Section 1401(b)(2) of OBRA 1987, 101 Stat at 1330-20.

[12] *See, e.g.*, Section 637 of the FY 1989 Agriculture Appropriations Act, 102 Stat at 2264 (reservation of funds for telephone borrowers).

Authority of the FBI to Conduct Background Investigations for Congress

The FBI has statutory authority to conduct background investigations of congressional employees who will have access to classified information or who the Attorney General identifies as having a connection to a matter within the control of the Justice or State Departments for which such an investigation is required.

June 5, 1989

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked us to review a series of requests forwarded to you by the Director of the Federal Bureau of Investigation ("FBI") regarding the FBI's authority to conduct background investigations of congressional employees. For the reasons stated below, we conclude that the FBI has the legal authority to conduct investigations of congressional employees who will have access to classified information or with respect to whom you have identified a connection with official matters under the control of this Department or the Department of State. The FBI has no statutory authority to conduct background investigations of congressional employees that do not meet these criteria. If you believe that the FBI's role in this area should be expanded, the best course would be to seek legislation authorizing the FBI to conduct background investigations of all congressional employees and providing for reimbursement of all costs.

I. Background

Historically, the FBI has conducted background investigations of staff members of certain congressional committees pursuant to memoranda of understanding ("MOUs") between this Department and Congress, where those staff members will have access to classified Department of Justice or Department of State material.[1] The FBI recently received a request from the Office of Senate Security ("OSS") to expand its role in performing background investigations (i) to congressional employees who will have access to classified information, but who are not covered by previous MOUs, and (ii) potentially to all other congressional employees,

[1] Other agencies, including the Defense Investigative Service of the Department of Defense, also conduct background investigations for Congress.

regardless of whether they will have access to classified information. In connection with the OSS request, Senators Dole and Mitchell also asked the FBI to perform expedited investigations necessary to process security clearances for ten to twelve Senate employees who will have access to classified information. The FBI has forwarded these requests to you for your advice and approval. You also have received memoranda from Assistant Attorney General Flickinger of the Justice Management Division and Assistant Attorney General Boyd of the Office of Legislative Affairs expressing policy concerns with the OSS requests.[2] You have asked this Office whether the FBI has the legal authority to perform any or all of these investigations. With respect to the policy issues involved, we defer to the views of the Justice Management Division and the Office of Legislative Affairs.

II. Analysis

A. The Scope of the FBI's Authority

The Attorney General has statutory authority to "appoint officials ... to conduct such ... investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." 28 U.S.C. § 533(3).[3] Regulations promulgated pursuant to this statute provide that the FBI shall "[c]onduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise." 28 C.F.R. § 0.85(c). Although neither the statute nor the regulations specifically address the FBI's authority to conduct background investigations for Congress, this Office previously has concluded that 28 U.S.C. § 533(3) authorizes the FBI to perform background investigations for certain committee staff members who will have access to classified information.[4]

Our analysis is simple. The FBI may conduct any investigations, includ-

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[2] On April 24, 1989, we received the following documents for review: (i) the letter from Senators Dole and Mitchell; (ii) a memorandum from Director Sessions to you explaining why your approval is needed before the FBI may conduct those investigations and indicating that the request of Senators Dole and Mitchell would serve as a test project to allow the FBI to demonstrate its ability to conduct such investigations on an expanded basis for all Senate employees for whom security clearances are sought, (iii) a memorandum from Assistant Attorney General Flickinger, Justice Management Division, expressing policy concerns with the requests, and (iv) a memorandum from Assistant Attorney General Boyd, Office of Legislative Affairs, concurring in some of Mr. Flickinger's concerns.

[3] We have interpreted 28 U.S.C. § 533(3) to require that *either* this Department *or* the Department of State have an official interest in a matter before an investigation may be authorized. *See, e.g.*, Memorandum for the Attorney General, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel at 6 n.4 (June 8, 1983).

[4] *See* Memorandum for Patricia W. Wald, Assistant Attorney General, Office of Legislative Affairs, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: FBI Background Checks for Congressional Committees* (May 4, 1978) (the "1978 Memorandum"), Memorandum for Frederick D. Baron, Special Assistant to the Attorney General, from John Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re. FBI Background Checks for Congressional Committees* (Feb. 22, 1977).

ing background investigations, concerning "official matters under the control of the Department." 28 U.S.C. § 533(3). Executive Order No. 12356 directs all executive officials to ensure that classified information is not disseminated outside the executive branch except to persons whose trustworthiness has been determined and under conditions that guarantee that the information will be protected. Exec. Order No. 12356, § 4.1, 3 C.F.R. 166 (1983). Thus, if a background investigation is necessary to establish the trustworthiness of a congressional employee who will have access to classified information, the Attorney General's responsibility under the Executive Order makes such an investigation an "official matter under the control of the Department." Pursuant to this analysis, the Attorney General over the last decade has entered into MOUs with certain congressional committee chairmen authorizing the FBI to conduct background investigations of staff members who will have access to classified material. Based on previous advice from this office,[5] however, the FBI rarely has performed investigations of congressional employees who were not on those committee staffs.

We see no reason why you should not authorize the FBI to conduct background investigations of the employees designated by Senators Dole and Mitchell and other congressional employees who will have access to classified information. The broad language of section 533(3) makes the availability of classified information to all such employees a "matter[] under the control of the Department" because their trustworthiness must be ascertained pursuant to the Executive Order.

We are unaware, however, of any statutory authority supporting the broader request that the FBI conduct background investigations of *all* congressional employees. Employees who will have no access to classified information lack the nexus to a matter within the control of this Department such as that identified in Executive Order No. 12356. If you were to identify some other matter within the control of this Department or the Department of State that involved some or all of those employees, you would be authorized in our view by section 533(3) to direct the FBI to investigate them. Absent a decision by you that such a matter is involved, however, we believe the FBI would have no authority to perform the investigation.

B. Reimbursement

We also have been asked to address whether Congress should reimburse the FBI for the costs of performing additional background investigations. To the extent that this presents a policy issue, we defer to the views of the Justice Management Division and the Office of Legislative Affairs. It can be argued that the FBI should bear the cost of investigations

[5] *See* 1978 Memorandum at 3

authorized by section 533(3) and Executive Order No. 12356 because the investigations are performed as part of the official business of this Department and to satisfy your duty under the Executive Order to determine the trustworthiness of persons to whom classified information will be released. Nevertheless, Congress undoubtedly will benefit from the FBI's work. It initiated the request for additional assistance, and expanding the FBI's responsibility beyond the few committee staffs for whom the FBI traditionally has provided the service no doubt will tax the FBI's resources. Under these circumstances, equity would suggest that Congress should at least share the costs, if not fully shoulder them, and we perceive no legal reason why the costs may not be reimbursed. Of course, if you decide to seek to expand the FBI's authority to include congressional employees who are not covered by section 533(3), legislation authorizing that work should provide for reimbursement of all costs, as well.

III. Conclusion

The FBI has the legal authority to conduct background investigations of congressional employees to the extent that (i) such employees will have access to classified information or (ii) you have identified a matter within the control of this Department or the Department of State that requires that such investigations be done. Expanding the FBI's authority beyond these circumstances will require legislation authorizing the FBI to conduct background investigations of any congressional employee. Such legislation also should provide for Congress to reimburse the FBI for the costs of these investigations.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force

In the absence of Presidential intervention to review its decision, the Nuclear Regulatory Commission may constitutionally issue an order imposing civil penalties on the Department of the Air Force under the Atomic Energy Act of 1954.

Although Congress may not deprive the President of an opportunity to review a decision made by an agency subject to his supervisory authority, the President is not constitutionally required to review all such decisions before they may be lawfully implemented.

Because the Atomic Energy Act gives the Attorney General exclusive authority and discretion to enforce civil penalties imposed under the Act, an interagency dispute regarding the collection of such penalties would properly be resolved within the executive branch rather than through interagency litigation.

June 8, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE AIR FORCE

This memorandum responds to your request for an opinion of this Office on the constitutionality of the United States Nuclear Regulatory Commission's ("NRC") imposition of civil penalties on the Department of the Air Force under the Atomic Energy Act of 1954, as amended ("Act"), 42 U.S.C. §§ 2011-2296. In particular, you have asked whether the Constitution permits the NRC: 1) to issue an order imposing civil penalties against the Air Force without a prior opportunity for the Air Force to contest the fine within the executive branch; or 2) to collect civil penalties against the Air Force by litigation in court.

We believe, as a general matter, that the President has authority to review and revise decisions of his subordinates in the executive branch. Although the President cannot be deprived of the opportunity to review a decision subject to his supervisory authority, this does not mean that the President is constitutionally compelled to review every decision before it is implemented. After reviewing the questions you have posed, we conclude that, because the President has expressed no interest in reviewing either personally or through a delegate the NRC's issuance of orders, we need not reach whether, and to what extent, the President's supervisory authority extends to orders issued by the NRC.[1] On the other hand, we agree with you that there would be significant constitutional

problems had Congress directed the NRC to collect the penalties it orders by suing the Air Force in federal court. The Act, however, permits the Attorney General to determine whether, and to what extent, civil penalties should be collected. Thus, any issue regarding your liability for civil penalties may be resolved by an executive branch agency and without resort to interagency litigation.

I. Background

The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, as amended by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5851, established the Nuclear Regulatory Commission ("NRC"). The agency is charged with broad licensing and regulatory authority over the development and utilization of atomic energy, the construction and maintenance of facilities, and the uses and storage of nuclear material. 42 U.S.C. §§ 2061-2064 (ownership and acquisition of production facilities); 42 U.S.C. §§ 2071-2078, 2091-2099, and 2111-2114 (regulation of nuclear materials and byproducts); 42 U.S.C. §§ 2131-2140 (licensing); 42 U.S.C. §§ 2201-2213 (general powers and duties). The Act provides that Commissioners are appointed by the President, with the advice and consent of the Senate, and "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 42 U.S.C. § 5841(a), (e).

The Act invests the NRC with broad authority to regulate uses of nuclear power, with certain exceptions for military purposes expressly provided for in the Act.[2] Specifically, the NRC has the authority to license nuclear facilities and material, *id.* §§ 2133, 2073, including those of government agencies, *id.* § 2014(s); to issue rules and regulations, *id.* § 2201; and to inspect and investigate alleged violations of its rules, *id.*

In 1969, Congress passed amendments to the Atomic Energy Act authorizing the NRC to levy civil monetary penalties for violations of its regulations. The addition of monetary penalties was intended to give the NRC additional flexibility to deal with infractions of regulations that did not require the harsher sanctions of revocation or suspension of a license or

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[1] The Air Force does not argue that all actions by the NRC are unconstitutional because of the NRC's status as an agency with some statutory independence We thus do not address the constitutional status of the NRC or the constitutionality of its actions generally.

[2] The President is authorized by the Act to require the Commission to deliver nuclear material and to authorize its use for military purposes:

> The President from time to time may direct the Commission (1) to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of national defense, or (2) to authorize the Department of Defense to manufacture, produce, or acquire any atomic weapon or utilization facility for military purposes: *Provided, however,* That such authorization shall not extend to the production of special nuclear material other than that incidental to the operation of such utilization facilities

42 U S C. § 2121(b). A license is not required for any actions authorized under section 2121. *See* 42 U.S C. § 2140(b).

a cease and desist order. *See* S. Rep. No. 553, 91st Cong., lst Sess. 9-12 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1607, 1615-19.[3]

Section 2282(a) provides:

> Any person who (1) violates any licensing provision ... or any rule, regulation, or order issued thereunder, or any term, condition, or limitation of any license issued thereunder, or (2) commits any violation for which a license may be revoked under section 2236 of this title, shall be subject to a civil penalty, to be imposed by the Commission, of not to exceed $100,000 for each such violation. If any violation is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty. The Commission shall have the power to compromise, mitigate or remit such penalties.

42 U.S.C. § 2282(a). The term "person" is defined specifically to include government agencies:

> The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission ....

42 U.S.C. § 2014(s). "Government Agency" includes any executive department of the United States. 42 U.S.C. § 2014(l).

Whenever the Commission has reason to believe that a violation subject to a civil penalty has occurred, the Commission is required to notify the person, identify the alleged violation, advise the person of the proposed penalty, and provide an opportunity to demonstrate why the penalty should not be imposed. 42 U.S.C. § 2282(b). The Commission has formally adopted procedures for the imposition of civil penalties. *See* 10 C.F.R. § 2.205; 10 C.F.R. pt. 2, app. C. (1988). Under these provisions, the person charged with a civil penalty will receive a written notice of violation specifying the date and nature of the alleged violation, the particular provision, rule, or regulation allegedly violated, and the amount of the proposed penalty. 10 C.F.R. § 2.2.01(a). Payment of the penalty or a written answer either denying the violation or showing extenuating circumstances is required within twenty days. *Id.* § 2.201(a), (b). The NRC may, at this time, issue an order dismissing, mitigating or imposing a civil penalty. The person charged may then request a hearing at which the

[3] In 1980, the maximum penalty for each violation was raised from $5000 to $100,000 to provide the NRC with escalated enforcement sanctions and a greater prospect of deterrence Pub L No. 96-295, 94 Stat. 780, 787 (1980).

merits of the alleged violation and the applicability of the rules and regulations can be contested. *Id.* § 2.205(c), (d). After the hearing, the Commission will issue an order dismissing, mitigating, or imposing the civil penalty. *Id.* § 2.205(f).[4]

The Commission, however, does not itself have authority directly to collect the amount of the penalty assessed if the violator fails to pay the fine upon issuance of a final order. Instead, the Act permits the NRC to refer the matter to the Attorney General for collection. Section 2282(c) provides:

> On the request of the Commission, the Attorney General is authorized to institute a civil action to collect a penalty imposed pursuant to this section. The Attorney General shall have the exclusive power to compromise, mitigate, or remit such civil penalties as are referred to him for collection.

42 U.S.C. § 2282(c). The Senate Report accompanying the civil penalty provisions makes clear that the Attorney General is authorized, but not required, to institute a civil action to collect the penalty:

> While the bill would confer on the Commission the power of compromise, mitigation, and remission of penalties, such power would reside exclusively with the Attorney General under the bill with respect to such civil penalties as are referred by the AEC to him for collection.

S. Rep. No. 553, 91st Cong., lst Sess. 11 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1607, 1618. In 1980, the NRC requested authority to collect civil penalties directly, but Congress refused to change the law.[5]

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[4] The NRC assesses civil penalties based in part on the severity of the violation. *See* 10 C.F.R. § 2.205 and 10 C.F.R. pt. 2, app. C (1988). Violations for which civil penalties can be imposed are broken down into five severity levels, and in determining the amount of the violation, the Commission will take into account such factors as whether the violation was identified by the licensee, whether it was reported by the licensee, the corrective action taken, and whether the violation or similar violations have been recurring. *See* 10 C.F.R. pt. 2, app. C.

[5] *See* S. Rep. No. 176, 96th Cong., 1st Sess. 24 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2216, 2239

> The Commission also requested that it be given the authority to administratively impose and collect penalties without the opportunity for de novo trial before a Federal District Court. According to the Commission, the present system of imposing and collecting a civil penalty through action of the Attorney General in Federal district court denies the Commission full control of its enforcement action, and raises the possibility that the Attorney General will settle the action for a lower penalty than that sought by NRC. The Commission recognizes, however, that the present enforcement approach, including the opportunity for de novo trial, is typical for Federal agencies. Further, the Commission has failed to identify any instances in which the present approach has resulted in a significant weakening of the enforcement action proposed by NRC.
>
> The committee believes that there is considerable value in retaining the existing approach .... Accordingly, the committee recommends that the present statutory mechanism for imposing and correcting civil penalties be retained.

Under its section 2282 authority to impose civil penalties, the NRC sent the Air Force a Notice of Violation and Proposed Imposition of Civil Penalties of $102,500 on June 17, 1988. The alleged violation arose from the accidental spill in 1986 of radioactive materials from a barrel stored on Wright-Patterson Air Force Base, Ohio. The penalty was proposed because of the alleged failure of the Air Force personnel to adequately report the spill to the NRC.

The Air Force replied to the alleged violation with a written response on July 15, 1988. Air Force officials had an extended meeting with the NRC at which they contested the underlying factual basis for the charges. The principal factual disagreement is whether and to what extent certain Air Force personnel were involved in a deliberate or willful failure to report the spill. The Air Force has not participated in internal administrative hearings before the NRC, but has instead raised constitutional defenses, asserting both that the NRC cannot constitutionally issue a final order assessing a penalty without prior review by the President and that in any event the penalty cannot be enforced by the Attorney General through litigation. The NRC has agreed to hold its final order in abeyance pending our resolution of these issues.

II. Imposition of Civil Penalties Against Federal Agencies

The Air Force contends that the Constitution does not permit the NRC unilaterally to impose civil penalties against a member of the executive branch because both the NRC and the Air Force are "part of one of the three fundamental Branches of the Government under our Constitution." Letter for Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from Ann N. Foreman, General Counsel, Department of the Air Force at 3 (Mar. 17, 1989) ("Foreman Letter"). Underlying this contention is the Air Force's view that "[t]he President is the final arbiter of a singular executive branch policy and of how any dispute between agencies will be resolved." *Id.* The Air Force concludes from this premise that the NRC cannot constitutionally issue a final order against the Air Force until the President resolves any differences between the two agencies.

Although we agree as a general matter with the premise underlying the Air Force's argument — namely that the President must have an opportunity to review disputes between members of the executive branch — we disagree with its conclusion that the President is affirmatively compelled to resolve this dispute between the NRC and itself. In our view, the President may permit the NRC to carry out a decision taken pursuant to its statutory duties despite the objection of another agency.

The President's authority to review and revise the decisions of his subordinates derives from his authority under Article II of the Constitution, which states that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl.

1. Moreover, the President has the constitutional responsibility to "take Care that the Laws be faithfully executed." *Id.* § 3. It is well-established that these provisions generally authorize the President to supervise and guide executive officers in the administration of their statutory duties. *See Myers v. United States*, 272 U.S. 52, 135 (1926) (The President has the authority to "supervise and guide" executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.").

Although the President *may* take the opportunity to review decisions pursuant to his Article II authority, Article II does not mandate that he undertake such review. Thus, the President's subordinates may make decisions pursuant to the statutory duties that Congress has entrusted to their respective offices even in the absence of the President's actual review of those decisions so long as the President is not precluded from the opportunity to review these decisions. This understanding of the President's supervisory authority comports with the practical reality of decisionmaking within the executive branch: day-to-day decisions are often made by the President's subordinates although the President does not review these decisions.

The President's authority to review disputes between his subordinates is simply an aspect of his general supervisory authority over the executive branch. For instance, when two of his subordinates dispute the meaning of a statute, the President may decide to review the matter. The Constitution, however, does not mandate that he resolve disputes either personally or through his subordinates.[6] If it is the President's choice not to review the dispute, then the agencies may act in accordance with their respective statutory authorities. Thus, it is not inconsistent with the Constitution for an executive agency to impose a penalty on another

[6] The Air Force quotes testimony from former Assistant Attorney General for Land and Natural Resources F. Henry Habicht II that "Executive Branch agencies may not sue one another, nor may one agency be ordered by another to comply with an administrative order *without the prior opportunity to contest the order within the Executive Branch.*" *Environmental Compliance by Federal Agencies Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 210 (1987) (statement of F. Henry Habicht). We believe, however, that Mr. Habicht's testimony is consistent with our view that, while the President must have the opportunity to review decisions subject to his supervisory authority, the Constitution does not compel him to review such decisions. The Air Force cannot contend that it has had no opportunity to contest the NRC's order within the executive branch. It could have brought this dispute to the attention of the President at any time after it received notice from the NRC on June 17, 1988. Moreover, Mr. Habicht's testimony occurred in the context of an oversight hearing relating to the Resource Conservation and Recovery Act ("RCRA"), a statute that permits the EPA directly to impose civil penalties on other agencies. 42 U.S.C. §§ 6927(c), 6928(c). The President has specified an internal dispute resolution mechanism for agency disagreements with the EPA. *See* Exec. Order No. 12088, 3 C.F.R. 243 (1978) (authorizing the Director of the Office of Management and Budget to consider unresolved conflicts between agencies at the request of the EPA Administrator).

executive agency pursuant to its statutory authority so long as the President is not deprived of his opportunity to review the matter.[7]

A number of Executive Orders illustrate that the President does establish formal dispute resolution mechanisms for executive branch disagreements when he deems them necessary. For certain executive branch disputes, for example, the President has directly asserted his authority by ordering such agencies to submit the dispute to the Attorney General.[8] The President has also directed that agencies in conflict with the Equal Employment Opportunity Commission on a question of employment standards refer their dispute to the Executive Office of the President.[9] Finally, in a context similar to this one, the President has issued an Executive Order requiring that certain disputes relating to pollution controls enforceable by the EPA shall be resolved by the Director of OMB.[10] This last order requires the Administrator of EPA to "make every effort to resolve conflicts regarding" agency violations, and provides that the Director of OMB shall adjudicate if the Administrator is unsuccessful. Exec. Order No. 12088, § 1-602, 3 C.F.R. 244 (1978). The Order is significant both in its anticipation that the EPA may enforce environmental laws against other federal agencies and in its prescribing a method of resolving interagency disputes should they arise.

The President, however, has issued no such order concerning the NRC's issuance of civil penalties against other agencies. Nor has the

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[7] The Air Force also contends that the Office of Management and Budget "expressed the Administration's view" that several proposed bills "raise[d] serious constitutional problems" because they provided "for one agency or office of the federal government to issue administrative orders and take judicial enforcement action against another." Foreman Letter at 3. We would first note that the Administration positions on which the Air Force relies were merely drafts that are necessarily summary and tentative in nature Moreover, two of the draft statements are wholly unrelated to the issue of enforcement orders by one agency against another. *See* draft Floor Statement on H.R. 3781 (objecting to the requirement that the Department of Energy provide certain documents to Congress prior to any clearance by the President or Secretary of Energy); draft Floor Statement on H R. 3782 (objecting to the proposed creation of a Special Environmental Counsel independent of the President and the Department of Justice). The draft Floor Statement on H R 3785 did relate to the President's authority to resolve disputes within the executive branch, but that bill contained objectionable provisions that would have appeared to restrict the President's authority to establish a dispute resolution mechanism between EPA and other agencies This draft floor statement may thus be understood as seeking to preserve the President's opportunity to review Finally, the Air Force cites a letter by Assistant Attorney General John R Bolton, Office of Legislative and Intergovernmental Affairs, to Chairman John D Dingell of the House Subcommittee on Oversight and Investigations, December 20, 1985 ("Bolton Letter"), for the proposition that administrative orders to other executive agencies raise serious constitutional objections. We read the Bolton letter, however, simply as a discussion of the justiciability of suits between executive agencies, a subject we discuss below

[8] Exec Order No 12146, § 1-402, 3 C.F.R. 409 (1979). The mandatory provision of this Executive Order, by its terms, applies only to "Executive agencies whose heads serve at the pleasure of the President." *Cf id* § 1-401 (stating that "each agency is encouraged" to submit a dispute to the Attorney General when there is an interagency dispute over jurisdiction or a particular activity).

[9] *See* Exec Order No 12067, § 1-307 (1978)

[10] *See* Exec Order No. 12088, § 1-603, 3 C.F.R 244 (1978) (requiring the Director of OMB to "consider unresolved conflicts at the request of the Administrator"). This Order further provides that "[t]hese conflict resolution procedures are in addition to, not in lieu of, other procedures, including sanctions, for the enforcement of applicable pollution control standards." *Id* § 1-604

President been deprived of an opportunity to review the dispute. The statute expressly provides that the regulated agency be given a reasonable opportunity to respond to the Commission whenever the latter intends to impose a civil penalty. 42 U.S.C. § 2282(b). The NRC sent notice to the Air Force of its intent to impose a civil penalty on June 17, 1988. Thus, the statutory scheme provides, and the Air Force has received, sufficient opportunity to raise this dispute with the President. Moreover, before this penalty is collected from an unwilling agency, the NRC must refer the civil penalty order to the Attorney General for collection.[11] As we discuss below, this procedure may itself serve as a dispute resolution mechanism under the control of one of the President's subordinates.

Accordingly, we conclude that because the President has neither expressed any interest in, nor been precluded from, reviewing the NRC's orders imposing civil liability on executive branch agencies, there is no constitutional requirement that the NRC submit its decision to issue an order imposing civil fines on the Air Force to prior Presidential review.[12]

III. Lawsuits Between Federal Agencies

The Air Force also contends that a lawsuit between the NRC and the Air Force would not be justiciable. It argues that because the lawsuit would be between two members of the executive branch, there would be no Article III "case or controversy," and therefore the federal courts could not adjudicate the dispute. We agree that substantial constitutional difficulties are raised by interagency lawsuits, but we believe that the Act permits resolution of your dispute with the NRC over any civil penalty without resort to such litigation.

The Office of Legal Counsel has long held the view that lawsuits between two federal agencies are not generally justiciable. *Proposed Tax Assessment Against the United States Postal Service*, 1 Op. O.L.C. 79 (1977). In this opinion, we stated that a dispute between the Postal Service and the IRS over the service's tax liability could not be entertained in court. We relied on the principle that the federal courts may only adjudicate actual cases and controversies. *Muskrat v. United States*, 219 U.S. 346 (1911). A lawsuit involving the same person as plaintiff and defendant does not constitute an actual controversy. *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850); *Cleveland v. Chamberlain*, 66 U.S. (1 Black) 419 (1862). This principle applies to lawsuits between members of the executive branch. *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1082 (D.

[11] *See* 10 C.F.R. § 2.205(h).

[12] The Air Force, of course, may urge the President to take the opportunity to review any issue relating to the proposed civil penalty. Assuming the President expressed an interest in such review, the question as to the extent of the President's authority to review and supervise the NRC would then be raised

Colo. 1985); *United States v. Easement and Right of Way over Certain Land in Bedford County, Tenn.*, 204 F. Supp. 837, 839 (E.D. Tenn. 1962); *Defense Supplies Corp. v. United States Lines Co.*, 148 F.2d 311, 312-13 (2d. Cir.), *cert. denied*, 326 U.S. 746 (1945).

The reasoning of our 1977 opinion applied to so-called "independent agencies." The opinion described the Postal Service as having "a degree of independence from the executive branch" and as "removed from direct political control." 1 Op. O.L.C. at 83. Our position is also consistent with the Supreme Court's most recent analysis concerning officials who do not serve at the pleasure of the President. *Morrison v. Olson*, 487 U.S. 654 (1988), indicates that despite the removal restrictions, such agencies exercise executive power and are members of the executive branch. *Id.* at 690 n.28, 691 ("[T]he real question is whether the removal restrictions [including those at issue in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) and *Wiener v. United States*, 357 U.S. 349 (1958)] are of such a nature that they impede the President's ability to perform his constitutional duty.").

We have recognized that the Supreme Court has decided several cases that appeared to be between two members of the executive branch. 1 Op. O.L.C. at 80. On further examination, however, we have concluded that such suits are only nominally between two agencies: one of the executive agencies is not the "real part[y] in interest" but simply a stand-in for private interests. *Id.* at 81. The Supreme Court first made the "real party in interest" distinction in *United States v. ICC* , 337 U.S. 426 (1949), where the United States, in its role as a shipper, contended that charges imposed on it by railroads violated a statute. The United States unsuccessfully filed a complaint against the railroads before the Interstate Commerce Commission ("ICC"), and then brought an action in court to set aside the Commission's order. Pursuant to statute, the United States was made a defendant in its action to set aside the ICC order. Responding to the argument that the suit was nonjusticiable because the United States was suing itself, the Court stated:

> There is much argument with citation of many cases to establish the long-recognized general principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies.... Thus a suit filed by John Smith against John Smith might present no case or controversy which courts could determine. But one person named John Smith might have a justiciable controversy with another John Smith. This illustrates that courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.

337 U.S. at 430. The Court then applied this standard to the dispute between the United States and the railroads:

> While this case is *United States v. United States, et al.*, it involves controversies of a type which are traditionally justiciable. The basic question is whether railroads have illegally exacted sums of money from the United States.... To collect the alleged illegal exactions from the railroads the United States instituted proceedings before the Interstate Commerce Commission.... This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads.... Consequently, the established principle that a person cannot create a justiciable controversy against himself has no application here.

Id. at 430-31. Thus, the Court concluded that the lawsuit could be brought because the railroads, and not the United States, were in essence the real parties in interest as defendants. *Id.* at 432.

We believe that this reasoning explains other cases in which the Supreme Court has appeared to decide a case between two members of the executive branch. In these cases, one of the members of the executive branch was not the real party in interest, and therefore, the suit was, for purposes of justiciability analysis, actually between a private party and a government agency. In *Secretary of Agriculture v. United States*, 347 U.S. 645, 647 (1954), the Court was at pains to point out that the Secretary of Agriculture was appearing in the litigation in opposition to the ICC "on behalf of the affected agricultural interests," pursuant to specific statutory authorization. *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89 (1983), involved a dispute between the National Treasury Employees Union and the Bureau over reimbursement of a union representative for travel expenses. In *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153 (1953), the dispute was actually between the Secretary of Interior and a private power company. *See Ishverlal Madanlal & Co. v. SS Vishva Mangal*, 358 F. Supp. 386 (S.D.N.Y. 1973).[13] Other cases where a private party was the real party in interest include *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967) (dispute between nonfederal power companies and Secretary of Interior over the award of construction licenses); *Federal Maritime Bd. v. Isbrandtsen*,

[13] In *United States v. Marine Bancorp , Inc.*, 418 U.S. 602 (1974) and *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974), the United States had brought civil antitrust actions under section 7 of the Clayton Act challenging the proposed merger of banks in each of the respective cases The Comptroller of the Currency intervened in both actions as a party defendant pursuant to 12 U.S.C. § 1828(c)(7)(D). *See Marine*, 418 U.S. at 614 The Supreme Court did not address whether the intervention of the Comptroller General denied the Court federal jurisdiction The presence of private parties as the real parties-in-interest, however, distinguishes those cases from mere interagency litigation.

356 U.S. 481, 483 n.2 (1958) (dispute between shipper, joined by the United States, against Federal Maritime Board over shipping rates approved by the Maritime Board); *Interstate Commerce Comm'n v. Jersey City*, 322 U.S. 503 (1944) (dispute between municipality and Interstate Commerce Commission, with U.S. Price Administrator intervening on behalf of municipality); *Mitchell v. United States*, 313 U.S. 80 (1941) (dispute between private citizen, supported by a brief from the United States, and the ICC concerning dismissal of a discrimination complaint).

Finally, in *United States v. Nixon*, 418 U.S. 683 (1974), the Court found justiciable a lawsuit between the special prosecutor and President Nixon over the validity of a subpoena issued to acquire evidence in a pending criminal case. The Court concluded that "[i]n light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the executive branch cannot be viewed as a barrier to justiciability." *Id.* at 697. The Court noted that the President had been named as an unindicted coconspirator by the grand jury, *id.* at 687, and that the question of the validity of a subpoena to acquire evidence from a person in a pending criminal case was "traditionally justiciable." *Id.* at 697. In view of these special circumstances, we have understood the decision as based on the Court's view that the real party in interest was President Nixon in his private capacity.

Application of these principles strongly suggests that the dispute between the NRC and the Air Force is not justiciable. Both the NRC and the Air Force would be the real parties in interest in the lawsuit. The NRC seeks enforcement of its civil penalties against violators of its regulations. *See* 10 C.F.R. § 2.205; 10 C.F.R. pt. 2, app. C. The civil penalty would be imposed directly on the Air Force, which would be required to make the payment out of its appropriated funds. No private party has a direct interest in the lawsuit.

We believe, however, that this constitutional issue need not arise, because the framework of the Act clearly permits this dispute over civil penalties to be resolved within the executive branch, and without recourse to the judiciary. The Attorney General has the exclusive authority to collect civil penalties for the NRC, 42 U.S.C. § 2282(c), and therefore may exercise his discretion to resolve the dispute without resort to litigation.

Under 42 U.S.C. § 2282(a), the NRC is given the authority to impose civil penalties, and to "compromise, mitigate, or remit such penalties." The NRC, however, cannot enforce its decision to impose civil penalties, nor is there a procedure for judicial review of the decision. Rather, if the defendant disagrees with the NRC's decision, the civil penalties may be enforced or collected only by the Attorney General. Section 2282(c) provides that "the Attorney General is *authorized* to institute a civil action to collect" the civil penalty, thus indicating that he is not *required* to do so. 42 U.S.C. § 2282(c) (emphasis added). The section also expressly provides

that "[t]he Attorney General shall have the *exclusive* power to compromise, mitigate, or remit such civil penalties as are referred to him for collection." *Id.* (emphasis added). Thus, it is clear that the Attorney General has complete control concerning enforcement of the civil penalty.

The committee report accompanying the bill that was adopted by Congress as the Atomic Energy Act Amendments confirms the breadth of the Attorney General's discretion with respect to enforcement:

> The Attorney General would be authorized, but not required, to institute a civil action in a court of competent jurisdiction to collect the penalty. While the bill would confer on the Commission the power of compromise, mitigation, and remission of penalties, such power would reside exclusively with the Attorney General under the bill with respect to such civil penalties as are referred by the [Commission] to him for collection.
>
> ....
>
> The committee also has accepted the recommendation ... that the legislation provide discretion to the Department, after the matter has been referred to it by the Commission, to determine whether a civil action should be instituted, since that Department would have basic responsibility for that action.

S. Rep. No. 553, 91st Cong., lst Sess. 11 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1607, 1618-19.

Finally, it is also evident that the Attorney General's discretion extends to the underlying merits of the lawsuit. Because there is no judicial review of the NRC's initial decision to order payment of civil penalties, the collection suit itself is the vehicle for judicial review. Moreover, both the legislative history of the Act[14] and case law[15] indicate that the judicial

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[14] In 1969 when the civil penalty provisions were enacted, the General Counsel for the Atomic Energy Commission testified before the Joint Committee on Atomic Energy that violations of the provisions were to receive de novo review. *See AEC Omnibus Legislation 1969: Hearings Before the Joint Comm on Atomic Energy*, 91st Cong , lst Sess. 29-30 (1969) (statement of Joseph F Hennessey, General Counsel for AEC) That testimony provided as follows

> Section c. [42 U S C. 2282(c)] deals with the responsibility of the Attorney General. If after the Commission determines that a penalty should be imposed, the licensee fails to pay, the matter is referred to the Attorney General. He will determine whether a civil action for collection in Federal district court should be instituted. He is given exclusive authority to compromise, mitigate, or remit the civil penalty after the matter has been referred by the AEC.
>
> Under these provisions, an alleged violator is guaranteed an opportunity for a full hearing on the merits in Federal district court before any civil penalty may be collected from him.

Id Mr Hennessey further noted that, "[a]s we understand it, no agency has been given this type of

Continued

review takes the form of a trial de novo. Because the trial is not limited in scope, the Attorney General's prosecutorial discretion should be similarly plenary.

It is therefore clear that the Attorney General may exercise his discretion to ensure that no lawsuits are filed by the NRC against other agencies of the executive branch. If the Attorney General and the President determine that no civil penalties should be collected, the Attorney General may simply refrain from bringing a lawsuit. If the Attorney General determines that certain civil penalties are appropriate, however, the Attorney General would still not bring a lawsuit because of the constitutional problems noted above. Rather, procedures internal to the executive branch are adequate to resolve the dispute through the determination that the Air Force is liable.[16]

We thus conclude that a lawsuit between two agencies of the executive branch would involve substantial constitutional problems, but that the statutory scheme permits resolution of the interagency dispute within the executive branch.

IV. Conclusion

We conclude that, unless the President seeks to review the NRC's decision, the NRC may issue an order imposing civil fines on the Air Force. We further conclude that any issue regarding the Air Force's liability for such fines may be resolved within the executive branch and without resort to litigation.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

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[14] (. .continued)
authority [to collect its own fines] because this would tend to cut off a judicial trial *de novo* of a 'penalty' action." *Id.* at 38

[15] *See United States Nuclear Regulatory Comm'n v Radiation Technology, Inc*, 519 F. Supp. 1266 (D.N.J. 1981). To determine the proper scope of judicial review, the district court examined the legislative history of NRC's penalty provisions and analogous civil penalty provisions of other regulatory agencies to conclude that Congress intended NRC's collection actions to receive de novo review. *Id* at 1275-86. *Radiation Technology* is the only reported case interpreting the NRC's civil penalty provisions.

[16] The Attorney General has authority to resolve conclusively any legal question on which he and the Air Force disagree *See* Exec. Order No. 12146, 3 C.F.R. 409 (1979) (mandating that the Attorney General resolve legal disputes between agencies whose heads serve at the pleasure of the President) Any remaining disagreement between the Attorney General and the Air Force could be submitted to the President for his resolution.

Application of Vacancy Act Limitations to Presidential Designation of an Acting Special Counsel

The Vacancy Act does not circumscribe the President's express authority pursuant to the Immigration Reform and Control Act of 1986 to designate an Acting Special Counsel for Immigration-Related Unfair Employment Practices.

June 8, 1989

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This is to provide you with this Office's views on whether the limitations of the Vacancy Act, 5 U.S.C. §§ 3345-3349, are applicable to the designation of an Acting Special Counsel for Immigration-Related Unfair Employment Practices. As you know, we have recommended that the President designate Andrew M. Strojny for that position pursuant to express authority in the Immigration Reform and Control Act of 1986 ("Immigration Act"), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.). We believe that the Vacancy Act does not circumscribe the President's authority to designate an Acting Special Counsel pursuant to the Immigration Act.

Pursuant to 8 U.S.C. § 1324b(c)(1), the Special Counsel is appointed by the President, by and with the advice and consent of the Senate. That same section also expressly authorizes the President to fill the position in the event of a vacancy.

> In the case of a vacancy in the Office of the Special Counsel the President may designate the officer or employee who shall act as Special Counsel during such vacancy.

8 U.S.C. § 1324b(c)(1).

We understand that the question has been raised as to whether the provisions of the Vacancy Act, 5 U.S.C. §§ 3345-3349, would be applicable to such a designation. The provisions of the Vacancy Act would, inter alia, require either that the "first assistant" in the Office assume the duties of the Acting Special Counsel, *see id.* § 3346, or that the President detail to the position an official confirmed with the advice and consent of the Senate. *See id.* § 3347. Moreover, the term of those who take office under the authority of the Vacancy Act is limited to a specified number of days. *See id.* § 3348.

We believe, however, that the Vacancy Act clearly does not limit the President's authority under section 1324b(c)(1). This Office has long held that the Vacancy Act does not extinguish other statutory authority for filling vacancies and that the Act's limitations do not apply to designations made pursuant to those authorities. For example, this Office concluded in 1973 that the limitations of the Vacancy Act were not applicable to the services of Solicitor General Robert H. Bork as Acting Attorney General because "by its own terms the section of the Vacancy Act containing the 30-day rule applies only to vacancies filled under the provisions of the Vacancy Act. It thus is inapplicable to vacancies filled under other statutes." Letter to Sen. Proxmire, drafted by Assistant Attorney General Robert G. Dixon, Jr., for signature by Leonard Garment, Counsel to the President. *See also Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287 (1977) (Vacancy Act not applicable to filling the vacancy in the office of Director of OMB in light of the specific statutory authority providing for filling the vacancy). The Office also relied on this analysis when it recommended in 1987 that President Reagan designate an Acting Special Counsel under the authority of section 1324b(c)(1). Letter for Arthur B. Culvahouse, Jr., Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (Apr. 9, 1987).

We recognize that in 1988 Congress amended the Vacancy Act with the enactment of section 7 of the Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7, 102 Stat. 985, 988 (1988). That amendment made two changes to the Vacancy Act. First, it expanded the scope of 5 U.S.C. § 3345, which provided for the filling of vacancies in the "heads of executive departments" to include "executive agencies." Second, it extended the Vacancy Act's previous 30-day limitation on the temporary filling of vacancies under its authority to 120 days.[1]

The two changes made to the Vacancy Act in 1988 provide no basis for us to alter our conclusion that section 1324b(c)(1) is available for the appointment of an Acting Special Counsel. As noted above, the first

[1] 5 U.S.C. § 3348 provides, in full

(a) A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 120 days, except that —

(1) if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section 3345, 3346, or 3347 of this title -

(A) until the Senate confirms the nomination, or

(B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn; or

(2) if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes, subject thereafter to the provisions of paragraph (1) of this subsection.

(b) Any person filling a vacancy temporarily under section 3345, 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn.

change concerned section 3345 of title 5, United States Code. That section now provides for the temporary filling of the "head of an Executive agency (other than the General Accounting Office)." 5 U.S.C. § 3345. Because the Special Counsel, however, is not the head of an executive agency, this amendment does not bear on the scope of the Vacancy Act with respect to this position. Nor does extending the time a person temporarily filling a vacancy under the Vacancy Act may serve render the Act applicable to designations of acting officials made under the authority of other statutes.

We acknowledge that during consideration of the recent amendments to the Vacancy Act the Senate Government Affairs Committee appeared to disagree with the Department of Justice's long-standing view that the Vacancy Act does not extinguish other general authorities relating to the appointment of officers. *See* S. Rep. No. 317, 100th Cong., 2d Sess. 2 (1988). We do not believe however, that a congressional committee can alter the proper construction of a statute through subsequent legislative history. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 & n.13 (1980). In any event, even the Senate Report recognizes that express authority for filling vacancies, such as section 1324b(c)(1), may be used notwithstanding the Vacancy Act. S. Rep. No. 317 at 14. ("The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies.").

In conclusion, our review of the 1988 amendments to the Vacancy Act does not change our opinion that the express authority contained in section 1324b(c)(1) is available for the President to designate an Acting Special Counsel and that the limitations in the Vacancy Act do not apply to this authority.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Authority of the Customs Service to Offer Rewards for Information Concerning the Whereabouts of Indicted Drug Traffickers

The Customs Service is not authorized to offer financial rewards for original information on the whereabouts in the United States of high-level, international drug traffickers who are under indictment.

June 15, 1989

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request of June 12, 1989, for our analysis of whether there exists authority for the Customs Service to create a program in which financial rewards of up to five million dollars will be offered for original information on the whereabouts in the United States of high-level, international drug traffickers who are under indictment. Our review indicates that, although several statutes expressly authorize the payment of a reward to informants,[1] they do not authorize the Customs Service to offer the kind of reward proposed here. We also believe that the Customs Service may not use its general appropriations to make such payments.

I. Background

The Customs Service proposes to initiate a program, code named Operation PALADIN. The purpose of the program would be to make available sums of money to individuals who provide the Customs Service original information on the whereabouts in the United States of certain high level, international narcotic traffickers and money launderers who have been indicted and are wanted for violation of laws enforced by the Customs Service. The amount of the award would be determined by the importance of the violator, with awards of up to five million dollars to be

[1] Several other statutes authorize various department heads to pay rewards in connection with offenses under laws peculiarly identified with their departments *E g* , 18 U S.C § 3056(c)(1)(D) (matters within the jurisdiction of the Secretary of the Treasury relating to the Secret Service), 14 U.S.C § 644 (matters within the jurisdiction of the Coast Guard), 50 U S.C. §§ 47a-47f (offenses involving nuclear materials and atomic weapons) A reward of up to $100,000 may be paid for information concerning presidential assassination, kidnapping or assault 18 U S C § 1751(g)(Supp.).

available for information leading to the arrest of very high level fugitives in the United States.

Operation PALADIN would be aimed also at heightening public awareness of the identities of international drug kingpins. This would be accomplished by maximizing media exposure, including newspapers, television, magazines and posters.

II. Statutes Expressly Authorizing Rewards

Several statutes authorize the payment of rewards for information leading to the arrest or capture of various law violators. None of these statutes, however, authorizes the Customs Service to offer such payments. The only statutory authority relating to reward offers that expressly includes the Customs Service is 19 U.S.C. § 1619. That provision, however, only authorizes payments to persons who seize items subject to seizure and forfeiture or who furnish information "concerning ... any fraud upon the customs revenue, or ... [a] violation of the customs laws or the navigation laws ... [which] leads to a recovery of ... any duties withheld, or ... [of] any fine, penalty, or forfeiture incurred."[2] 19 U.S.C. § 1619. It is plain that this provision cannot be relied upon as authority for Operation PALADIN.

Similarly, it is clear that the other statutes that authorize various government officials to offer rewards cannot be the basis for Operation PALADIN. For example, 18 U.S.C. § 3059, which authorizes the payment of rewards for information leading to the capture of anyone charged with violating a federal criminal law, is administered by the Attorney General, not the Customs Service.[3] The same is true of 28 U.S.C. § 524(c), which establishes the Department of Justice Assets Forfeiture Fund, which is available to the Attorney General for payments for information relating to

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[2] The reward "may not exceed $250,000 for any case." 19 U.S.C. § 1619(c)

[3] 18 U.S.C. § 3059 provides:

> (a)(1) There is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $25,000 as a reward or rewards for the capture of anyone who is charged with violation of criminal laws of the United States . . and an equal amount as a reward or rewards for information leading to the arrest of any such person, to be apportioned and expended in the discretion of, and upon such conditions as may be imposed by, the Attorney General of the United States. Not more than $25,000 shall be expended for information or capture of any one person.
>
> ...
>
> (b) The Attorney General each year may spend not more than $10,000 for services or information looking toward the apprehension of narcotic law violators who are fugitives from justice

[4] The Department of Justice Asset Forfeiture Fund is available to the Attorney General for the purpose of the "payment of awards for information or assistance directly relating to violations of the criminal drug laws of the United States," 28 U.S.C. § 524(c)(1)(B), and the "payment of awards for information or assistance leading to a civil or criminal forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 800 *et seq.*) or a criminal forfeiture under the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. 1961 *et seq.*), at the discretion of the Attorney General." 28 U.S.C. § 524(c)(1)(C).

violations of the drug laws.[4] A third statute that authorizes the offer of rewards for information is chapter 204 of title 18, United States Code. The rewards provided for in this chapter, which concern only terrorist acts,[5] are also administered by the Attorney General.[6] A fourth statute authorizing the offer of a reward for information is 22 U.S.C. § 2708. This section, which is the only provision that is expressly international in scope, allows the Secretary of State, with the concurrence of the Attorney General, to pay a reward to any individual who furnishes certain helpful information.[7] Finally, 21 U.S.C. § 886(a) requires that the reward offers it authorizes regarding drug violations be administered by or receive the approval of the Attorney General.[8]

In short, we believe it is undisputable that none of the statutes expressly authorizing the payment of reward offers authorizes the Customs Service to create a program such as Operation PALADIN.

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[5] As used in chapter 204, the term "act of terrorism" is defined to mean any activity that:

(A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and

(B) appears to be intended—

(i) to intimidate or coerce a civilian population,

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnaping.

18 U.S.C. § 3077(1).

[6] Pursuant to 18 U.S.C. § 3071, the Attorney General may reward any individual who furnishes information—

(1) leading to the arrest or conviction, in any country, of any individual or individuals for the commission of any act of terrorism against a United States person or United States property, or

(2) leading to the arrest or conviction, in any country, of any individual or individuals for conspiring or attempting to commit any act of terrorism against a United States person or United States property.

It should also be noted that rewards under this section may not exceed $500,000 and if greater than $100,000, must be made with the personal approval of the President or Attorney General. 18 U.S.C. § 3072.

[7] 22 U.S.C. § 2708(b)(1) provides that the Secretary of State, with the concurrence of the Attorney General, may offer money for any information leading to—

(A) the arrest or conviction in any country of any individual for committing, primarily outside the territorial jurisdiction of the United States, any narcotics-related offense if that offense involves or is a significant part of conduct that involves—

(i) a violation of United States drug laws which occurs primarily outside the territorial jurisdiction of the United States and which is such that the individual would be a major violator of such laws; or

(ii) the killing or kidnapping outside the territorial jurisdiction of the United States of [certain officers]; or

(iii) an attempt or conspiracy to do any of the acts described in clause (i) or (ii);

Rewards made pursuant to section 2708 are not to exceed $500,000, with those over $100,000 requiring the personal approval of the Secretary of State or the President. 22 U.S.C. § 2708(c). Any award made must be reported to Congress within 30 days. 22 U.S.C. § 2708(h).

[8] 21 U.S.C. § 886(a) authorizes the Attorney General to pay any person "from funds appropriated for the Drug Enforcement Administration, for information concerning a violation of this subchapter, such sum or sums of money as he may deem appropriate." The subchapter referenced in this section is subchapter I, "Control and Enforcement," chapter 13 ("Drug Abuse Prevention and Control") of title 21, United States Code.

III. Inherent Authority to Use General Appropriations

We also conclude that the Customs Service is not authorized to fund from its general appropriations a program that would publicly and routinely offer large awards for the provision of original information on the location in the United States of indicted drug traffickers. Customs may use its general appropriation only for activities that it is authorized by statute to undertake. Customs, however, does not have as part of its statutory mission the general responsibility to investigate the location of indicted drug dealers; it is authorized under Reorganization Plan No. 2 of 1973, 87 Stat. 1091 (1973), only to undertake activities related to the search and seizure of drugs at the borders of the United States. Accordingly, we do not believe there is a nexus between Customs' limited enforcement authority and PALADIN's general reward program sufficient to justify the use of Customs' appropriations for such a program.

This Office has long been of the view that Reorganization Plan No. 2 severely restricts the jurisdiction of the Customs Service in drug enforcement matters. *See Authority of the Customs Service to Seize or Forfeit Property Pursuant to 21 U.S.C. § 881*, 12 Op. O.L.C. 267 (1988) (Customs Service does not have independent forfeiture authority in light of the Reorganization Plan's transfer of drug enforcement authority to the Department of Justice); *see also* Memorandum for the Deputy Attorney General, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel (June 3, 1986) (19 U.S.C. §§ 1589 and 1589(a) do not provide the Customs Service with general narcotics law enforcement authority); Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: United States Customs Service Jurisdiction* (Dec. 23, 1983) (the Customs Service does not have independent enforcement authority over title 21 drug offenses).

Our conclusions with respect to the Customs Service's enforcement authority have been grounded in the clear language of the Reorganization Plan, which transferred "all intelligence, investigative, and law enforcement functions" pertaining to "the suppression of illicit traffic in narcotics, dangerous drugs, or marihuana" from the Department of Treasury to the Department of Justice. Reorg. Plan No. 2 of 1973, *supra*. The Plan also contained a clause (the "retention clause"), which provided in part that "[t]he Secretary of Treasury shall retain, and continue to perform, drug intelligence, investigative and enforcement functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marihuana or to the apprehension or detention of persons in *connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States.*" *Id.* (emphasis added). The proviso immediately following the retention clause states, moreover, that any drugs or drug-related evidence seized by

the Customs Service at those points "shall be turned over forthwith to the jurisdiction of the Attorney General." Read in tandem, the retention clause and the proviso indicate that the Customs Service's narcotics law enforcement authority is limited to enforcing customs laws at the borders. *See* 12 Op. O.L.C. at 274 n.24.

It is a cardinal principle of appropriation law that an agency may use its general appropriation to fund activities only if those activities are undertaken pursuant to its statutory mission. As we discussed above, the Customs Service's mission encompasses only the investigation, search for and seizure of drugs at the borders of the United States, and arrests and detentions related to such law enforcement efforts. Consequently, any general program of public rewards funded from the Customs Service's appropriations must be limited to activities relating to this mission.

Operation PALADIN relates to the general enforcement of the narcotics laws, not to the Customs Services' more circumscribed mission. PALADIN contemplates that any drug trafficker who has been indicted may be the subject of a reward for information. There is no requirement that the reward directly facilitate the seizure of drugs located at the border or the arrest of a drug offender in possession of drugs at the border. Consequently, we believe that there is no nexus between Operation PALADIN's broad and general program of rewards and the limited law enforcement mission of Customs.

We have considered and rejected the argument that Operation PALADIN is incidental to the Customs Service's authority under 19 U.S.C. § 1589(a) to

> make an arrest without a warrant for any offense against the United States committed in the officer's presence or for a felony, cognizable under the laws of the United States committed outside the officer's presence if the officer has reasonable grounds to believe that the person to be arrested has committed or is committing a felony.

This Office has previously determined that the purpose of this provision was merely to clarify that the Customs Service has arrest authority to the full extent of its jurisdiction. OLC Memorandum of June 3, 1986, *supra*, at 11.[9] It is plain that this provision did not redefine the jurisdictions of the Customs Service and the DEA that had been carefully defined in the Reorganization Plan of 1973.

In conclusion, we believe that the Customs Service does not possess the legal authority to establish Operation PALADIN. No statute expressly

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[9] At least one court had held that warrants pursued and drug arrests made by Customs officers acting under the direction of DEA were not authorized. *United States v Harrington*, 520 F. Supp. 93, 95 (E.D. Cal 1981), *rev'd on other grounds, United States v. Harrington*, 681 F.2d 612 (9th Cir 1982)

authorizes Customs to offer rewards for information leading to the arrest of fugitives. Nor is the offering of such rewards either necessary or incidental to its duties as defined by the Reorganization Plan of 1973.

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Congressional Requests for Confidential Executive Branch Information

This memorandum summarizes the principles and practices governing congressional requests for confidential executive branch information.

June 19, 1989

MEMORANDUM OPINION FOR THE
GENERAL COUNSEL'S CONSULTATIVE GROUP

This memorandum summarizes the principles and practices governing congressional requests for confidential executive branch information. As discussed below, the executive branch's general practice has been to attempt to accommodate whatever legitimate interests Congress may have in obtaining the information, while, at the same time, preserving executive branch interests in maintaining essential confidentiality. Only when the accommodation process fails to resolve a dispute and a subpoena is issued does it become necessary for the President to consider asserting executive privilege.

I. Congress' Oversight Authority

The constitutional role of Congress is to adopt general legislation that will be implemented — "executed" — by the executive branch. The courts have recognized that this general legislative interest gives Congress investigatory authority. Both Houses of Congress have power, "through [their] own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function "has long been held to be a legitimate use by Congress of its power to investigate," *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 504 (1975), provided that the investigation is "related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States*, 354 U.S. 178, 187 (1957). The inquiry must pertain to subjects "on which legislation could be had." *McGrain v. Daugherty*, 273 U.S. at 177. Thus, Congress' oversight authority

> is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.
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> Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.

Barenblatt v. United States, 360 U.S. 109, 111-12 (1959).

II. Executive Privilege

If it is established that Congress has a legitimate legislative purpose for its oversight inquiry, the executive branch's interest in keeping the information confidential must be assessed. This subject is usually discussed in terms of "executive privilege," and that convention is used here. The question, however, is not strictly speaking just one of executive privilege. While the considerations that support the concept and assertion of executive privilege apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to a congressional request for information, the executive branch is not necessarily bound by the limits of executive privilege.

Executive privilege is constitutionally based. To be sure, the Constitution nowhere expressly states that the President, or the executive branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution.[1] It has been asserted by numerous Presidents from the earliest days of our Nation, and it was explicitly recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683, 705-06 (1974).

There are at least three generally-recognized components of executive privilege: state secrets, law enforcement, and deliberative process. Since most disputes with Congress in this area in recent years have concerned the privilege for executive branch deliberations, this memorandum will focus on that component. *See generally Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 484-90 (1982).

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[1] The privilege to withhold information is implicit in the scheme of Article II and particularly in the provisions that "[t]he executive Power shall be vested in a President of the United States of America," U S Const. art. II, § 1, cl. 1, and that the President shall "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3.

The first congressional request for information from the executive branch occurred in 1792, in the course of a congressional investigation into the failure of an expedition under the command of one General St. Clair. President Washington called his Cabinet together to consider his response, stating that he could conceive that there might be papers of so secret a nature that they ought not be given up. The President and his Cabinet concluded "that the Executive ought to communicate *such papers as the public good would permit*, and ought to refuse those, *the disclosure of which would injure the public.*" 1 *Writings of Thomas Jefferson* 304 (1903) (emphasis added). While President Washington ultimately determined in the St. Clair case that the papers requested could be furnished without injury to the public, he refused four years later to comply with a House committee's request for copies of instructions and other documents employed in connection with the negotiation of a treaty with Great Britain.

The practice of refusing congressional requests for information, on the ground that the national interest would be harmed by the disclosure, was employed by many Presidents in the ensuing years. *See generally History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part I - Presidential Invocations of Executive Privilege Vis-a-Vis Congress*, 6 Op. O.L.C. 751 (1982). The privilege was most frequently asserted in the areas of foreign affairs and military and national security secrets; it was also invoked in a variety of other contexts, including executive branch investigations. In 1954, in instructing the Secretary of Defense concerning a Senate investigation, President Eisenhower asserted that the privilege extends to deliberative communications within the executive branch:

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

Pub. Papers of Dwight D. Eisenhower 483-84 (1954).

The Supreme Court has recognized that the Constitution gives the President the power to protect the confidentiality of executive branch deliberations. *See generally Nixon v. Administrator of Gen. Servs.*, 433

U.S. 425, 446-55 (1977). This power is independent of the President's power over foreign affairs, national security, or law enforcement; it is rooted instead in "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States v. Nixon*, 418 U.S. at 708.

It necessarily follows — and the Supreme Court so held in *United States v. Nixon* — that communications among the President and his advisers enjoy "a presumptive privilege" against disclosure in court. *Id.*[2] The reasons for this privilege, the *Nixon* Court explained, are "plain." "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." *Id.* at 705. Often, an adviser's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. Advisers change their views, or make mistakes which others correct; this is indeed the purpose of internal debate. The result is that advisers are likely to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisers may hesitate — out of self-interest — to make remarks that might later be used against their colleagues or superiors. As the Court stated, "[a] president and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708.

These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information. The possibility that deliberations will be disclosed to Congress is, if anything, more likely to chill internal debate among executive branch advisers. When the Supreme Court held that the need for presidential communications in the criminal trial of President Nixon's close aides outweighed the constitutional privilege, an important premise of its decision was that it did not believe that "advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* at 712. By contrast, congressional requests for executive branch deliberative information are anything but infrequent.

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[2] The *Nixon* Court explained that the privilege is constitutionally based:

> [T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

418 U.S. at 705-06 (footnote omitted). The Court also acknowledged that the privilege stems from the principle of separation of powers: "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id* at 708.

Moreover, compared to a criminal prosecution, a congressional investigation is usually sweeping; its issues are seldom narrowly defined, and the inquiry is not restricted by the rules of evidence. Finally, when Congress is investigating, it is by its own account often in an adversarial position to the executive branch and initiating action to override judgments made by the executive branch. This increases the likelihood that candid advice from executive branch advisers will be taken out of context or misconstrued. For all these reasons, the constitutional privilege that protects executive branch deliberations against judicial subpoenas must also apply, perhaps even with greater force, to Congress' demands for information.

The United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional demands. During the Watergate investigation, the Court of Appeals rejected a Senate committee's efforts to obtain tape recordings of conversations in President Nixon's offices. The court held that the tapes were constitutionally privileged and that the committee had not made a strong enough showing to overcome the privilege. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (*en banc*). Indeed, the court held that the committee was not entitled to the recordings unless it showed that "the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions." *Id.* at 731 (emphasis added).[3]

Finally, history is replete with examples of the executive's assertion of privilege in the face of congressional requests for deliberative process information. We have previously recounted the incidents in which Presidents, beginning with President Washington, have withheld from Congress documents that reflected deliberations within the executive branch. *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part II - Invocations of Executive Privilege by Exective Officials*, 6 Op. O.L.C. 782 (1982).

III. Accommodation Process

Where Congress has a legitimate need for information that will help it legislate, and the executive branch has a legitimate, constitutionally recognized need to keep certain information confidential, at least one court

[3] The Supreme Court has assumed that the constitutional privilege protects executive branch deliberations against Congress to some degree. *See United States v Nixon*, 418 U S at 712 n 19. Moreover, the Court held in *Administrator of General Services*, that the constitutional privilege protects executive branch deliberations from disclosure to members of the *same* branch in a later administration, the Court rejected the specific claim of privilege in the case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. *See* 433 U S at 446-55. Since the Court has held that the privilege protects executive branch communications against compelled disclosure to the judicial branch and to later members of the executive branch, there is every reason to believe that the Court would hold that it protects against compelled disclosure to Congress

has referred to the obligation of each branch to accommodate the legitimate needs of the other. This duty to accommodate was described by the D.C. Circuit in a case involving a House committee's request to a private party for information which the executive branch believed should not be disclosed. The court said:

> The framers ... expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.
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> ....
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> [Because] it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, 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.

United States v. AT&T, 567 F.2d 121, 127, 130 (D.C. Cir. 1977) (footnotes omitted).

In an opinion he issued in connection with a 1981 executive privilege dispute involving a committee of the House of Representatives and the Department of Interior, Attorney General William French Smith captured the essence of the accommodation process:

> The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.

Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981) ("Smith Opinion").

The process of accommodation requires that each branch explain to the other why it believes its needs to be legitimate. Without such an explanation, it may be difficult or impossible to assess the needs of one branch and relate them to those of the other. At the same time, requiring such an explanation imposes no great burden on either branch. If either branch has a reason for needing to obtain or withhold information, it should be able to express it.

The duty of Congress to justify its requests not only arises directly from the logic of accommodation between the two branches, but it is established in the case law as well. In *United States v. Nixon*, the Supreme Court emphasized that the need for evidence was articulated and specific. 418 U.S. at 700-02, 713. Even more to the point is *Senate Select Committee on Presidential Campaign Activities*. In that case, the D.C. Circuit stated that the sole question was "whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." 498 F.2d at 731. The court held that the Committee had not made a sufficient showing. It pointed out that the President had already released transcripts of the conversations of which the Committee was seeking recordings. The Committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. *Id.* at 723-33. But the court answered that, in order to legislate, a committee of Congress seldom needs a "precise reconstruction of past events." *Id.* at 732. The court concluded:

> The Committee has ... shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain.

Id. at 733. For this reason, the court stated, "the need demonstrated by the Select Committee ... is too attenuated and too tangential to its functions" to override the President's constitutional privilege. *Id.*

Senate Select Committee thus establishes Congress' duty to articulate its need for particular materials — to "point[] to ... specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in" the privileged document it has requested. Moreover, this case suggests that Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials. When Congress demands such information, it must explain its need carefully and convincingly.

It is difficult to generalize about the kind of accommodation with respect to deliberative process information that may be appropriate in particular cases. Whether to adhere to the consistent general policy of confidentiality for such information will depend on the facts of the specific situation. Certain general principles do apply, however. As Attorney General Smith explained in advising President Reagan:

> [T]he interest of Congress in obtaining information for oversight purposes is ... considerably weaker than its interest when specific legislative proposals are in question. At the stage of oversight, the congressional interest is a generalized one of ensuring that the laws are well and faithfully executed and of proposing remedial legislation if they are not. The information requested is usually broad in scope and the reasons for the request correspondingly general and vague. In contrast, when Congress is examining specific proposals for legislation, the information which Congress needs to enable it to legislative effectively is usually quite narrow in scope and the reasons for obtaining that information correspondingly specific. A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information.

Smith Opinion, 5 Op. O.L.C. at 30. Moreover, Attorney General Smith explained, information concerning ongoing deliberations need rarely be disclosed:

> [T]he congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances. It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached. Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances. Congressional demands, under the

> guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded on the Executive Branch's function of executing the law. At the same time, the interference with the President's ability to execute the law is greatest while the decisionmaking process is ongoing.

Id. at 30-31.

IV. Procedures

President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" ("Reagan Memorandum") sets forth the long-standing executive branch policy in this area:

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

Reagan Memorandum at 1. The Reagan Memorandum also sets forth the procedures for asserting executive privilege in response to a congressional request for information. Under the terms of the Memorandum, an agency must notify and consult with the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, as soon as it determines that compliance with the request raises a "substantial question of executive privilege." The Memorandum further provides that executive privilege cannot be asserted without specific authorization by the President, based on recommendations made to him by the concerned agency head, the Attorney General, and the Counsel to the President.

In practice, disputes with Congress in this area typically commence with an informal oral or written request from a congressional committee or subcommittee for information in the possession of the executive branch. Most such requests are honored promptly; in some cases, however, the executive branch official may resist supplying some or all of the

requested information either because of the burden of compliance or because the information is of a sensitive nature. The executive branch agency and the committee staff will typically negotiate during this period to see if the dispute can be settled in a manner acceptable to both sides. In most cases this accommodation process is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued. At that point, if further negotiation is unavailing, it is necessary to consider asking the President to assert executive privilege.

If after assertion of executive privilege the committee remains unsatisfied with the agency's response, it may vote to hold the agency head in contempt of Congress. If the full Senate or House of Representatives then votes to hold the official in contempt, it might attempt to impose sanctions by one of three methods. First, it might refer the matter to a United States Attorney for reference to a grand jury. *See* 2 U.S.C. §§ 192, 194. Second, the Sergeant-at-Arms theoretically could be dispatched to arrest the official and detain him in the Capitol; if this unlikely event did occur, the official would be able to test the legality of this detention through a habeas corpus petition, thereby placing in issue the legitimacy of his actions in refusing to disclose the subpoenaed information. Third, and the most likely option due to legal and practical difficulties associated with the first two options, the Senate or House might bring an action in court to obtain a judicial order requiring compliance with the subpoena and contempt of court enforcement orders if the court's order is defied.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Authority of the Federal Bureau of Investigation To Override International Law In Extraterritorial Law Enforcement Activities

At the direction of the President or the Attorney General, the FBI may use its statutory authority to investigate and arrest individuals for violating United States law, even if the FBI's actions contravene customary international law.

The President, acting through the Attorney General, has the inherent constitutional authority to deploy the FBI to investigate and arrest individuals for violating United States law, even if those actions contravene customary international law.

Extraterritorial law enforcement activities that are authorized by domestic law are not barred even if they contravene unexecuted treaties or treaty provisions, such as Article 2(4) of the United Nations Charter.

An arrest that is inconsistent with international or foreign law does not violate the Fourth Amendment.

June 21, 1989

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to the request of the Federal Bureau of Investigation ("FBI") that we reconsider our 1980 opinion that the FBI has no authority under 28 U.S.C. § 533(1) to apprehend and abduct a fugitive residing in a foreign state when those actions would be contrary to customary international law. *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. O.L.C. 543 (1980) (the "1980 Opinion" or "Opinion"). After undertaking a comprehensive review of the applicable law, we conclude that the 1980 Opinion erred in ruling that the FBI does not have legal authority to carry out extraterritorial law enforcement activities that contravene customary international law.

First, we conclude that, with appropriate direction, the FBI may use its broad statutory authority under 28 U.S.C. § 533(1) and 18 U.S.C. § 3052 to investigate and arrest individuals for violations of United States law even if those investigations and arrests are not consistent with international law. Second, we conclude that the President, acting through the Attorney General, has inherent constitutional authority to order the FBI to investigate and arrest individuals in a manner that departs from international law. The international law that may be abridged in this manner includes

not only customary international law but also Article 2(4) of the U.N. Charter and other unexecuted treaties or treaty provisions that have not become part of the domestic law of the United States. Finally, we reaffirm the conclusion of the 1980 Opinion that an arrest departing from international law does not violate the Fourth Amendment, and we further conclude that an arrest in violation of foreign law does not abridge the Fourth Amendment.[1]

We caution that this memorandum addresses only whether the FBI has the legal authority to carry out law enforcement operations that contravene international law. It does not address the serious policy considerations that may weigh against carrying out such operations.

I. The 1980 Opinion

The 1980 Opinion addressed the legal implications of a proposed operation in which FBI agents would forcibly apprehend a fugitive in a foreign country that would not consent to the apprehension. That Opinion acknowledges that 28 U.S.C. § 533(1), the statute authorizing FBI investigations, contains no explicit geographical restrictions. It also refers to a previous opinion issued by this Office that concluded that the statute's general authorization to detect and prosecute crimes against the United States appears broad enough to include such law enforcement activity no matter where it is undertaken.[2] 4B Op. O.L.C. at 551. The 1980 Opinion asserts, however, that customary and other international law limits the reach of section 533(1). Under customary international law, as viewed by the 1980 Opinion, it is considered an invasion of sovereignty for one country to carry out law enforcement activities within another country without that country's consent. Thus, the Opinion concludes that section 533(1) authorizes extraterritorial apprehension of a fugitive only where the apprehension is approved by the asylum state. *Id.*

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[1] The 1980 Opinion concluded that FBI agents who participate in overseas arrests in violation of international law might be subject to civil liability Because we now conclude that FBI agents do have authority to engage in such actions, we do not believe they will be subject to civil liability. We do not discuss that issue in this memorandum, however, because the FBI agreed that our opinion concerning the FBI's substantive authority should precede any analysis of civil liability issues. *See* Memorandum for John O McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, from Margaret Love, Deputy Associate Attorney General (Mar 15, 1989).

The 1980 Opinion also addressed several other issues, including whether bringing a fugitive before the court by forcible methods would impair the court's power to try the fugitive. We agree with the 1980 Opinion's conclusion that, absent cruel or outrageous treatment, the fact that the fugitive was brought within the court's jurisdiction by means of forcible abduction would not impair the court's power to try the fugitive. *See Frisbie v Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U S. 436 (1886), *United States v. Toscanino*, 500 F.2d 267 (2d Cir 1974). We do not reconsider any issues addressed by the 1980 Opinion that are not specifically discussed in this memorandum.

[2] The referenced opinion is a June 8, 1978 Memorandum for the Counselor to the Attorney General, from the Deputy Assistant Attorney General, Office of Legal Counsel, on FBI investigative activities in a foreign country (the "1978 Opinion")

The Opinion supports this conclusion with "two distinct but related lines of analysis." *Id.* at 552. First, citing *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.), the Opinion concludes that the authority of the United States outside its territory is limited by the sovereignty of other nations. The Opinion does not explain the juridical source of this limitation on the authority of the United States. In *The Schooner Exchange*, however, Chief Justice Marshall relies on customary international law for many of his conclusions, and this part of the 1980 Opinion appears to suggest that customary international law imposes absolute jurisdictional limitations on the United States' lawmaking authority.

Second, the Opinion implicitly relies on the principle of statutory construction that statutes should be construed, when possible, so as to avoid conflict with international law. The Opinion notes that a statute imposing a duty ordinarily is construed to authorize all reasonable and necessary means of executing that duty. The Opinion concludes that although the law enforcement methods at issue may be necessary to carry out the FBI agents' duties under section 533(1), those methods are "unreasonable" and hence, unauthorized, if executed in violation of international law. Thus, the Opinion concludes that without asylum state consent, "the FBI is acting outside the bounds of its statutory authority when it makes an apprehension of the type proposed here — either because § 533 could not contemplate a violation of international law or because the powers of the FBI are delimited by those of the enabling sovereign." *Id.* at 553.

The 1980 Opinion's impact on the ability of the United States to execute necessary law enforcement operations may be significant. The reasoning of the 1980 Opinion would seem to apply to a broad range of law enforcement activities other than forcible apprehension. United States law enforcement agents frequently are required to travel to foreign countries to conduct investigative activities or to meet foreign informants. Formal consent cannot always be obtained from the foreign government, and indeed, in many cases to seek such consent would endanger both the agents and their investigation. Although such activities are less intrusive than forcible apprehension and removal of the fugitive, under the 1980 Opinion they nonetheless may be viewed as encroachments on the asylum state's sovereignty and hence, violations of international law, if not authorized by that state. *See* Ian Brownlie, *Principles of Public International Law* 307 (3d ed. 1979) ("Brownlie") ("Police or tax investigations may not be mounted ... on the territory of another state, except under the terms of a treaty or other consent given."); 6 Marjorie M. Whiteman, *Digest of International Law* 179-83 (1968) (describing incidents in which American authorities sought and received permission from host country to interview persons held in foreign custody and to examine records). Thus, the 1980 Opinion has the potential to preclude the United States not only from apprehending fugitives in foreign coun-

tries, but also from engaging in a variety of more routine law enforcement activities.

The United States is facing increasingly serious threats to its domestic security from both international terrorist groups and narcotics traffickers. While targeting the United States and United States citizens, these criminal organizations frequently operate from foreign sanctuaries. Unfortunately, some foreign governments have failed to take effective steps to protect the United States from these predations, and some foreign governments actually act in complicity with these groups. Accordingly, the extraterritorial enforcement of United States laws is becoming increasingly important to the nation's ability to protect its own vital national interests.

II. Analysis

A. The Scope of the FBI's Statutory Authority

The general investigative authority of the FBI derives from 28 U.S.C. § 533(1), which provides that "[t]he Attorney General may appoint officials to detect and prosecute crimes against the United States." This provision was first enacted in 1921 as part of the Department of Justice Appropriations Act, ch. 161, 41 Stat. 1367, 1411 (1921). As originally enacted, it also provided that the officials appointed by the Attorney General "shall be vested with the authority necessary for the execution of [their] duties." *Id.* This provision was carried forward in successive appropriations acts and received permanent codification in 1966. Pub. L. No. 89-554, § 4(c), 80 Stat. 378, 616 (1966). At that time, the reference to "necessary" authority was dropped as surplusage because "the appointment of the officials for the purposes indicated carries with it the authority necessary to perform their duties." H.R. Rep. No. 901, 89th Cong., lst Sess. 190 (1965).

The FBI's arrest authority derives from 18 U.S.C. § 3052,[3] which provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have rea-

[3] The 1980 Opinion did not discuss section 3052, apparently believing that section 533(1) also provided the authority for the FBI's power to make arrests

sonable grounds to believe that the person to be arrested has committed or is committing such felony.

We believe, consistent with earlier opinions of this Office, that sections 533(1) and 3052 authorize extraterritorial investigations and arrests.[4] Section 533(1) has been described as granting "broad general investigative power." *United States v. Marzani*, 71 F. Supp. 615, 617 (D.D.C. 1947), *aff'd*, 168 F.2d 133 (D.C. Cir.), *aff'd*, 335 U.S. 895 (1948) (per curiam). Section 3052 confers an equally broad arrest power. Neither statute by its terms limits the FBI's authority to operations conducted within the United States.[5] Moreover, reading these sections as applying extraterritorially accords with Congress' intent to give certain criminal statutes extraterritorial reach.[6] In many statutes, Congress has extended the United States' substantive criminal jurisdiction extraterritorially. *See, e.g.*, 18 U.S.C. § 844(i) (enacting penalties for destruction of property used in foreign commerce); 18 U.S.C. § 1116(c) (implementing Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons); 18 U.S.C. § 1203(b)(1) (implementing Hostage Convention); 49 U.S.C. § 1472(1) (enacting penalties for carrying weapons or explosives aboard aircraft). These statutes are enforced principally by the FBI. In order for the FBI to have the authority necessary to execute these statutes, its investigative and arrest authority must have an equivalent extraterritorial scope.[7]

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[4] Our 1978 Opinion concluded that section 533(1) authorized extraterritorial investigations, and our 1980 Opinion did not disagree with that conclusion.

[5] The Court repeatedly has held that Congress' intent to have its laws apply extraterritorially need not be explicitly stated where the statute involves the sovereign's ability to defend itself against crimes against the sovereign *See, e g , Blackmer v United States*, 284 U S 421, 437 (1932), *United States v. Bowman*, 260 U S. 94, 98 (1922).

[6] Courts frequently have held that Congress has the power to criminalize extraterritorial conduct, whether committed by American citizens or foreign citizens, if the conduct (i) threatens the country's security or interferes with governmental operations or (ii) is intended to have an illegal effect in the United States. *See e g , United States v Columba-Colella*, 604 F.2d 356, 359 (5th Cir 1979) (collecting cases), *United States v King*, 552 F 2d 833 (9th Cir. 1976), *cert denied*, 430 U.S. 966 (1977) As the Court held in *United States v Bowman*, criminal statutes that are enacted because of the government's right to defend itself *must* apply abroad, otherwise, "to limit their *locus* to the strictly territorial jurisdiction would ... greatly curtail the scope and usefulness of the statute " 260 U.S at 98 Although *Bowman* involved Congress' prescriptive power, the Court also applied this principle to an enforcement action in *Blackmer v. United States Blackmer* upheld a contempt citation against an American citizen residing in France who refused to appear as a witness in a criminal trial. The Court noted that the sovereign's power to protect itself would be meaningless if the court's enforcement powers were not coextensive with the legislature's power to criminalize the conduct *See* 284 U.S at 438-39

[7] Other considerations support this conclusion. As discussed *infra* at p. 172, a general enabling statute that confers broad authority on an agency to effectuate core executive functions should, absent explicit restriction, be read as conferring on the agency authority that is commensurate with the inherent executive functions it is effectuating Since the President's law enforcement authority has extraterritorial scope, the FBI's basic statutory authority should be read as having the same scope.

It has been suggested to us that because professional bail bondsmen lack power to arrest bail jumpers outside the territory of the United States, *see Kear v. Hilton*, 699 F 2d 181, 182 (4th Cir 1983), FBI agents

Continued

B. The Effect of Customary International Law on the FBI's Extraterritorial Powers

The 1980 Opinion offers two bases for its conclusion that customary international law limits the FBI's extraterritorial powers. First, the Opinion asserts that the FBI's powers are delimited by those of the enabling sovereign and that the United States itself lacks the legal authority to take actions that contravene customary international law. The implication is that both Congress and the Executive are powerless to authorize actions that impinge on the sovereignty of other countries. Second, the Opinion concludes that the FBI's statutory authority must be read as constricted by the requirements of customary international law. We conclude that both bases for decision are erroneous.

1. Effect on the Sovereign's Power

The 1980 Opinion was clearly wrong in asserting that the United States is legally powerless to carry out actions that violate international law by impinging on the sovereignty of other countries. It is well established that both political branches — the Congress and the Executive — have, within their respective spheres, the authority to override customary international law. Indeed, this inherent sovereign power has been recognized since the earliest days of the Republic.

In *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), Chief Justice Marshall explicitly stated that the United States has the authority to override international law. At issue was whether a French warship was immune from judicial process within the territory of the United States. Relying on customary international law, Marshall concluded that it was immune, but stated that the Court had followed these customary international law principles only in default of any declaration by the United States government that they were not to be followed:

> It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

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[7] (.. continued)
similarly lack extraterritorial arrest authority, regardless of whether the arrest violates international law. However, the arrest authority of professional bail bondsmen is derived from common law, *see Taylor v. Taintor*, 83 U.S (16 Wall) 366, 371 (1872), and thus is amenable to judicial limitation; this does not suggest that the FBI's broad *statutory* authority under 28 U S C. § 533 and 18 U S.C. § 3052 may be similarly limited Indeed, because responsibility for the conduct of foreign relations is vested in the Executive, not private citizens, it is appropriate that the Executive's authority should extend extraterritorially, while the authority of bail bondsmen should be deemed restricted to the boundaries of the United States.

> Without doubt, *the sovereign of the place is capable of destroying this implication.* He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.

Id. at 145-46 (emphasis added).[8]

Chief Justice Marshall unequivocally reaffirmed the validity of this principle in *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), in which he stated:

> This usage [the rule of customary international law] is a guide which the sovereign *follows or abandons at his will.* The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet *it may be disregarded.*

Id. at 128 (emphasis added). The understanding that the political branches have the power under the Constitution to exercise the sovereign's right to override international law (including obligations created by treaty) has been repeatedly recognized by the courts. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (courts must apply customary international law unless there is a treaty or a controlling executive or legislative act to the contrary); *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889) (noting that "[t]he question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts"); *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972) (stating that "[u]nder our constitutional scheme, Congress can denounce treaties if it sees fit to do so"), *cert. denied*, 411 U.S. 931 (1973); *Tag v. Rogers*, 267 F.2d 664, 668 (D.C. Cir. 1959) (concluding that "[w]hen, however, a constitutional agency adopts a policy contrary to a trend in international law or to a treaty or prior statute, the courts must accept the latest act of that

[8] In concluding that the United States does not have the legal authority to assert extraterritorial enforcement jurisdiction in violation of international law, the 1980 Opinion relies exclusively on a statement in *The Schooner Exchange* that the "power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." 11 U.S. (7 Cranch) at 136. However, this statement was made in connection with explaining that any restriction on an American court's jurisdiction over the foreign warship could not flow from an external source, but had to be based on domestic law. *Id.* The statement thus provides no support for the 1980 Opinion's analysis. Moreover, the Opinion ignores the case's explicit recognition of the principle that a sovereign has the power to act inconsistently with customary international law.

agency"), *cert. denied*, 362 U.S. 904 (1960); *The Over the Top*, 5 F.2d 838, 842 (D. Conn. 1925) (stating that "[i]nternational practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of the Congress"). Leading commentators also agree that the United States, acting through its political branches, has the prerogative to take action in disregard of international law.[9]

Indeed, the sovereign's authority to override customary international law necessarily follows from the nature of international law itself. Customary international law is not static: it evolves through a dynamic process of state custom and practice. States ultimately adhere to a norm of practice because they determine that upholding the norm best serves their long-run interests and because violation of the norm may subject the nation to public obloquy or expose it to retaliatory violations. *See Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814). States necessarily must have the *authority* to contravene international norms, however, for it is the process of changing state practice that allows customary international law to evolve.[10] As Chief Justice Marshall stated in *Brown*, "[t]he rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary." 12 U.S. (8 Cranch) at 128. If the United States is to participate in the evolution of international law, the Executive must have the power to act inconsistently with international law where necessary. "It is principally the President, 'sole organ' of the United States in its international relations, who is responsible for the behavior of the United States in regard to international law, and who participates on her

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[9] As Professor Henkin has noted, "the Constitution does not forbid the President (or the Congress) to violate international law, and the courts will give effect to acts within the constitutional powers of the political branches without regard to international law." Louis Henkin, *Foreign Affairs and the Constitution* 221-22 (1972). The Restatement also expressly maintains that Congress by subsequent enactment may supersede a rule of international law or international agreement. *See* Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(b) (1987) ("Restatement (Third)"). The reporters' notes also agree that "[t]here is authority for the view that the President has the power, when acting within his constitutional authority, to disregard a rule of international law or an agreement of the United States." *Id.* § 15(1)(b) note 3. While the Restatement (Third) does not explicitly address whether the President or his delegate may violate international law when acting pursuant to statutory rather than constitutional authority, this proposition appears to be a direct corollary to the Restatement (Third)'s conclusion with respect to legislative authority. If Congress has the authority to enact a statute contrary to international law, it may also enact a statute that delegates to the Executive authority that can be exercised contrary to international law. Thus, we believe that the Restatement (Third) substantially agrees with our view that the political branches, under the authority of either constitutional or statutory domestic law, legally may act in a manner that is inconsistent with international law.

[10] A recent example involves international territory and economic sovereignty over the seas. In 1945, the contiguous sea outside the territorial sea (from three to twelve miles) was generally considered to be international waters. *See* Brownlie, *supra*, at 218. Shortly thereafter, however, a number of states began asserting 200-mile fishery conservation zones. *Id.* These claims were, at times, supported by military force. Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas* 152-77 (1972). The international law norm that waters beyond the territorial sea were not subject to the jurisdiction of the coastal states collapsed. Restatement (Third), *supra*, § 514(1)(a). By 1979, there was general acceptance of an exclusive economic zone of 200 miles. Brownlie, *supra*, at 219-20.

behalf in the indefinable process by which customary international law is made, unmade, remade." Louis Henkin, *Foreign Affairs and the Constitution* 188 (1972). Thus, the power in the Executive to override international law is a necessary attribute of sovereignty and an integral part of the President's foreign affairs power. Indeed, the absence of such authority in the Executive would profoundly and uniquely disable the United States — rendering the nation a passive bystander, bound to follow practices dictated by other nations, yet powerless to play a role in shaping those practices.[11]

Thus, we think it clear that, contrary to the 1980 Opinion's assertions, customary international law does not impose absolute legal limits on the power of the United States to exercise its law enforcement jurisdiction in foreign countries. Both the Congress and the President, acting within their respective spheres, retain the authority to override any such limitations imposed by customary international law.

2. Effect on the FBI's Statutory Authority

We also believe that the 1980 Opinion erred in concluding that the statutes granting the FBI its investigative and arrest powers must be construed as limited by customary international law. The 1980 Opinion notes that a conventional rule of statutory construction states that where a statute prescribes a duty, by implication it authorizes all reasonable and necessary means to effectuate that duty. 4B Op. O.L.C. at 552. The Opinion concludes, based principally on the disapproval expressed in several academic journals, that an extraterritorial apprehension is "unreasonable," and hence, unauthorized, when it violates international law. *Id.* at 552. In substance, though not explicitly, the 1980 Opinion relies on the canon of statutory interpretation — enunciated in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) — that a

[11] Because customary international law consists of evolving state customs and practice, it is an inherently uncertain area of law, from which clear rules rarely emerge Some extraterritorial law enforcement actions in which the FBI might engage without the foreign country's consent would not necessarily contravene international law. For instance, because sovereignty over territory derives not from the possession of legal title, but from the reality of effective control, *see* Brownlie, *supra*, at 117-18, logic would suggest there would be no violation of international law in exercising law enforcement activity in foreign territory over which no state exercises effective control In addition, if the United States were the target of attacks that violated international law, it would be justified in making a proportional unilateral response, even though its actions might otherwise be contrary to international law *See generally* Restatement (Third), *supra*, § 905(1); U.N. Charter art 51 (recognizing a nation's inherent right of self-defense). Other circumstances may exist, as well, under which extraterritorial law enforcement is appropriate under international law. *See generally* D Cameron Findley, *Abducting Terrorists for Trial in the United States. Issues of International and Domestic Law*, 23 Tex Int'l L J. 1, 25 (1988) (discussing other such circumstances) In addition, some unilateral actions by the United States, though inconsistent with prior international practice, may constitute justifiable efforts by the United States to shape the content of international norms. Such unilateral actions may be legitimate means by which the United States signals its rejection of a putative norm or seeks to gain acceptance for an alternative norm.

statute should be construed when possible so as not to conflict with international law.[12] We believe this line of analysis is wholly inapposite.

First, this canon does not apply to the kind of statutes at issue here. Sections 533(1) and 3052 are broad authorizing statutes "carrying into Execution" core Executive powers. *See* U.S. Const. art I, § 8, cl. 18. In creating the FBI and conferring on it broad investigative and arrest authority, Congress has created an agency through which the President carries out his constitutionally assigned law enforcement functions. Such general enabling statutes, in the absence of an explicit restriction, must be read as conferring on the agency a scope of authority commensurate with that of the Executive. Because, as part of his law enforcement powers, the President has the inherent authority to override customary international law, it must be presumed that Congress intended to grant the President's instrumentality the authority to act in contravention of international law when directed to do so. Unless Congress places explicit limitations on the FBI's investigative and arrest powers, it must be presumed that Congress did not intend to derogate from Presidential authority by limiting those statutory powers.[13]

This presumption is all the more compelling where, as here, the President's foreign relations powers are implicated. Courts have long recognized that delegations of discretion involving the President's constitutional powers must be construed broadly, especially in matters involving foreign affairs. *See e.g., Dames & Moore v. Regan*, 453 U.S. 654, 677 (1981) (Hostage Act and International Emergency Economic Powers Act,

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[12] Actually, *Murray v. Schooner Charming Betsy*, 6 U S. (2 Cranch) 64 (1804), and *Lauritzen v Larsen*, 345 U S. 571, 578 (1953), are examples of cases applying the general rule of construction that prescriptive statutes not expressly purporting to apply extraterritorially ordinarily will not be presumed to have such an effect The presumption arises in those cases where it is apparent that extraterritorial application of a legal prohibition would gratuitously interfere with the sovereignty of foreign countries, while not advancing the United States' interest in preserving its own sovereignty In *Schooner Charming Betsy*, for example, the Court held that a non-intercourse act prohibiting trade between the United States and France could not be applied to justify seizure of a Danish ship 6 U.S (2 Cranch) at 118. To do so would have needlessly infringed on Danish sovereignty without protecting the interest of the United States in prohibiting its own citizens from trading with an enemy. However, such cases certainly cannot be read as suggesting that Congress does not have the *power* to enact statutes with extraterritorial effect. Nor do such cases apply where Congress actually intends a statute to have extraterritorial reach *See Blackmer v. United States*, 284 U S. at 437, *United States v. King*, 552 F.2d at 850-51.

[13] The court in *United States v Postal*, 589 F.2d 862 (5th Cir.), *cert denied*, 444 U.S. 832 (1979), recognized the need to apply enforcement statutes broadly to effectuate Congress' intent to reach certain drug trafficking. It held that the statute granting the power to search and seize vessels in all cases in "'which the United States has jurisdiction,'" for purposes of enforcing United States law, granted authority to the Coast Guard to seize vessels in violation of Article 22 of the Convention on the High Seas *Id.* at 884 (quoting 14 U S C. § 89(a) (1976)). (The United States was a party to that Convention, but the Court held it was non-self-executing) The Court based this conclusion on an earlier decision in which it had construed the statute as granting "jurisdiction" in the type of case at issue — a conspiracy to violate federal narcotics statutes. *Id.* at 884. Indeed, since the court viewed the statute as "'intended to give the Coast Guard the broadest authority available under law,'" it held that a Coast Guard regulation requiring boarding of vessels only in conformity with a treaty could not be applied to limit the Coast Guard's authority under the statute. *Id* at 885 (quoting *United States v. Warren*, 578 F2d 1058, 1068 (5th Cir. 1978) (en banc))

although not providing specific authorization for the President's actions, are still relevant because they "indicat[e] congressional acceptance of a broad scope for executive action" in settling claims against Iran); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 111 (2d Cir.), *cert. denied*, 385 U.S. 898 (1961) (noting that especially with respect to foreign affairs, statutory delegations of power to the President must be read more broadly than other delegations). *See Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 110-14 (1948) (denying availability of judicial review over presidential decisions based on statutory authority involving broad foreign policy matters); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (upholding broad statutory delegation that implicated President's foreign affairs responsibilities).[14]

In contrast, the 1980 Opinion reverses the presumptions of our constitutional system. The Opinion imputes to Congress an intent to make the scope of domestic legal authority for law enforcement operations depend on the vague and fluctuating standards of international custom. In effect, this would delegate to foreign nations the power to define, on a continuing basis, the content of United States law, according to standards that are outside the direct control of the political branches. Such an intent should not be presumed. To the contrary, Congress must be presumed to entrust such vital law enforcement decisions directly to the democratically accountable President and his subordinates. *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (holding that it is for the executive branch, not the judiciary, to make policy choices within the ambit of delegated statutory authority when Congress has not spoken).

In enacting sections 533(1) and 3052, Congress was legislating against the background of the well-recognized principle that international law is part of the law of the United States only insofar as it has not been overridden by actions of the political branches. In *The Paquete Habana*, Justice Gray stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and *no controlling exec-*

[14] Two recent cases refusing to apply statutory enforcement jurisdiction abroad are inapposite. *See Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 493 (D.C. Cir. 1984) (CFTC could not enforce investigative subpoena on foreign citizen in a foreign nation), *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1324-27 (D C Cir 1980) (FTC could not enforce document subpoena on a foreign citizen residing abroad). In each case, the agency whose authority was at issue was an independent agency that exercised statutory authority thought to be shielded from direct presidential control. Thus, the statutory authorities at issue in those cases, unlike those exercised by the FBI, may not have been understood to effectuate directly the President's constitutional authority, and thus need not be interpreted as commensurate with that authority.

> *utive or legislative act* or judicial decision, resort must be had to the customs and usages of civilized nations ....

175 U.S. at 700 (emphasis added). Thus, the Court held that United States forces unlawfully had seized Cuban fishing vessels as prizes of war where such vessels were "exempt by the general consent of civilized nations from capture, and ... no act of Congress or order of the President ha[d] expressly authorized [such an action] to be taken." *Id.* at 711.

In 1986, the Eleventh Circuit applied *The Paquete Habana* to uphold executive branch action taken pursuant to a broad statutory delegation in circumstances analogous to those here. In *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986), the issue was whether the United States was authorized to detain indefinitely Cuban aliens who had arrived as part of the Mariel boatlift, notwithstanding that such a detention violated customary international law.

The Attorney General ordered the detention pursuant to 8 U.S.C. § 1227(a), which, like 28 U.S.C. § 533(1) and 18 U.S.C. § 3052, contained a broad grant of authority to the Attorney General, but did not specifically authorize indefinite detention.[15] With respect to one group of the Mariel detainees, the court concluded that there was insufficient evidence of an express congressional intention to override international law. *Id.* at 1453-54.[16] The court found, however, that the Attorney General's decision to incarcerate them indefinitely constituted a "controlling executive act" of the kind required by *The Paquete Habana*, and the court thus found that the detention was lawful. *Id.* at 1454. *Garcia-Mir* therefore may be understood as holding that the Executive acting within broad statutory discretion may depart from customary international law, even in the absence of an affirmative decision by Congress that international law may be violated.[17] Accordingly, we believe that *Garcia-Mir* provides

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[15] The relevant portion of 8 U.S.C. § 1227(a) provides that "[a]ny alien ... arriving in the United States who is excluded under this chapter, shall be immediately deported, ... unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper."

[16] As to another group of Mariel Cubans — those who had been incarcerated continuously since their arrival in the United States — the court concluded that Pub. L. No. 96-533, tit. VII, § 716, 94 Stat. 3131, 3162 (1980), provided sufficient evidence of congressional intention to override international law. *See* 788 F.2d at 1453-54 n.9.

[17] There are two different ways to read the holding in *Garcia-Mir*. One is that the Executive has broad discretionary authority, pursuant to general power delegated by statute, to determine whether to act inconsistently with international law. Certain language in the district court's decision suggests that it viewed the "controlling executive act" as having been taken pursuant to statutory authorization. *See Fernandez-Roque v. Smith*, 622 F. Supp. 887, 903 (N.D. Ga. 1985) ("[T]his Court is reluctant to hold that the Attorney General's involvement in plaintiffs' detention cannot be considered a 'controlling executive act,' especially since Congress has delegated to the Attorney General broad discretion over the detention of unadmitted aliens.") In affirming, the Eleventh Circuit may have intended to adopt the statutory rationale.

Alternatively, *Garcia-Mir* may be understood as holding that the President has inherent constitutional authority, independent of the statutory grant of power, to determine whether to act inconsistently with international law. The Eleventh Circuit quoted a draft of the Restatement referring to the President

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additional support for the proposition that broad statutory grants of Executive authority must be interpreted in light of the political branches' inherent power to override international norms.[18]

In sum, then, we conclude that the FBI has authority under sections 533(1) and 3052 to carry out overseas investigations and arrests that contravene customary international law. Those statutes do not explicitly require the FBI to conform its activities to customary international law, and there is no basis for gratuitously assuming that Congress intended to impose such limitations on the FBI. On the contrary, in view of the President's authority to override customary international law, it must be presumed that Congress granted the FBI commensurate statutory authority.[19]

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[17](...continued)
"acting within his constitutional authority" in support of its holding, *see* 788 F.2d at 1454-55, and it may therefore have been relying on the President's inherent constitutional authority This is the interpretation of *Garcia-Mir* adopted by the Restatement (Third), *supra*, § 115, note 3, and particularly by the Chief Reporter. *See* Louis Henkin, *The Constitution and United States Sovereignty A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, 883-86 (1987) ("Henkin"). We think that the decision in *Garcia-Mir* is correct under either interpretation

Professor Henkin disagrees with the result in *Garcia-Mir* because he does not believe that the President has an inherent constitutional authority to exclude aliens. *See id* at 884 n 131. We disagree on this specific point with Professor Henkin. *See United States ex rel Knauff v. Shaughnessy*, 338 U S. 537, 543 (1950) ("[T]he power of exclusion of aliens is also inherent in the executive department of the sovereign .."); *see also Nishimura Ekiu v. United States*, 142 U S. 651, 659 (1892). In any event, this debate pertains only to the particular issue in *Garcia-Mir*; it does not go to the basic question of whether the President has inherent constitutional authority to violate customary or other international law — a proposition with which both the Restatement (Third) and Professor Henkin agree. Restatement (Third), *supra*, § 115, note 3; Henkin, *supra*, at 882 ("Thus, a domestic court espousing this view would not, for example, enjoin the President from directing United States officers to overfly another country's territory without that country's consent ... or to kidnap a wanted criminal from a foreign country . [but] would have to accept such directives as an exercise by the President of the prerogative of the United States to take such measures regardless of its international obligations.").

[18] Recent legislation reflects Congress' intent that the United States be able to exercise its law enforcement powers abroad when necessary to counter international terrorism. For instance, in introducing legislation (now codified at 18 U S C § 2331) to criminalize murder and other acts against U S. nationals committed abroad, Senator Specter noted that

> In many cases, the terrorist murderer will be extradited or seized with the cooperation of the government in whose jurisdiction he or she is found Yet, if the terrorist is hiding in a country like Lebanon, where the government, such as it is, is powerless to aid in his removal, or in Libya, where the Government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial

131 Cong Rec. 18,870 (1985)

[19] We do not here discuss limitations on the scope of the FBI's authority for such actions that may be derived from other statutes We know of no provisions by which Congress generally has prohibited the use of agents to enforce United States laws contrary to principles of customary international law. We believe, however, that such provisions would have to be quite explicit before they would be so construed, because the extraterritorial enforcement of United States laws relates to two areas of the President's constitutional authority — the conduct of foreign relations and his duty to execute the laws *See Youngstown Sheet & Tube Co v Sawyer*, 343 U S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."). For example, we do not believe that the Mansfield Amendment circumscribes the FBI's authority to make arrests abroad for violations of United States anti-drug laws, because its restrictions relate solely to United States participation in operations to enforce *foreign* anti-drug laws *See* 22 U S C § 2291(c).

C. The President's Constitutional Power to Authorize Actions Inconsistent with Customary International Law

We believe that the 1980 Opinion also erred because it failed to consider the President's inherent constitutional power to authorize law enforcement activities. Pursuant to the constitutional command to "take Care that the laws be faithfully executed,"[20] the President has the power to authorize agents of the executive branch to engage in law enforcement activities in addition to those provided by statute.

The Court so held in *In re Neagle*, 135 U.S. 1 (1890). There, the life of Justice Field had been threatened, and as a result, the Attorney General assigned a Deputy United States Marshal to accompany the Justice. *Id.* at 42-52. While performing the duties assigned to him by the Attorney General, Neagle shot and killed a man whom he believed was about to attack Justice Field. *Id.* at 52-53. Neagle was arrested and charged with murder by California authorities.

The Court assumed that the authorizing statute did not empower the U.S. Marshals or their deputies to accompany and guard Supreme Court Justices as they traveled through their circuits. *Id.* at 58. Nevertheless, the Court held that the constitutional command that the President "shall take Care that the laws be faithfully executed" gave him the power to authorize agents of the executive branch to take enforcement actions in addition to those provided by statute. *Id.* at 63-64. The Court concluded that the President's constitutional duty is not limited to the enforcement of acts of Congress or treaties according to their terms, but that it extends also to the "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." *Id.* at 64-67. The Court thus concluded that the President had the legal authority, acting through the Attorney General, to direct the Deputy Marshal's actions, and that the authority overrode any contrary California law. *Id.* at 67-68.[21]

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[20] U.S. Const. art. II, § 3.

[21] *See also United States ex rel Martinez-Angosto v. Mason*, 344 F.2d 673, 688 (2d Cir. 1965) (Friendly, J., concurring) (noting that congressional silence did not preclude the inference that the President has the power to decide whether to follow provisions of a non-self-executing treaty)

Durand v. Hollins, 8 F. Cas. 111 (C C.S D N Y. 1860) (No. 4,186) is also apposite. In 1854, Lieutenant Hollins of the U.S.S. Cyane ordered the bombardment of Greytown, Nicaragua in retaliation for the failure of local authorities to make reparation for a mob attack on the United States Consul. Hollins was then sued for the value of property alleged to have been destroyed in the bombardment Justice Nelson, on circuit, held Hollins not liable on the grounds that he was acting pursuant to orders of the President and the Secretary of the Navy He ruled that

> 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 citizens abroad must look for protection of person and of property, and for the faithful

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The *Neagle* Court pointed particularly to the President's power in the area of foreign affairs as an area in which there exists considerable inherent presidential power to authorize action independent of any statutory provision. *See id.* at 64. The Court's decision reflects the fundamental principle stated by John Jay that "[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature." The Federalist No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961).

This Office also has previously opined that the President, pursuant to his inherent constitutional authority, can authorize enforcement actions independent of any statutory grant of power. *See* Memorandum for Wayne B. Colborn, Director, United States Marshals Services, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Law Enforcement Authority of Special Deputies Assigned to DOT to Guard Against Air Privacy* (Sept. 30, 1970) (the "1970 Opinion"). In that opinion, this Office ruled that the President's inherent constitutional authority permitted Department of Transportation personnel to be deputized as Deputy U.S. Marshals and authorized to carry firearms, to take necessary action to prevent air piracy while an American carrier is in flight anywhere in the world, and to make arrests for violations of United States laws regarding air piracy and related offenses. *Id.* at 1. The opinion recognized that there was no statute expressly authorizing this protection and enforcement action. *Id.* at 2.[22] Relying on *In re Neagle* and *In re Debs*, 158 U.S. 564, 581 (1895), however, it concluded that "since the United States has jurisdiction to punish air piracy and related offenses, it likewise has inherent authority to take reasonable and necessary steps to prevent these offenses." 1970 Opinion at 2-3. In its analysis, the 1970 Opinion noted that "the exercise of their authority ... could give rise to conflicts with the countries involved of an international nature. But this would not, in

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[21] (continued)
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.

Now, as respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for, and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of Government, the citizen abroad is as much entitled to protection as the citizen at home The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home, and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving

Id at 112

[22] The authorizing statute of the U S. Marshals, 18 U S.C. § 3053, like 28 U S C § 33(1) and 18 U S.C § 3052, contains no express extraterritorial arrest or enforcement authority

our view, affect the legality of their actions under U.S. domestic law." *Id.* at 6.[23]

Accordingly, we believe that even if sections 533(1) and 3052 are construed as authorizing enforcement action only within the limits imposed by international law, the President retains the constitutional authority to order enforcement actions in addition to those permitted by statute. As discussed *supra* pp. *168-71*, this constitutional authority carries with it the power to override customary international law. Thus, Executive agents, when appropriately directed pursuant to the President's constitutional law enforcement authority, may lawfully carry on investigations and make arrests that contravene customary international law.

D. The Status of Article 2(4) of the U.N. Charter and Other Unexecuted Treaties or Treaty Provisions

To this point, we have discussed the Executive's power to override customary international law. Another issue is whether Article 2(4) of the U.N. Charter would prohibit the Executive as a matter of domestic law from authorizing forcible abductions absent acquiescence by the foreign government.[24] We do not believe that it does.

The text of Article 2(4) does not prohibit extraterritorial law enforcement activities, and we question whether Article 2(4) should be construed as generally addressing these activities. Nevertheless, even if Article 2(4) were construed as prohibiting certain forcible abductions, we believe that the President has the authority to order such actions in contravention of the Charter.

Treaties that are self-executing can provide rules of decision for a United States court,[25] *see Cook v. United States*, 288 U.S. 102, 112 (1933), but when a treaty is non-self-executing, it "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). Accordingly, the decision whether to act consistently with an unexecuted treaty is a political issue

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[23] We understand that as a matter of international law the United States may exercise jurisdiction on United States carriers flying over foreign territories Convention on Offenses and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, art. 3, 20 U S.T. 2941, 2944 The 1970 Opinion, however, did not rely on the Convention and, to the contrary, appeared to assume that exercise of such jurisdiction would be viewed as infringing on the sovereignty of other nations.

[24] Article 2(4) provides:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. Charter, art 2, ¶ 4.

[25] *See* Restatement (Third), *supra*, § 111, introductory note (declaring that "[u]nder the Supremacy Clause, self-executed treaties concluded by the United States become law of the United States"), *id* § 111, comment h (noting that unexecuted treaty does not furnish a rule of decision in the United States).

rather than a legal one,[26] and unexecuted treaties, like customary international law, are not legally binding on the political branches. The President, acting within the scope of his constitutional or statutory authority, thus retains full authority to determine whether to pursue action abridging the provisions of unexecuted treaties.[27]

We agree with the 1980 Opinion that Article 2(4) is not self-executing.[28] 4B Op. O.L.C. at 548. *See also Sei Fujii v. State*, 242 P.2d 617, 620 (Cal. 1952) (human rights provisions of U.N. Charter not self-executing); *Pauling v. McElroy*, 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960) (finding other sections of Charter not self-executing). Article 2(4) relates to one of the most fundamentally political questions that faces a nation — when to use force in its international relations. For these reasons, we conclude that as a matter of domestic law, the Executive has the power to authorize actions inconsistent with Article 2(4) of the U.N. Charter.[29]

E. The President's Ability to Delegate to the Attorney General the Power to Authorize Enforcement Actions Inconsistent with International Law

Even though the Constitution vests the "executive power" in the President, *see* U.S. Const. art. II, § 1, we do not believe that the President's statutory or constitutionally based Executive power to override customary or other international law can be exercised only by him. Rather, we believe that this Executive power can be exercised by the Attorney General as well, and that this conclusion obtains regardless of whether

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[26] Of course, there may be significant political reasons for not abridging an unexecuted treaty, just as the President may decide it is politically unwise to act inconsistently with customary international law. Such political decisions necessarily depend on the facts of each case, and we do not address their ramifications here.

[27] As discussed above, law enforcement activities outside the United States implicate the President's constitutional authority to conduct the international relations of the United States and to execute our laws. Pursuant to these constitutional authorities, the President has the power to decide whether or not to operate within the terms of an unexecuted treaty. If the President acts inconsistently with the terms of a treaty, the treaty is not automatically terminated. It may simply mean that the treaty is rendered inoperative to the extent it is inconsistent with the President's actions. In any event, the determination of whether a treaty has been rendered inoperative is largely a decision made by the Executive as part of the conduct of the foreign relations of the United States. *Cf Charlton v Kelly*, 229 U.S. 447 (1913) (holding that the President must decide whether the actions of a foreign government have voided a treaty).

[28] The 1980 Opinion speaks somewhat loosely of the U.N. Charter not being "a self-executing treaty." 4B Op. O.L.C. at 548. More properly, the question should be whether individual provisions of the treaty are self-executing. *See, e.g., United States v Postal*, 589 F.2d at 884 n.35.

[29] We do not address the effect on the FBI's authority of treaties that have become part of United States law, either because they are self-executing or because they have been implemented by legislation. As noted above, such treaties do have domestic legal effect, although they can be denounced by the Executive. *Cf The Chinese Exclusion Case*, 130 U.S. 581 (1889). *See also* Louis Henkin, *Foreign Affairs and the Constitution*, *supra*, at 171. We are unaware, however, of any treaties of general application that would limit the law enforcement authority of the United States. Applicable treaties should, of course, be examined in the context of any particular operation.

the authority is viewed as derived from statute or from the President's inherent constitutional authority.

Section 533(1) designates the Attorney General as the responsible executive branch official. Thus, all enforcement action authorized pursuant to this statute, including enforcement action that departs from customary or other international law, may be undertaken by the Attorney General.[30] The *Garcia-Mir* decision, confirmed this conclusion by holding that the Attorney General performed the "controlling executive act" that sufficed to override customary international law in that case. 788 F.2d at 1454-55.

The Attorney General also may exercise the President's constitutional power to override customary international law because "[t]he President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839). *See also Wolsey v. Chapman*, 101 U.S. 755, 769 (1879). Specific direction from the President, or even explicit invocation of his authority, cannot reasonably be expected and is not generally required. 7 Op. Att'y Gen. 453, 480-82 (1855).[31]

Thus, we believe that the Attorney General has the power to authorize departures from customary or other international law in the course of law enforcement activities and that the President need not personally approve such actions. We would not recommend, however, that the Attorney General delegate the authority to more subordinate officials. Even if he is viewed as exercising statutory authority pursuant to section 533(1) or section 3052, we think that as a prudential matter the Attorney General should, in this case, exercise it personally. Decisions such as *Garcia-Mir* rely on the theory that the Executive has the constitutional authority to make political decisions affecting our international relations. To the extent that such decisions are made by officials below cabinet rank, however, the factual basis for this theory may be weaker.

Specifically, we recommend that any overseas law enforcement activity that presents a significant possibility of departing from customary or other international law be approved directly by the President or the Attorney General. As an administrative matter, the Attorney General may

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[30] The same is true with respect to section 3052.

[31] *In re Neagle*, provides an example of a case in which the Court upheld the exercise by the Attorney General of the President's inherent constitutional authority 135 U.S at 67-68. More recent examples are the cases upholding the President's constitutional authority to order warrantless wiretaps relating to foreign intelligence activities. *United States v. Butenko*, 494 F.2d 593 (3d Cir.) (en banc), *cert denied*, 419 U.S. 881 (1974), *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert denied*, 415 U.S. 960 (1974); *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), *cert denied*, 454 U.S 1144 (1982); *United States v Buck*, 548 F.2d 871 (9th Cir.), *cert denied*, 434 U.S. 890 (1977). In all of these cases, the warrantless wiretaps were ordered by the Attorney General, and the courts accepted his authority to act on behalf of the President. *See also United States v. Ehrlichman*, 546 F.2d 910, 925-26 (D.C. Cir. 1976), *cert denied*, 429 U.S. 1120 (1977) (holding that, if a national security exception for warrantless foreign intelligence searches exists, such searches must be authorized by the President or by "his alter ego for these matters, the Attorney General").

wish to promulgate guidelines specifying what actions could be taken by the FBI overseas, when consent should be obtained from foreign governments, and when such consent need not be obtained. Such guidelines also could provide general authorization for certain types of non-intrusive law enforcement activities (such as interviews with informants) in foreign countries that nonetheless might depart from customary international law if not authorized by the foreign government. Nevertheless, it would be prudent for such guidelines to require individual approval by the Attorney General for any operation, such as an apprehension and abduction, that would involve the use of force in the territory of another country without that country's consent.

F. International and Foreign Law and the Fourth Amendment

The 1980 Opinion concluded that an arrest in violation of customary international law did not violate the Fourth Amendment.[32] 4B Op. O.L.C. at 554 n.34. We agree. The Opinion did not address whether the violation of foreign statutes or other law would create a Fourth Amendment violation.[33] We conclude that it would not.

The central question is whether an arrest that violates international law or foreign statutory law is "unreasonable" within the meaning of the Fourth Amendment's proscription of unreasonable searches and seizures. The Fourth Amendment is an autonomous rule of federal law that represents a judgment by the United States as to the appropriate balance between individual rights and the authority of the government to enforce the law. The Court recently held that state standards for reasonable searches and seizures are irrelevant to determining whether the

[32] The Bill of Rights applies to actions of American officials directed at American nationals overseas *Reid v Covert*, 354 U S 1, 5-6 (1957). There remains some dispute as to the extent to which the Bill of Rights, particularly the Fourth Amendment, applies to actions of American officials directed at nonresident aliens overseas *Compare* Steven A. Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 Va J. Int'l L. 741 (1980) ("Saltzburg") *with* Paul B. Stephan III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 Va J Int'l L. 777 (1980) ("Stephan") *and* Paul B Stephan III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 Conn L. Rev 831 (1987) The Supreme Court recently granted certiorari in a case holding the Fourth Amendment applicable to warrantless searches by DEA officials of foreign nationals in their own country. *United States v. Verdugo-Urquidez*, 856 F 2d 1214 (9th Cir 1988), [*rev'd*, 494 U S. 259 (1990)]. We are addressing here, however, only the general question of whether a violation of foreign or international law results in a violation of the Fourth Amendment, regardless of whether the individual arrested is a citizen or alien

[33] Presumably this omission was based on the Opinion's conclusion that the FBI had "the authority to violate the local law of another country as long as that country does not object." 4B Op O.L.C at 552 n.29 This conclusion was principally based on the notion that it is for the sovereign, not an individual, to determine whether objection should be made to an infringement on sovereignty *Id.* While we think this analysis correctly resolves any question of violation of international law, it does not necessarily answer the Fourth Amendment question, for it is at least theoretically possible that the Fourth Amendment itself contains a requirement that arrests comply with applicable foreign laws If such a right were contained in the Fourth Amendment, it is difficult to see how a foreign government could extinguish the individual's right by failing to object. We address this issue in the text *infra*

Fourth Amendment has been violated. *California v. Greenwood*, 486 U.S. 35 (1988). The Court stated:

> We reject respondent['s] ... alternative argument for affirmance: that his expectation of privacy ... should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure ... was impermissible as a matter of California law.... We have never intimated ... that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.... Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission.

Id. at 43-44. *See also Oliver v. United States*, 466 U.S. 170, 183-84 (1984) (police officers who trespassed upon posted and fenced land did not violate the Fourth Amendment, even though their action was subject to criminal sanctions); *Olmstead v. United States*, 277 U.S. 438, 466-69 (1928) (illegality of a wiretap under state law irrelevant in considering whether evidence was inadmissible under the Fourth Amendment); *Hester v. United States*, 265 U.S. 57, 59 (1924) (trespass in "open fields" does not violate the Fourth Amendment). By analogy, the standards imposed by the Fourth Amendment, insofar as it applies abroad, *see Reid v. Covert*, 354 U.S. 1, 5-6 (1957), must be determined by United States law.

It would be contrary to the Fourth Amendment's purpose to incorporate into it rules of international law or analogous foreign statutes authorizing only local law enforcement officers to investigate and arrest. Such laws would have as their purpose the protection of another country's sovereignty. In contrast, the Fourth Amendment is concerned with the protection of individual rights. As the Fifth Circuit has stated:

> Whether the search and seizure were Fourth-Amendment-unreasonable must be established by showing that the interests to be served by the Fourth Amendment were violated, and not merely by establishing the violation of general principles of international law.

United States v. Cadena, 585 F.2d 1252, 1264 (5th Cir. 1978).[34]

[34] In *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987), the court reviewed whether evidence derived from wiretaps illegal under Philippine law was subject to the exclusionary rule. Without analysis, the court stated that the "local law of the Philippines governs whether the search was reasonable." *Id.* at 491. We do not accept this automatic incorporation of local law into the Fourth Amendment, because it is inconsistent with *California v. Greenwood*, 486 U.S. 35 (1988). Moreover, the statement in *Peterson* was of no consequence to the decision because the court proceeded to admit the evidence under the good faith exception to the exclusionary rule. 812 F.2d at 491-92.

We believe that the requirements of the Fourth Amendment are met when officers with authority under United States law arrest with probable cause.[35] *See United States v. Reed*, 639 F.2d 896, 902 & n.2 (2d Cir. 1981). Section 3052 of title 18 authorizes agents of the FBI to arrest without warrant if probable cause exists, which is all the Constitution requires, at least for an arrest in a public place. *United States v. Watson*, 423 U.S. 411, 414-17 (1976); *Henry v. United States*, 361 U.S. 98, 100 (1959).[36]

Accordingly, we conclude that an arrest in violation of foreign law does not violate the Fourth Amendment.[37] In addition, based on the analysis in the 1980 Opinion, we reaffirm that an arrest departing from international law does not violate the Fourth Amendment.

IV. Conclusion

This Office concludes that at the direction of the President or the Attorney General the FBI may use its statutory authority under 28 U.S.C. § 533(1) and 18 U.S.C. § 3052 to investigate and arrest individuals for violations of applicable United States law, even if those actions depart from customary international law or unexecuted treaties. Moreover, we conclude that the President, acting through the Attorney General, has inherent constitutional authority to deploy the FBI to investigate and arrest individuals for violations of United States law, even if those actions contravene international law. Finally, we conclude that an arrest that is

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[35] There is some doubt whether the Fourth Amendment standard includes a requirement of domestic law authority to arrest. The 1980 Opinion concluded that it does 4B Op O L C at 553-54. That Opinion relied principally on *United States v. Di Re*, 332 U S 581, 589-92 (1948), a case involving exclusion of evidence obtained incident to an unauthorized arrest by federal officials. But it is not clear that *Di Re* was a Fourth Amendment decision, and it is also unclear that the Constitution requires statutory or other authority to arrest. *See* 1 Wayne R. LaFave, *Search and Seizure* § 1 5(b) at 107 (2d ed. 1987) (concluding that *Di Re* is not a Fourth Amendment case but "simply an instance of the court utilizing its supervisory power to exclude from a federal prosecution evidence obtained pursuant to an illegal but constitutional federal arrest"). *Cf* George E Dix, *Fourth Amendment Federalism: The Potential Requirement of State Law Authorization for Law Enforcement Activity*, 14 Am J. Crim L. 1, 10 (1987) ("There is considerable doubt . as to whether the Court has . . committed itself to the position that the fourth amendment reasonableness of an arrest depends upon the existence of state law and the arrest's validity under that law."). In any event, as we have previously stated, we believe that authority exists for the Executive to authorize the FBI to make arrests in foreign countries

[36] As to an arrest in a non-public place, there are circumstances in which an arrest warrant is required. *Payton v New York*, 445 U S 573, 576 (1980). While presumably an arrest warrant often could be obtained, there are limitations to the extraterritorial jurisdiction of the magistrate's writ *See* 18 U.S C §§ 3041-3042 Commentators have questioned, however, whether the warrant requirements of *Payton* and other cases should apply overseas. *See* Saltzburg, *supra*, 20 Va J Int'l L. at 762; Stephan, *supra*, 20 Va. J Int'l L at 792 n.44

[37] We note that fear that our agents will be extradited for violations of foreign law during an enforcement operation authorized by the President or the Attorney General is not a warranted concern The Secretary of State always has discretion to refuse to extradite, even if the offense is covered by an extradition treaty entered into with another country *See* 18 U S C. § 3186 (Secretary of State "may" extradite the person committed under section 3184); *Sindona v Grant*, 619 F.2d 167 (2d Cir 1980), *Wacker v. Bisson*, 348 F.2d 602, 606 (5th Cir 1965).

inconsistent with international or foreign law does not violate the Fourth Amendment.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Use of Department of Defense Drug-Detecting Dogs to Aid in Civilian Law Enforcement

Lending Department of Defense drug-detecting dogs to civilian law enforcement officials and training the officials to handle the dogs is permitted by the Posse Comitatus Act.

The use of Department of Defense personnel to search, but not seize, materials is permissible if there are no persons present with whom a confrontation might arise.

The restrictions of 10 U.S.C. § 375 are inapplicable to the Navy and the Marine Corps. Therefore, the use of Naval and Marine drug-detecting dogs lies within the discretion of the Secretary of the Navy and the Secretary of Defense.

June 23, 1989

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked for a brief summary of the laws pertaining to the use of drug-detecting dogs owned by the Department of Defense ("DoD") and handled by DoD personnel in civilian law enforcement. In particular, you have asked us to address the extent to which the Posse Comitatus Act, 18 U.S.C. § 1385, as amended, may limit the ability of the military to lend such assistance to civilian law enforcement officials.

The Secretary of Defense may lend "equipment" to "law enforcement official[s] for law enforcement purposes." 10 U.S.C. § 372. The Secretary of Defense is also authorized to assign personnel to train civilian law enforcement officials in the operation and maintenance of loaned equipment. 10 U.S.C. § 373. If the dogs were capable of being loaned without their handlers or if training were a practical alternative, we would have no difficulty in concluding that drug-detecting dogs are "equipment" that may be loaned to civilian law enforcement officials, who may then be trained by DoD personnel to handle the dogs. We are informed, however, that these dogs can only be used with their DoD handlers. Therefore, we must consider as well the restrictions upon the use of DoD personnel.

Congress has directed the Secretary of Defense to

> prescribe such regulations as may be necessary to ensure that the provision of any support (including the provision of any equipment or facility or the assignment or detail of

> any personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search and seizure, an arrest or other similar activity unless participation in such activity by such member is otherwise authorized by law.

10 U.S.C. § 375. At first blush, the statute's prohibition on participation in a "search and seizure" may be thought to proscribe use of drug-detecting dogs and their handlers. The legislative history, however, indicates that the purpose of this provision is to avoid confrontations between civilians and members of the military.[1] Reading this legislative history together with the statute's use of the phrase "direct participation," we conclude that the statute reasonably may be read to permit the use of drug-detecting dogs and their handlers with respect to a search as long as that search is not conducted in conjunction with a seizure. Thus, we believe that drug-detecting dogs may be used in searches of packages and places in the absence of persons with whom a confrontation may arise, as long as the actual seizure is made by civilian law enforcement personnel.

Finally, we note that section 375 need not be read as limiting even the direct participation of Navy or Marine Corps personnel in supporting civilian law enforcement efforts.[2] The Posse Comitatus Act by its terms does not apply to the Navy.[3] The purpose of the 1981 Amendments was to expand, and not contract, the existing "authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes." 10 U.S.C. § 378. Thus, we believe the Navy and the Marine Corps continue to be exempt from the Act's restrictions, notwithstanding the reference in section 375. By regulation, however, the Navy has accepted the restrictions of the Posse Comitatus Act. *See* 32 C.F.R. § 213.10(c) (1988). That regulation may be waived, abrogated, or amended by the Secretary of the Navy to provide for the participation of drug detection personnel in civilian law enforcement operations. With such a change to the regulation, Navy and Marine Corps drug-detecting dogs and their handlers may be used fully in the civilian enforcement of the laws.

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[1] *See, e g., Posse Comitatus Act. Hearings on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 28, 65, 538 (1981)

[2] OLC has been asked by the Hawaii Postal Inspector and the Navy whether Naval drug-detecting dogs and their handlers may be loaned to the Post Office to inspect packages. Even assuming that section 375 applies to the Navy, we think the Navy may lend these dogs and their handlers to the Post Office A fuller opinion on this issue is forthcoming.

[3] The Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or any Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S C. § 1385

In sum, lending DoD drug-detecting dogs to civilian law enforcement personnel and training them to handle the dogs is plainly permitted by the Posse Comitatus Act, as amended. Use of DoD personnel to search, but not seize, materials is permissible in the absence of persons with whom a confrontation might arise. Finally, we believe that the restrictions of 10 U.S.C. § 375 are inapplicable to the Navy and the Marine Corps, and therefore, that use of Naval and Marine drug-detecting dogs lies within the discretion of the Secretary of the Navy and the Secretary of Defense.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Reimbursement for Detail of Judge Advocate General Corps Personnel to a United States Attorney's Office

The Economy Act requires the Department of Defense to be reimbursed for the detail of Judge Advocate General Corps attorneys to a United States Attorney's Office.

The authority of the Director of National Drug Control Policy temporarily to reassign federal personnel under the Anti-Drug Abuse Act of 1988 does not displace the requirements of the Economy Act.

June 27, 1989

MEMORANDUM OPINION FOR THE ACTING ASSOCIATE ATTORNEY GENERAL

You have asked for our opinion whether the United States Attorney's Office for the District of Columbia ("DCUSA") must reimburse the Department of Defense ("DOD") for costs associated with the detail of ten lawyers from the Judge Advocate General Corps ("JAGC") to the DCUSA for one year pursuant to an official request by the Director of National Drug Control Policy William Bennett ("Director"), under sections 1003(d)(2) or 1005(c)(1)(A) of the Anti-Drug Abuse Act of 1988 ("the 1988 Act"), Pub. L. No. 100-690, 102 Stat. 4181 (codified at 21 U.S.C. §§ 1502(d)(2), 1504(c)(1)(A).[1] DOD contends that DCUSA must reimburse the various departments from which JAGC personnel would be detailed for salaries and expenses, at an estimated cost of $300,000.

For the reasons stated below, we conclude that the Economy Act, 31 U.S.C. § 1301,* requires reimbursement for the detailed JAGC personnel, and that the Director's authority temporarily to reassign federal personnel under the 1988 Act does not displace the requirements of the Economy Act. However, the 1988 Act provides for the Director to report to the Congress regarding the need for any transfer of appropriated funds for National Drug Control Program activities. 21 U.S.C. § 1502(c)(6). To the extent this situation may be deemed to present a need for such a

[1] Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Joe D. Whitley, Acting Associate Attorney General (May 12, 1989) *See* Letter for Joe D Whitley, Acting Associate Attorney General, from Jay B Stephens, United States Attorney for the District of Columbia (May 9, 1989).

* Editor's Note: This opinion incorrectly refers to 31 U S.C § 1301 as the Economy Act, when that Act is actually codified at 31 U.S.C. § 1535. This mistake in terminology does not affect the conclusions or essential analysis of the opinion

transfer, the Director's report is the appropriate vehicle for seeking such a transfer of funds.

Analysis

1. The Economy Act

Under the Economy Act, a federal agency must spend its funds on the objects for which they were appropriated. 31 U.S.C. § 1301(a). A corollary to this statutory rule is that an agency may not augment its appropriations from outside sources without specific statutory authority. *See generally* United States General Accounting Office, Office of General Counsel, *Principles of Federal Appropriations Law* 5-62 to 5-63 (1st ed. 1982) (explaining the non-augmentation theory). In combination, these rules require an agency to spend its appropriated funds — and only its appropriated funds — as directed by its relevant appropriation legislation. These dual requirements consistently have been interpreted as generally prohibiting the detail of employees from one federal agency to another on a nonreimbursable basis. As the Comptroller General has held, "[t]o the extent that agencies detail employees on a nonreimbursable basis ... they may be avoiding congressional limitations on the amount of moneys appropriated to the receiving agency for particular programs." 64 Comp. Gen. 370, 380 (1985).[2]

Three exceptions to the general rule against nonreimbursable details have been recognized. First, Congress may, of course, specifically authorize nonreimbursable details by statute. *See, e.g.*, 5 U.S.C. § 3343 (authorizing nonreimbursable details to international organizations). Second, a loaning agency may authorize nonreimbursable details involving "a matter [that is] similar or related to matters ordinarily handled by the loaning agency and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided." 64 Comp. Gen. 370, 380 (1985) (concluding that nonreimbursable detail of employees to other agencies or to different programs within the same agency is unlawful; opinion given prospective application only); *see also* 65 Comp. Gen. 635, 637

[2] The Comptroller General is an officer of the legislative branch, *see Bowsher v Synar*, 478 U S 714, 727-32 (1986), and historically, the executive branch has not considered itself bound by the Comptroller General's legal opinions if they conflict with the legal opinions of the Attorney General and the Office of Legal Counsel. Under some circumstances the opinions supply valuable guidance, however, and this Office generally has found these opinions persuasive on the application of the Economy Act to the question of nonreimbursable details *See* Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re Executive Agency Assistance to the Presidential Transition* at 3 (Jan 3, 1989) ("Kmiec Memo"); *Reimbursement of the Internal Revenue Service for Investigative Services Provided to the Independent Counsel*, 12 Op O.L C 233 (1988); *Assignment of Army Lawyers to the Department of Justice*, 10 Op. O L.C 115, 118 (1986) With one exception described in footnote 3 below, the Comptroller General's construction of appropriations law is consistent with our interpretation here

(1986) (detail of administrative law judges from National Labor Relations Board to Department of Labor to hear black lung cases is not directly related to the objects of NLRB's appropriations and therefore must be reimbursed). Third, the Comptroller General would recognize a de minimis exception for details that have a negligible effect on the loaning agency's appropriations. *Cf.* 65 Comp. Gen. 635, 637 (1985) ($674,250 for costs of detail of 15-20 NLRB employees to Department of Labor not de minimis).[3]

Neither of the latter two exceptions applies here. Even assuming that the de minimis exception is lawful, we would not regard this detail, which would cost DOD approximately $300,000, as having a negligible effect on DOD's appropriations. The exception for details involving matters related to the loaning agency's appropriations also does not appear applicable here. JAGC lawyers ordinarily do not engage in civilian litigation.[4] A case can be made that nonreimbursable details should be allowed when the loaning agency is the "client" on whose behalf litigation is undertaken, such as if the JAGC attorneys were to be used for military matters or military prosecutions. In such cases, the detailed personnel would provide specialized knowledge or assistance related to the objects of their agency's appropriations. The reassignment of JAGC attorneys to DCUSA pursuant to the 1988 Act does not meet these criteria, however. Rather, the apparent purpose of the reassignment is to provide additional personnel for prosecution of civilians for narcotics and narcotics-related offenses committed in the District of Columbia.

In U.S. Attorney Jay B. Stephens' letter of May 9, 1989, to Acting Associate Attorney General Joe D. Whitley, reference is made to the DCUSA's "long history of maintaining a nonreimbursable Specials Program which involves the assignment of attorney personnel from various federal agencies to this Office for a period of four to six months." However, we understand those short-term details to have had a different purpose — the training of inexperienced trial attorneys. Details for such purposes might well fall within the exception for details involving matters related to the loaning agency's appropriation, in that intensive training in litigation skills may assist the loaning agency by improving the abilities and performance of its attorney personnel.[5] While the DCUSA doubtless also receives a benefit from the detail of attorneys under the Specials Program, the primary *purpose* of the program appears to be for the training of the detailed attorneys.

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[3] Prior opinions of this Office have regarded the "de minimis exception" with some caution. *See* Kmiec Memo at 7 n 8 The Comptroller General's opinions acknowledge that the de minimis exception actually violates 31 U S C § 1301(a). *See* 65 Comp Gen. at 638; 64 Comp. Gen at 381.

[4] We have reached this conclusion in a prior memorandum. *See* 10 Op O L.C. at 118 & n.4 (discussing circumstances under which JAGC attorneys may be detailed to Department of Justice to assist in litigation).

[5] We do not here address the validity of the Specials Program at the DCUSA

In contrast, the reassignment of JAGC attorneys pursuant to the 1988 Act does not appear to be for the purpose of training. Rather, we understand the proposed detail to involve the reassignment of relatively experienced attorneys to supplement the DCUSA's resources for combatting narcotics offenses. Moreover, the training of JAGC attorneys for specialized civilian narcotics prosecutions in civilian courts would not appear to be directly related to more than a small fraction of the work customarily done by JAGC attorneys for their military departments.[6]

In sum, we conclude that the Economy Act does not permit the proposed detail on a nonreimbursable basis, unless the 1988 Act specifically authorizes nonreimbursable details.

2. The 1988 Act

The 1988 Act gives the Director of National Drug Control Policy broad powers to reassign federal personnel to further the National Drug Control Program. Section 1502(d)(2) empowers the Director to

> direct, with the concurrence of the Secretary of a department or head of an agency, the temporary reassignment within the Federal Government of personnel employed by such department or agency, in order to implement United States drug control policy.

21 U.S.C. § 1502(d)(2). In addition, section 1504(c)(1) permits the temporary assignment of personnel to provide assistance where the Director has designated a specific locale as a "high intensity drug trafficking area."[7]

Neither of these provisions addresses directly whether the temporary reassignment of personnel should be on a reimbursable basis. In addition, nothing in the legislative history of the 1988 Act suggests that Congress intended for details made pursuant to the Director's reassignment authority to be on a nonreimbursable basis. There are no committee reports on the 1988 Act, and statements of individual legislators speak only in general terms of the need for a "drug czar" who would have

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[6] In addition, a substantial question would be presented concerning the Director's authority to order reassignment for "training" purposes. The 1988 Act authorizes the Director to direct, with agency concurrence, temporary reassignment of personnel "in order to implement United States drug control policy." 21 U.S.C. § 1502(d)(3). *See also id.* § 1504(c)(1)(A). It is unclear whether the ordering of training details falls within the Director's powers to reassign personnel in order to implement drug control policy. It could be argued that details specifically for training in narcotics prosecutions would be within the Director's statutory authority; however, the more narrow the focus of the training, the weaker the argument that the detail would further the objects of the loaning agency's appropriations, so as to be permitted on a nonreimbursable basis.

[7] We are informed by Chuck Wexler, Special Assistant to the Director, that as of this date the Director has not designated the District of Columbia as a "high intensity drug trafficking area," though he may do so in the future.

broad powers to coordinate action within the federal government related to the drug problem.[8]

The only reference to the issue of reimbursement occurs in section 1502(d)(3), which authorizes the Director to use services, equipment, or personnel of other agencies for administrative purposes on a reimbursable basis. It could be argued by negative inference from this provision that Congress intended the Director's reassignment authority under section 1502(d)(2) to be exercised on a nonreimbursable basis because Congress failed to provide specifically for reimbursement, as in section 1502(d)(3). This construction fails, however, for two reasons.

First, the structure of the 1988 Act cuts against the negative inference of nonreimbursable details. To read the 1988 Act as authorizing nonreimbursable details would create a tension between section 1502(d)(2) and section 1502(c)(6), which requires the Director "to report to the Congress on a quarterly basis regarding the need for any reprogramming or transfer of appropriated funds for National Drug Control Program activities." Section 1502(c)(6) suggests that Congress intended to reserve for itself the decision whether National Drug Control Program policies require changes in appropriations, including any transfer of appropriated funds necessary to accomplish temporary personnel reassignments.[9] Reserving this power would be consistent with the Economy Act and Congressional retention of control over its constitutional power of the purse.

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[8] A recent Comptroller General decision held that the Economy Act prohibits nonreimbursable details under circumstances in which there were far stronger indications of legislative intent to permit such details. 65 Comp. Gen 635 (1986) There, the National Labor Relations Board planned to detail 15-20 administrative law judges to the Department of Labor to handle a backlog of 20,000 black lung cases. The legislative history of both a 1985 Supplemental Appropriations Act and the fiscal year 1986 Department of Labor Appropriations Act reflected

> congressional concern about the backlog and provide[d] suggestions about how to resolve it The Senate report accompanying the 1985 Supplemental directed the Department [of Labor], to the extent practical, to increase its efforts to temporarily borrow ALJs from other agencies with less pressing workloads For fiscal year 1986, aside from recommending an additional $4 4 million for 15 new ALJs, and a substantial number of attorneys and support positions, the Senate again directed the Department to actively pursue borrowing ALJs from other agencies Both congressional debate and hearings accompanying the 1986 appropriations act contain similar comments

65 Comp. Gen. at 636 (citations and footnote omitted) Despite this legislative history, the Comptroller General concluded that, because the statute itself did not specifically authorize nonreimbursable details, the concerns expressed in the legislative history remained merely generalized concerns that were left unaddressed in the actual legislation. *Id.* at 639 ("[I]t is well settled that suggestions or expressions of congressional intent in committee reports, floor debates and hearings are not legally binding unless they are incorporated either expressly or by reference in an appropriations act itself or in some other statute."). *Accord Train v City of New York*, 420 U.S 35, 45 (1975) (involving issue of Executive compliance with appropriations laws and noting that "legislative intention, without more, is not legislation")

[9] This inference is also supported by changes made from earlier versions of the legislation S 2852, 100th Cong., 2d Sess. (1988) (the "Omnibus Anti-Substance Abuse Act of 1988") at one point provided in sections 1006(d)(2) and (3).

> (2) The Director may *reprogram funds* within National Drug Control Programs

Continued

Moreover, title X, chapter I of the 1988 Act provides specific supplemental appropriations for United States Attorney's Offices for salaries and expenses for increased narcotics prosecution efforts. It reasonably can be inferred that further enhancements of funding, such as by detailing additional personnel pursuant to the Director's temporary reassignment authority, were not intended. *See* 31 U.S.C. § 1301(d) (rule of construction against implied appropriations) (discussed below). *Cf.* United States General Accounting Office, Office of General Counsel, *Principles of Federal Appropriations Law*, *supra*, at 5-62 to 5-63 (non-augmentation theory);

Second, reading the 1988 Act as authorizing nonreimbursable details requires the conclusion that Congress made an "implied appropriation" through the Director's reassignment authority. The Economy Act provides, however, that "[a] law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made." 31 U.S.C. § 1301(d). Thus, reading the 1988 Act to require nonreimbursable details would be inconsistent with the Economy Act. Statutes ordinarily are to be read as consistent with one another, where possible. *See Ruckelshaus v. Monsanto*, 467 U.S. 986, 1017, 1018 (1984) (repeals by implication are disfavored).

Under these circumstances, the 1988 Act should not be read to authorize nonreimbursable details. If nonreimbursable details are necessary to accomplish the Director's goals of implementing national drug control policy, he can report to Congress under section 1502(c)(6) on the need for a transfer of appropriated funds to accomplish the detail of the JAGC attorneys.

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[9] (continued)

(3) The Director may *transfer*, after providing notification to the Committees on Appropriations of the Senate and the House of Representatives, *an amount not to exceed 5 per centum of the funds appropriated for one such program to another such program* within the same National Drug Control Program agency.

134 Cong Rec 27,467 (1988) (emphasis added). This provision was deleted In its place, the 1988 Act, as enacted into law, provides

The Director shall *report to the Congress* on a quarterly basis *regarding the need for any reprogramming or transfer of appropriated funds* for National Drug Control Program activities.

21 U.S C. § 1502(c)(6) (emphasis added).

The same, early version of S 2852 provided in section 1010(a), with respect to the Director's powers to designate "High Intensity Drug Areas," that:

Upon making such a designation and in order to provide Federal assistance to such area, the Director may —

..

(2) transfer, after providing notification to the Committees on Appropriations of the Senate and the House of Representatives, an amount not to exceed 5 per centum of the funds appropriated for one such program to another such program, ..

134 Cong Rec. 27,468 (1988). *See also id.* at 27,414, 27,416 (statement of Sen Nunn, including section-by-section analysis of bill) As passed, the 1988 Act contains no such provision

Conclusion

We believe that the Economy Act prevents the detail of JAGC attorneys to the DCUSA on a nonreimbursable basis, absent clear language in the 1988 Act that provides for such details. We conclude that no such clear intent is expressed in sections 1502(d)(2) and 1504(c)(1)(A) of the 1988 Act. If the Director determines that the inability to direct the detail of JAGC attorneys to the DCUSA on a nonreimbursable basis impedes his ability to further national drug control policy, section 1502(d)(6) of the 1988 Act provides an appropriate mechanism for seeking a remedy from Congress.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Application of the Posse Comitatus Act to Assistance to the United States National Central Bureau

The assistance to the United States National Central Bureau by military agencies that is permitted by the Posse Comitatus Act is not limited to investigations into violations of the Uniform Code of Military Justice. Additional situations under which assistance is permitted is discussed in the memorandum.

July 3, 1989

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

This responds to your request that we reconsider our June 5, 1986 opinion to you advising that the Posse Comitatus Act, 18 U.S.C. § 1385, permits U.S. military agencies to cooperate with the United States National Central Bureau ("USNCB") only with respect to investigations into violations of the Uniform Code of Military Justice ("UCMJ") by a member of the armed services. We agree for the reasons described below that reconsideration of our 1986 opinion is warranted.

The USNCB is a component of the Department of Justice created to assist the Attorney General in fulfilling his responsibility to "accept and maintain, on behalf of the United States, membership in the International Criminal Police Organization." 22 U.S.C. § 263a. Generally, the USNCB acts as the representative of the United States in coordinating the international law enforcement work of INTERPOL. *See* 28 C.F.R. § 0.34 (describing the functions of the USNCB). Other federal agencies with law enforcement responsibilities aid the USNCB by detailing personnel to assist with its international law enforcement work.

In 1986, you asked this Office whether the USNCB is barred from accepting assistance from the military intelligence agencies of the United States by Article 3 of the INTERPOL constitution, which prohibits USNCB involvement in matters of a "military ... character."[1] We advised that the INTERPOL constitution permits military intelligence agencies to cooperate with the USNCB in the investigation of common law crimes

[1] Interpol Const., *reprinted in* Michael Fooner, *Interpol: Issues in World Crime and International Criminal Justice* app B (1989).

even if they also constitute violations of the UCMJ.[2] We acknowledged, however, that this Office does not have the authority to interpret the INTERPOL constitution in a manner that is binding on other members of INTERPOL.

We then observed that cooperation between the USNCB and United States military intelligence agencies raises a question under the Posse Comitatus Act, which imposes additional restrictions on the military assistance that may be received by the USNCB. The Posse Comitatus Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385. Our brief discussion of this issue concluded that because federal law expressly authorizes the military to enforce the UCMJ, *see* 10 U.S.C. §§ 801-940, the Posse Comitatus Act does not prohibit military personnel from engaging in law enforcement activities necessary to enforce the UCMJ. 1986 Opinion at 8. We went on to suggest that military agencies may assist the USNCB only with respect to investigations into violations of the UCMJ by a member of the armed services. *Id.* at 9.

You have requested that we reconsider our opinion to the extent that it said that military assistance may only be used in investigations into UCMJ violations. You have provided us with a memorandum prepared by the Office of Special Investigations of the Department of the Air Force which identifies several situations in addition to investigations into alleged violations of the UCMJ in which the Act assertedly does not apply.[3]

We have examined each of the situations described in the Air Force Memorandum. Furthermore, we have examined the regulations promulgated by the Department of Defense implementing the restrictions imposed by the Posse Comitatus Act on the participation of Department personnel in civilian law enforcement. *See* 32 C.F.R. § 213.10. With one exception, which we consider separately below, the situations described in the Air Force Memorandum are discussed in the Department of

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[2] Memorandum for Richard C Stiener, Chief, INTERPOL-United States National Central Bureau, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Cooperation by the United States Central Bureau with United States Military Agencies* (June 5, 1986) ("1986 Opinion")

[3] Memorandum from Donald A. Cox, Jr, Major, USAF, Staff Judge Advocate, *Re: Cooperation by the United States National Central Bureau with United States Military Agencies* (Aug. 27, 1987) ("Air Force Memorandum")

Defense regulations. We believe that each of the regulatory authorizations of military assistance is permitted by the Posse Comitatus Act.

First, the regulations provide that actions taken for the primary purpose of furthering a military or foreign affairs function of the United States are permitted. 32 C.F.R. § 213.10(a)(2)(i). We agree that the Posse Comitatus Act does not prohibit military involvement in actions that are primarily military or foreign affairs related, even if they have an incidental effect on law enforcement, provided that such actions are not undertaken for the purpose of executing the laws. Second, the regulations permit actions taken pursuant to express statutory authority to assist officials in the execution of the laws. 32 C.F.R. § 213.10(a)(2)(iv).[4] The plain language of the Posse Comitatus Act itself provides that it does not apply "in cases and under circumstances expressly authorized by the Constitution or Act of Congress." Finally, the regulations provide that actions taken by civilian employees of the Department of Defense are not subject to the Posse Comitatus Act. 32 C.F.R. § 213.10(b)(3). This is consistent with the understanding of this Office that Congress did not intend civilian employees to be considered "part of the Army or the Air Force" within the meaning of the Posse Comitatus Act. Therefore, we believe that these Department of Defense regulations are consistent with the Posse Comitatus Act. Of course, if you have further questions regarding the permissibility of certain activities under the Act or regulations, we would be pleased to assist you in such matters.

The remaining issue raised by the Air Force Memorandum that is not addressed by the regulations concerns the extraterritorial application of the Posse Comitatus Act. There is no dispute that the Act does not apply extraterritorially at least where the U.S. military is acting as the government within an occupied territory. *See, e.g., Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949). It is not settled, however, whether the Act restricts extraterritorial use of the military to execute the law in other contexts.[5] As observed in a report pre-

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[4] The regulations identify several statutes that allow military assistance in law enforcement, notwithstanding the Posse Comitatus Act We do not know if this list is exhaustive, nor have we reviewed the statutes listed to determine the scope of their exceptions to the Posse Comitatus Act Thus, you should examine the underlying statute, not just the description in the regulations, before relying on one of these statutes

[5] The Air Force Memorandum cited *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948), *cert denied*, 336 U S. 918 (1949), for the proposition that the Posse Comitatus Act has no extraterritorial application. *Chandler* was the first of three post-World War II cases in which American citizens suspected of treason were arrested in Germany or Japan and brought to the United States for trial. In each instance, the defendant challenged the jurisdiction of the court, contending that the use of the military in the arrest and transportation to the United States violated the Posse Comitatus Act and thus deprived the court of jurisdiction. Each defendant lost. In *Chandler*, the court held:

> [T]his is the type of criminal statute which is properly presumed to have no extraterritorial application in the absence of statutory language indicating a contrary intent Particularly, it would be unwarranted to assume that such a statute was intended to be applicable to occu-

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pared by a House committee considering amendments to the Act in 1982, "it is not possible to definitely conclude whether the Act has extraterritorial application." H.R. Rep. No. 71, 97th Cong., 1st Sess., pt. 2, at 7 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1785, 1789.

Because your request to this Office does not directly raise the full range of issues concerning the extraterritorial effect of the Act, and because resolution of those issues is unnecessary given our conclusion that military assistance to the USNCB is permissible in the instances described by the Department of Defense regulations, we have not considered these issues. We would be glad to do so if the USNCB ever contemplates receiving military assistance for an extraterritorial investigation that is not permitted by any of the exceptions to the restrictions of the Posse Comitatus Act outlined in the regulations.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

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[5] (.continued)
pied enemy territory, where the military power is in control and Congress has not set up a civil regime

171 F.2d at 936 (citations omitted). Then, in *Gillars v. United States*, 182 F.2d 962, 973 (D.C. Cir. 1950), the court held that there was no Posse Comitatus Act violation because the military was the only authority in Germany at the time: "The right to arrest being a part of the right to govern, it cannot be doubted that our Army of Occupation was authorized to arrest notwithstanding [the Posse Comitatus Act]." The court expressly declined to consider whether the Act was generally extraterritorial in its scope. *Id.* Finally, the court in *Iva Ikuko Toguri D'Aguino v United States*, 192 F.2d 338, 351 (9th Cir. 1951), *cert denied*, 343 U.S. 935 (1952), cited *Chandler* and *Gillars* and rejected Tokyo Rose's argument that her transport from Japan to San Francisco by the military violated the Posse Comitatus Act.

Thus, although none of these courts found a violation of the Posse Comitatus Act despite military involvement in law enforcement overseas, the special conditions of the post-war occupation may limit the precedential authority of these decisions regarding the extraterritorial application of the Act generally. In avoiding a decision regarding the extraterritorial application of the Posse Comitatus Act, for example, the court in *United States v. Yunis*, 681 F. Supp. 891, 893 (D.D.C. 1988), noted that "[b]oth *Toguri D'Aguino* and *Chandler* involved situations where the United States military has a substantial presence in post-war enemy territory."

Availability of the Judgment Fund for Settlements with Foreign Countries

If the United States enters into appropriate settlement agreements with foreign countries whose nationals were victims of the 1988 Iran Air incident, the Attorney General would have the authority to certify such settlements for payment from the Judgment Fund, subject to approval by the Comptroller General. The Comptroller General's role is ministerial.

July 10, 1989

MEMORANDUM OPINION FOR THE LEGAL ADVISER
DEPARTMENT OF STATE

This is in response to your letter of June 12, 1989, to Stuart E. Schiffer, Acting Assistant Attorney General for the Civil Division, seeking advice regarding the availability of the Judgment Fund for settlements with foreign countries whose nationals were victims of the 1988 Iran Air Incident. Based on the relevant statutes and this Department's experience with payment of settlements from the Judgment Fund, we have concluded that, under the circumstances described below, the Judgment Fund could be used for this purpose. The Civil Division concurs in this view.

Your letter explains that on July 3, 1988, the USS Vincennes, while involved in actions against hostile Iranian vessels in the Persian Gulf, shot down Iran Air Flight 655. Nationals of several countries, including Iran, Italy, Yugoslavia, the United Arab Emirates, India and Pakistan were aboard the flight; all aboard were killed. On May 17, 1989, the Government of Iran commenced suit against the United States in the International Court of Justice ("ICJ"), alleging that the Vincennes' actions violated the 1944 Chicago Convention on International Civil Aviation and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Iran has demanded compensation for the families of its nationals who were killed. The other governments whose nationals were aboard have also requested compensation but have not yet commenced an action in the ICJ.

The President has announced that, for humanitarian reasons, the United States is prepared to offer ex gratia payments to the families of the victims.[1] You have asked our advice regarding the availability of the

[1] The ex gratia payments would not represent a complete disposition of all possible claims arising out of the incident For example, we understand that Iran may present a claim relating to the loss of the plane

Judgment Fund to make such payments, as settlement of pending or imminent litigation. We assume that, in order to make such settlements, the United States would enter into appropriate agreements with the affected countries, disposing of pending and threatened suits before the ICJ. We also assume that it is likely that the countries other than Iran will shortly seek redress through the ICJ.

The Judgment Fund Appropriation, 31 U.S.C. § 1304(a), appropriates funds necessary to pay "final judgments, awards [and] compromise settlements" when "(1) payment is not otherwise provided for; (2) payment is certified by the Comptroller General; and (3) the judgment, award, or settlement is payable — (A) under section 2414 ... of title 28." Section 2414 of title 28 provides that:

> Payment of final judgments rendered by a State or foreign court or tribunal against the United States ... shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same....
>
> ... [C]ompromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States ... made by the Attorney General ... shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

Thus, the Attorney General can settle actual or imminent litigation if a judgment in that litigation would be payable.

As we noted above, Iran has initiated litigation against the United States before the ICJ. We assume that, because the other countries involved are likely to commence such proceedings soon, suits by them can be regarded as imminent. Under these circumstances, the availability of the Judgment Fund to pay settlements of these ICJ proceedings depends on whether (1) the ICJ is a "foreign court or tribunal" within the meaning of 28 U.S.C. § 2414; (2) payment is provided for other than by 31 U.S.C. § 1304; and (3) the Attorney General could determine that the settlements are in the interests of the United States.

We believe that the ICJ is a "foreign court or tribunal" for purposes of 28 U.S.C. § 2414. While this question is not free from doubt, it is clear that the ICJ is authorized to decide cases between States, and, as your letter points out, the United States has accepted its jurisdiction in numerous treaties.[2] Given its permanent existence and judicial function, the ICJ appears to be a court or tribunal in the ordinary sense of those words. It is also foreign, not American.[3]

As to the second question, we are aware of no statute other than the Judgment Fund Appropriation that authorizes payment of ICJ judgments against the United States. In particular, you have advised us that the Department of State foreign claims statute, 22 U.S.C. § 2669(f), covers only settlements arising out of activities of the Department of State, not military operations. Similarly, the Department of Defense claims-settlement provisions, 10 U.S.C. §§ 2733(a), 2734(a), do not apply to claims arising out of combat.[4]

Finally, it is clear that the Attorney General could readily find that payment is in the interests of the United States, because the President already has determined that prompt compensation to the victims would serve our foreign policy goals.[5]

In sum, if the United States enters into appropriate settlement agreements with the affected governments, the Attorney General would have the authority to certify those settlements for payment from the Judgment Fund, subject to approval by the Comptroller General.[6]

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

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[2] This Office has previously opined that the Iran-United States Claims Tribunal "falls within the reach of foreign tribunals as that term appears in section 2414." *Memorandum for D Lowell Jensen, Acting* Deputy Attorney General, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel (Feb. 24, 1984)

[3] We recognize that judgments of the ICJ are enforceable in United States courts only as a matter of comity, and that the United States is not necessarily bound under international law by all judgments issued against it by the ICJ. We do not think that this keeps the ICJ from qualifying as a court or tribunal.

[4] The Secretary of the Navy has authority to enter into pre-litigation settlements of "admiralty claims" of up to $1,000,000 for "damage caused by a vessel in the naval service." 10 U S C § 7622(a) As we read the statute, however, the category of admiralty claims includes only suits within the admiralty jurisdiction of United States courts, and therefore does not extend to suits before the ICJ

[5] The Department believes that consideration should be given, in setting overall policy on this question, to consider obtaining releases from the families of victims, as well as the countries involved. While only States may bring actions before the ICJ, it is possible that an individual claimant would be able to sue in United States court under the Public Vessels Act, 46 U S.C. §§ 781-790, which provides an action against the government for wrongs committed by public vessels, in circumstances where a private person would be liable; this action, however, is available to foreign nationals only insofar as the laws of their country permit recovery by United States nationals under similar circumstances Moreover, a foreign national might be able to bring an action in foreign court, notwithstanding his country's waiver of its claim on his behalf. The extent to which individual waivers should be required in order to foreclose the possibility of such litigation is a question of policy concerning the interests of the United States.

[6] The Judgment Fund Appropriation states that payment will be made only when authorized by the Comptroller General It is our view that the Comptroller General's role in this process is ministerial, so that his certification simply follows from satisfaction of the other requirements and completion of the necessary paperwork. Indeed, we believe that were the requirement of certification to be other than a ministerial function it would raise serious questions under the Supreme Court's holding in *Bowsher v Synar*, 478 U S 714 (1986) (Congress cannot constitutionally assign to the Comptroller General, an arm of Congress, the duty of executing the laws).

Application of the Federal Bribery Statute to Civilian Aides to the Secretary of the Army

A Civilian Aide to the Secretary of the Army is a public official who is barred by 18 U.S.C. § 201(c) from receiving anything of value because of an official action taken.

July 12, 1989

MEMEORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE ARMY

This letter responds to your Office's request for an opinion on whether the federal bribery statute, 18 U.S.C. § 201(c), applies when a Civilian Aide to the Secretary of the Army receives an offer for reimbursement of expenses incurred in the discharge of Civilian Aide duties.[1]

We agree, based on the statement of facts in the Army Letter, that it was reasonable for the Army to conclude that the Civilian Aide should not accept the offer for reimbursement from the private, non-profit foundation for these services. Although there may be instances in which the conduct of a Civilian Aide could give rise to a prosecution under section 201(c), we do not believe that it would be useful or appropriate to speculate now regarding the legality of future cases that may raise similar issues. Our reasons for these conclusions are set forth below.

I. Background

A Civilian Aide is a private citizen appointed by the Secretary of the Army to represent the civilian community. Army Regulation 1-15, *Civilian Aides to the Secretary of the Army*. Civilian Aides serve without salary or other compensation by the federal government, although they may receive reimbursement for certain travel expenses. A private, non-profit foundation offered to pay the expenses incurred by one of these Civilian Aides in the discharge of her official duties, including the cost of any secretarial services needed in the future.[2] Your Office advised the Civilian Aide to decline the offer because of your concern that the con-

[1] Letter for Mr Douglas W Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, from Darrell L. Peck, Acting General Counsel, Department of the Army (July 8, 1988) ("Army Letter")

[2] Army Letter at 1.

tribution might be prohibited by 18 U.S.C. § 201(c). You have sought guidance about what to do if this situation arises again.

II. Analysis

Section 201(c)(1)(B) of the federal bribery statute subjects to criminal liability "[w]hoever — otherwise than as provided by law for the proper discharge of official duty — being a public official, ... directly or indirectly ... accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person." The requirements for criminal liability under this provision are three-fold: (1) the person must be a "public official"; (2) that official must accept or agree to receive anything of value; and (3) the thing of value must be given for or because of any official act by such official.

A. Public official

We believe that a Civilian Aide would be considered a "public official" under the statute. Section 201(a) defines a "public official," in relevant part, as a "person acting for or on behalf of the United States, or any department ... of Government thereof ... in any official function, under or by authority of any such department." Civilian Aides act on behalf of and by the authority of the Department of the Army. The Supreme Court has enforced a broad construction of the "public official" provision, "agreeing with the Government" that section 201 is a comprehensive statute aimed at all who act on behalf of the government. *Dixson v. United States*, 465 U.S. 482, 496 (1984). The *Dixson* court stated:

> To determine whether any particular individual falls within this category, the proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities. Persons who hold such positions are public officials within the meaning of § 201 and liable for prosecution under the federal bribery statute.

Id. In *Dixson*, the Court held that the term included "officers of a private, nonprofit corporation administering and expending federal community development block grants" because, as administrators of the subgrant, they were responsible for a program that distributed federal funds according to federal guidelines. *Id.* at 497.[3] As the *Dixson* court noted,

[3] *See also United States v Kirby*, 587 F 2d 876 (7th Cir. 1978) (grain inspector employed by private company but licensed by USDA was public official); *United States v Gallegos*, 510 F Supp. 1112 (D N.M.

Continued

since the original enactment of the bribery law in 1853 Congress has enacted successive statutes using "broad jurisdictional language," *id.* at 491, and in keeping with this intent, the courts have broadly interpreted the phrase "person acting for or on behalf of the United States." *Id.* at 492.

Although Civilian Aides are not federal employees, Army Regulation 1-15, § 5(b), they perform numerous functions that would appear to meet the test of "acting for or on behalf of the United States." *See, e.g.*, Army Regulation 1-15, § 4(d) (responsibility to provide "individual advice" to the Secretary of the Army and others about public attitudes towards the Army, to develop programs to attain maximum understanding and cooperation between the civilian community and the Army, and to disseminate information to the public about the Army's objectives); *id.* § 13 (travel as Civilian Aide paid for by government as official travel); *id.* § 10 (detailing Civilian Aides' access to classified information); *id.* § 11 (same). This Office previously has considered the duties and responsibilities of the Civilian Aides in determining whether such aides were subject to the Emoluments Clause of the Constitution. In that opinion, we noted that

> the United States reposes great trust in the Aides, and relies upon them to perform various duties that further the national defense.
>
> These same attributes — the reposing of trust, the necessity of undivided loyalty to the United States, the importance of the task performed by those who hold the office, personalized selection and access to classified information — characterize the "office of trust" for purposes of the Emoluments Clause .... We have no difficulty concluding, therefore, that the position of Civilian Aide to the Secretary of the Army is an "Office of Trust" under the United States for purpose of the Emoluments Clause.[4]

In keeping with this view and consistent with the *Dixson* decision, we believe that Civilian Aides should be considered "public officials" for purposes of 18 U.S.C. § 201.

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[3](. continued)
1981) (employee of state government who worked under direct supervision of federal official in administration of federal program was public official), *United States v. Griffin*, 401 F. Supp 1222 (S D. Ind 1975), *aff'd without opinion sub nom United States v Metro Management Corp.*, 541 F2d 284 (7th Cir 1976) (employee of a private company who acted as independent contractor for HUD was public official); S. Rep No 2213, 87th Cong., 2d Sess. 8 (1962) (term "include[s] officers and employees of the three branches of government, jurors, and other persons carrying on activities for or on behalf of the Government").

[4] Memorandum for James H. Thessin, Assistant Legal Adviser for Management, Department of State, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re. Application of the Emoluments Clause to a Civilian Aide to the Secretary of the Army* (Aug. 29, 1988) (citations and footnotes omitted).

B. Thing of value

The second requirement of criminal liability is that the Civilian Aide receive "anything of value." This requirement appears not to have been frequently litigated. Based on existing case law, however, we believe that items such as the reimbursement expenses you describe for prior expenses incurred by the Civilian Aide and future secretarial services probably would meet the statute's test. *See, e.g., United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988) (finding vacation expenses provided to Congressman to be a thing "of value"), *cert. denied*, 489 U.S. 1052 (1989); *United States v. Gorman*, 807 F.2d 1299 (6th Cir. 1986) (finding future employment promised by a third party to be a thing "of value"), *cert. denied*, 484 U.S. 815 (1987).

C. Received for an official act

The legislative history of the 1962 formulation of this provision, which has remained substantially unchanged, states that "[t]he term 'official act' is defined to include any decision or action taken by a public official in his capacity as such." S. Rep. No. 2213, 87th Cong., 2d Sess. 8 (1962). One court has held that the mere use by a public official of the status of his office is sufficient to warrant liability under the statute. *See, e.g., United States v. Biaggi*, 853 F.2d at 98 (noting that congressman's "invocation of his position and of congressional interest in his intercession with others on behalf of a constituent" is to be considered an official act). Absent particular facts, it is difficult to postulate the circumstances under which something of value would be deemed to be given because of an official act by a Civilian Aide.[5] However, given the apparent breadth of the *Biaggi* court's holding and our conclusion that Civilian Aides are public officials, we recommend that you caution the Civilian Aides to discuss with your Department any offer of funds or other assistance that they receive from a third party.

III. Conclusion

We believe that a Civilian Aide is a public official who is barred by 18 U.S.C. § 201(c) from receiving anything of value because of an official action taken. Whether this Department would prosecute a case of this type would depend upon the particular facts and circumstances.

We reiterate that we believe your advice to the Civilian Aide in the circumstances you described was appropriate and consistent with the Army

[5] For example, unless we were to interview officials at the private foundation that made the offer to the Civilian Aide in your example, we would not be able to judge whether the offer was made because of longstanding friendship with the particular Civilian Aide, because of disinterested community spirit and pride in her success, or because of a corrupt motive

Regulation's direction that Civilian Aides "avoid any situation producing an actual or apparent conflict" of interest between their private lives and their roles as Civilian Aides.[6] Should this problem arise again, we invite you to consult with us or with the Public Integrity Section of the Criminal Division.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

[6] Army Regulation 1-15, § 6(a)

Constitutionality of the Qui Tam Provisions of the False Claims Act

Qui tam suits brought by private parties to enforce the claims of the United States violate the Appointments Clause of the Constitution because qui tam relators are "Officers of the United States" but are not appointed in accordance with the requirements of the Appointments Clause.

Private qui tam actions violate the doctrine of Article III standing because the relator has suffered no personal "injury in fact."

The qui tam provisions of the False Claims Act violate the separation of powers doctrine because they impermissibly infringe on two aspects of the President's authority to execute the laws: the discretion whether to prosecute a claim and the authority to control the conduct of litigation brought to enforce the Government's interests.

Given qui tam's clear conflict with constitutional principles, any argument to sustain the qui tam provisions based upon historical practice must fail.

July 18, 1989

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL*

I. OVERVIEW AND SUMMARY

A. The Issue

The issue presented here is whether the so-called "qui tam" provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733 ("Act"), are constitutional. This may well be the most important separation of powers question you will have to address as Attorney General.

In these qui tam provisions, Congress purports to authorize *any* person to prosecute — on behalf of the United States and in the name of the United States — a civil fraud for treble damages and penalties against any person who allegedly makes a false claim to the U.S. government. Unlike normal citizen suits, the qui tam plaintiff — or so-called "relator" — is

*Editor's Note: This memorandum was not intended to present the official position of the Department of Justice at the time of its writing, but rather was intended to contribute to a discussion within the Department over what position should be adopted The views on the Appointments Clause expressed in the memorandum have been superseded by a subsequent Office of Legal Counsel memorandum. *See* Memorandum for the General Counsels of the Federal Government from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re. The Constitutional Separation of Powers between the President and Congress* 20-21 n 53 (May 7, 1996) (to be published)

empowered to sue, on the government's behalf, even if he has not sustained any personal injury as a result of the wrongdoer's alleged misconduct. As a bounty for prosecuting the fraud, the relator receives up to thirty percent of any damages and penalties recovered, with the balance paid into the U.S. Treasury. The relator is empowered to prosecute the government's claim even when the Attorney General has determined that there is no valid claim or that pursuing the suit is not in the interests of the United States.

Through qui tam, Congress has attempted to create universal standing to prosecute purely public offenses. These qui tam suits pose a devastating threat to the Executive's constitutional authority and to the doctrine of separation of powers. If qui tam suits are upheld, it would mean Congress will have carte blanche to divest the executive branch of its constitutional authority to enforce the laws and vest that authority in its own corps of private bounty hunters. Simply by attaching a penalty to the violation of any law and by offering a bounty to any person who sues, Congress effectively could "privatize" all civil law enforcement. Indeed, through this device, Congress has authorized each of its own members (as any "person") to enforce the laws directly.

In several qui tam suits currently pending in federal district court, defendant contractors have moved to dismiss, contending that the qui tam mechanism is unconstitutional. Several courts have asked the Department of Justice to express a position. The Office of Legal Counsel, the Civil Division, and the former Office of Legal Policy all agree that the qui tam provisions in the False Claims Act are unconstitutional. We believe they violate the Appointments Clause, infringe on the President's core Article II authority to execute the law, and violate Article III standing doctrine. The Civil Division would like to enter an appropriate case and, either as amicus or by intervention, present the executive branch's arguments against the constitutionality of qui tam. The Solicitor General argues that we should intervene in district court to support the constitutionality of qui tam.

B. Background

The use of qui tam suits arose in fourteenth century England as an aid to government's primitive law enforcement capabilities. These statutes authorized private "informers" to bring criminal prosecutions for violation of certain penal laws. Upon conviction of the wrongdoer, the private prosecutor was given a share of the penalty as a reward. While some statutes permitted prosecution only by a person who had suffered injury, other statutes authorized "any person," regardless of injury, to prosecute a wrongdoer in the name of the sovereign for violation of a penal law. Initially, these informer actions were brought by criminal indictment or information, but eventually informers could opt to bring their suits as

either a criminal or civil action. This experiment with private law enforcement had an unhappy history of abuse. Qui tam suits fell into disfavor and, from the sixteenth century forward, their use was progressively curtailed.

In the United States, during the emergency of the Civil War, Congress resorted to this archaic device in response to widespread contractor fraud. The False Claims Act of 1863, 12 Stat. 696, authorized any person to prosecute, in the name of the United States, a civil action against a contractor for alleged fraud against the United States. As a reward, the relator received a share of any recovery. After the Civil War, this qui tam statute fell into relative desuetude. By 1986, except for a flurry of activity during World War II, it had become an anachronism.

In 1986, Congress, dissatisfied with the way the executive branch was enforcing government procurement laws, sought to breathe new life into this dormant device. To stimulate private enforcement suits, Congress amended the False Claims Act to provide for treble damages and penalties of up to $10,000 for each false claim, and to provide for a bounty to the relator of up to thirty percent of any recovery (the "1986 Amendments"). The congressional proponents of these amendments made no pretense about the fact that they distrusted the executive's willingness or ability to enforce the law properly, and they stated that their purpose was to "deputize" private citizens to ensure effective law enforcement.

In the two years since enactment of the 1986 Amendments, there has been a massive upsurge in qui tam actions — over 150 suits have been filed. These actions have disrupted the civil and criminal enforcement activities of the Department. *See* Memorandum for the Solicitor General, from Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division (June 15, 1989). They have also undermined the executive's ability to administer complex procurement contracts and, in some cases, have caused serious national security concerns. The 1986 Amendments have also spawned the formation of full-time "bounty hunting" groups — ersatz departments of justice — that go about prosecuting civil fraud actions in the name of the United States.

C. Qui Tam's Unconstitutionality

The Office of Legal Counsel believes that the qui tam provisions of the False Claims Act are patently unconstitutional. In our view, this is not even a close question. Our conclusion rests on three grounds.

First, we believe that private qui tam actions violate the Appointments Clause of the Constitution. Art. II, § 2, cl. 2. The Supreme Court has repeatedly held that conducting litigation on behalf of the United States to enforce the rights of the United States must be carried out by an executive branch official or other properly appointed government officer. The Constitution thus does not permit Congress to vest governmental law

enforcement authority in self-selected private parties, who have not been injured and who act from mercenary motives, without commitment to the United States' interests and without accountability.

Second, we believe qui tam suits violate Article III standing doctrine. The Supreme Court has repeatedly held that under Article III, a plaintiff is ineligible to invoke federal judicial power unless he can demonstrate that he has suffered "injury in fact" as a result of the defendant's allegedly illegal conduct. Qui tam relators suffer no injury in fact and thus fail to meet this bedrock constitutional requirement. Because Congress may not abrogate this requirement, the False Claims Act's grant of universal standing to *any* person violates Article III.

Third, we believe that qui tam actions violate the doctrine of separation of powers. The Supreme Court has consistently ruled that the authority to enforce the laws is a core power vested in the Executive. The False Claims Act effectively strips this power away from the Executive and vests it in private individuals, depriving the Executive of sufficient supervision and control over the exercise of these sovereign powers. The Act thus impermissibly infringes on the President's authority to ensure faithful execution of the laws.

Until now, no federal court has ever considered or addressed the constitutionality of qui tam actions. Nor, to our knowledge, has any Attorney General ever conceded the constitutionality of the device. Indeed, in 1943, Attorney General Biddle called for its repeal. He contended that it was the duty of the Department of Justice to enforce the laws and that qui tam suits interfered with that responsibility. During these debates in 1943, a leading Senate proponent of qui tam complained:

> [T]he Congress enacted that statute in 1863. I ask any Senator to name one case, from 1863 until 1942, in which the Attorney General of the United States tried to enforce the statute. *From the day the statute went on the statute books to the present, the Attorneys General, whether Democrats or Republicans, fought it.*

89 Cong. Rec. 10,697 (1943) (emphasis added).

D. Reasons for Opposing Qui Tam

In my view, the Department of Justice has an obligation to the President and to the Constitution to resist this encroachment on executive power. Consequently, I recommend that the Civil Division be permitted to present the executive branch's arguments against the constitutionality of the qui tam device. I submit that three considerations dictate this course.

First, qui tam poses a potentially devastating threat to the President's constitutional authority. If qui tam is upheld, there would be nothing to

prevent Congress from using the device to eviscerate all of the executive branch's civil law enforcement authority. We can expect to see the inexorable extension of qui tam into such areas as securities fraud, savings and loan fraud, and civil rights. Once the facial constitutionality of the device is conceded, there is no principled basis for limiting its future use. As Justice Scalia noted with regard to the independent counsel statute:

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). The rationale for the special prosecutor statute at least can be restricted to narrow circumstances. Qui tam is far more dangerous: there is simply no way to cage this beast.

Not only would qui tam work a sea change in the balance of power between the Congress and the Executive, but it would, in my view, undermine the liberties of the American people — which is what the doctrine of separation of powers ultimately is designed to safeguard. One of the central tenets of the Framers was that the power to execute the law must be kept in hands that are both independent of the legislature and politically accountable to the people. This enforcement structure was designed to protect the people from the improvident or tyrannical enforcement of the laws. Qui tam allows Congress to circumvent the Executive's check and to have its laws enforced directly by its own private bounty hunters. This destroys the longstanding principle that all three branches must concur before the sovereign may exact public penalties from an individual.

The second consideration that dictates opposing the constitutionality of qui tam is the very force of the arguments against it. Taken together — or taken alone — the three constitutional objections against qui tam are formidable. Indeed, as a matter of principle, they are irresistible. They are by no means extreme arguments. On the contrary, they are — as the Solicitor General would acknowledge — well within the mainstream and firmly rooted in the consistent rulings of the Supreme Court. To date, the Supreme Court has been unyielding in its insistence both upon "injury in fact" as the essential requirement of standing and upon strict compliance with the Appointments Clause whenever significant governmental authority is vested in an individual.

But even if it were a close question — and I do not think that it is — it is not our job, when the President's core constitutional powers are at stake, to "decide" these cases as if we were an Article III judge. We are

the Executive's only advocates, and when the President's core powers are at stake, the Executive's case is so compelling, and the practical consequences of defeat so grave, we have a duty to advance the President's cause. Indeed, the Framers expected that a "great security" against the gradual erosion of the separation of powers was precisely the willingness and disposition of each branch's officers to resist the encroachments of the others: "Ambition must be made to counteract ambition." *The Federalist No. 51*, at 349 (James Madison) (Jacob E. Cooke ed. 1961).

The third consideration that dictates opposing qui tam relates to the posture of these cases. Because of the unusual way these cases arise, we have nothing to lose by challenging the constitutionality of qui tam. The Department of Justice is not a formal party to these cases. Private defendants, ably represented, have directly challenged the constitutionality of the qui tam provisions. The U.S. Senate has filed amicus briefs in support of qui tam. The fundamental powers of the President are thus being decided in our absence. This is not a case in which we have the freedom to pick where or when to fight. This litigation will proceed *with or without* us and will undoubtedly end up in the Supreme Court.

As Madison noted, because of the breadth of the constitutional powers of the legislative branch, that branch easily can "mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments." *The Federalist No. 48*, at 334 (James Madison) (Jacob E. Cooke ed. 1961). Madison therefore found it often to be a "question of real-nicety" whether a particular measure would extend beyond the legislature's sphere. *Id.* Despite the difficulties perceived by the Solicitor General, no such "question of real-nicety" is involved here. If we fail to object to qui tam, it almost certainly will be upheld. If we enter the case and vigorously contest qui tam's constitutionality, we stand a good chance of winning or, at least, obtaining a decision that restricts qui tam. Thus, this is a case in which we will be in no worse position if we go in and lose than we are in right now. In short, there is no "downside" here, and this is precisely the kind of case where we should be aggressively resisting encroachment.

E. The Solicitor General's Position

The Solicitor General admits that qui tam poses "grave dangers" to the Presidency. *See* Memorandum for the Solicitor General, from Richard G. Taranto, Assistant to the Solicitor General at 3, 10-11 (June 26, 1989) ("Taranto Memo"). He appears to perceive the issue of qui tam's constitutionality as a "close" one. *See id.* at 3. Nevertheless, he is recommending that the Department intervene in district court to *support* the facial constitutionality of the qui tam statute. The Solicitor General's position would require the surrender at the outset of the two strongest arguments against qui tam — the Appointments Clause and Article III standing arguments.

The Solicitor General assures us, however, that he will reserve the right to use a separation of powers balancing test to defend against encroachment if qui tam is unconstitutionally applied in the future. *Id.* at 12-14.

To uphold qui tam, the Solicitor General is prepared to disregard decades of clear Supreme Court jurisprudence and the application of well-settled constitutional principles. His sole reason for embracing qui tam is its historical usage. *Id.* at 4-5. This argument — that past usage alone is enough to establish a practice's constitutionality — is untenable both as a matter of history and of law. Moreover, the Solicitor General's proposed strategy of preemptive concession makes no sense as a litigation tactic.

The Solicitor General vastly overstates the historical acceptance of qui tam. Prior to passage of the False Claims Act, the only significant use of qui tam occurred in the Federalist period, during which time it appears that perhaps six statutes were enacted that may have authorized penalty actions by private persons. These statutes involved relatively arcane areas; one set fines for illegally trading with the Indians, another set fines for misconduct by census-takers. The record, however, is most unclear as to whether these statutes reflected *any* appreciable acceptance of qui tam actions by persons who had sustained no injury. It appears from actual practice that with very few exceptions, suits under these statutes were brought either by government officials (for whom the moiety was compensation) or by persons who had suffered injury in fact. There is little evidence that the long-accepted historical practice on which the Solicitor General relies ever existed.

It is easy to understand why qui tam has been so marginal a practice in the history of federal law. Adopted when the Executive was embryonic, the early qui tam statutes were essentially stop-gap measures, confined to narrow circumstances in which the government lacked the institutions to enforce the law. The intent of those statutes was to assist a fledgling executive, not supplant it. As the Executive's law enforcement capabilities gathered strength, qui tam rapidly fell into disuse. A fair reading of the history of qui tam in the United States reveals it as a transitory and aberrational device that never gained a secure foothold within our constitutional structure because of its fundamental incompatibility with that structure.

Moreover, even strong historical support for qui tam could not cure the practice's constitutional infirmities. No Supreme Court case has ever given history the kind of dispositive weight that the Solicitor General would here. On the contrary, the Supreme Court has repeatedly stated that history alone can never validate a practice that is contrary to constitutional principle, even when the practice "covers our entire national existence and indeed predates it." *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970). *Accord Marsh v. Chambers*, 463 U.S. 783, 790 (1983). There are numerous examples of statutes passed by the early congresses that have been held unconstitutional or clearly would be held unconstitution-

al today. *See infra* p. 233. Thus, if a past practice cannot be reconciled with constitutional principle, an appeal to history alone cannot sustain it. In the case of qui tam, absent the invocation of history there is no question about the practice's unconstitutionality.

Although history alone cannot validate a plainly unconstitutional practice, the Supreme Court has indicated that close cases will be resolved in favor of the constitutionality of certain strong historical traditions. The Court weighs several factors in determining the authority of a tradition, including (1) whether there is evidence that the Framers actually considered the constitutional implications of their actions; (2) whether the practice is so longstanding and pervasive that it has become "part of the fabric of our society;" and (3) whether the practice can be accommodated within the constitutional framework in a way that does not undermine settled principles. *See, e.g., Young v. United States ex rel. Vuitton et Fils*, 487 U.S. 787 (1987); *Marsh v. Chambers*; *Walz v. Tax Commission*.

Qui tam would deserve no deference under these criteria. There is no evidence that the Framers considered the constitutional status of qui tam. On the contrary, the early statutes are the kind to which the Court gives no weight — "action ... taken thoughtlessly, by force of long tradition and without regard to the problems posed." *Marsh v. Chambers*, 463 U.S. at 791. Nor can it seriously be maintained that qui tam is "part of the fabric of our society." Never more than a marginal device, it is today an anachronism that easily can be excised without disruption. Qui tam's principle of private law enforcement, however, is so fundamentally incompatible with established doctrines of standing and separation of powers that, if accepted, it would substantially undermine these doctrines. Thus, qui tam is not merely an innocuous historical oddity that can be narrowly accommodated, but is, by nature, an exception that will consume the rule.

Further, the Solicitor General's use of history is internally inconsistent. None of the old qui tam statutes upon which the Solicitor General relies allowed the Attorney General to intervene once the relator brought the case. However, the Solicitor General concludes that the current statute will be unconstitutional if it is applied to limit the Attorney General's participation in the suit. It is difficult to understand how the Solicitor General can give dispositive historical weight to statutes that would be unconstitutional under his theory for arguing qui tam's validity.

Finally, as a tactical matter, the Solicitor General's strategy of preemptive concession is extremely unwise. It voluntarily surrenders at the outset the two strongest objective arguments against qui tam. Once those are abandoned, all that will remain to protect the President's interests will be a subjective balancing approach and the argument that at some undefined point the degree of encroachment will become unbearable. This approach leaves executive powers entirely vulnerable to an adverse judicial decision.

II. THE STATUTE AND ITS IMPACT

A. The Statute

The False Claims Act provides that anyone who presents a false money claim to the Federal Government shall be liable for double or treble damages and civil penalties of up to $10,000 per false claim. 31 U.S.C. § 3729. Under the qui tam provisions of the Act, any person may bring a civil action "for the person and for the United States Government" to recover damages and penalties. *Id.* § 3730(b)(1). The qui tam action, although initiated by a private person called a relator, is "brought in the name of the Government." *Id.*

The details of the qui tam mechanism demonstrate that the real party in interest is the United States, with the relator functioning as attorney for the United States. When a private person brings a qui tam action, he must serve on the Government the complaint and a written disclosure of the information he possesses. *Id.* § 3730(b)(2). The Attorney General is then forced to decide, within 60 days, whether to "intervene and proceed with the action." *Id.* By the end of that period, the Attorney General must inform the court whether the government shall proceed; if not, "the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B).

Where the Attorney General decides not to proceed with the case, the relator alone represents the government. He has full control over the litigation, including discovery, admissions, and presentation of evidence, subject only to a few specific limitations.[1] If the relator prevails, most of the recovery is paid into the Treasury, with the relator keeping between twenty-five and thrity percent as his reward. *Id.* § 3730(d)(2). The relator is also entitled to attorneys' fees. *Id.*

If the Attorney General initially declines to proceed with the case, he may intervene later only upon a showing of "good cause," but such intervention does not limit "the status and rights of the person initiating the action." *Id.* § 3730(c)(3). Thus, the relator retains primary control over the case despite the government's intervention. Moreover, the legislative history to the 1986 Amendments expressly states that any judgment or settlement in a case conducted exclusively by the relator binds the Government under principles of preclusion. S. Rep. No. 345, 99th Cong.,

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[1] A qui tam action may be dismissed only if the court and the Attorney General give written consent. 31 U.S.C. § 3730(b)(1) If the Government shows that discovery by the relator would interfere with ongoing civil or criminal investigations or prosecutions, the court may stay discovery for a period not to exceed 60 days The court may impose further stays if the Attorney General shows "that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the [qui tam] action will interfere with the ongoing criminal or civil investigation or proceedings " *Id* § 3730(c)(4). The relator is under no general constraint to pursue Department of Justice litigation policies or procedures.

2d Sess. 27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5292. This stands to reason: since the relator's action is in the name of the United States, the relator seeks a share of damages inflicted on the United States, and any recovery (minus the relator's moiety) is paid into the Treasury.

In cases in which the Attorney General does enter within the initial sixty-day period, the government has "primary responsibility for prosecuting the action." 31 U.S.C. § 3730(c)(1). The relator nevertheless has "the right to continue as a party to the action." *Id.* This participation right gives the relator a substantial role in the litigation. The relator has the right to a hearing if the Attorney General decides to dismiss the action. *Id.* § 3730(c)(2)(A). If the Attorney General proposes to settle the case but the relator objects, the settlement may go forward only if "the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* § 3730(c)(2)(B). In addition, the relator participates fully at trial, calling witnesses, cross-examining witnesses, and testifying, except that on the government's motion "the court may, in its discretion, impose limitations on the [relator's] participation." *Id.* § 3730(c)(2)(C).

In cases primarily conducted by the Attorney General, the relator receives between 15 and 25 percent of the proceeds, plus reasonable expenses (including attorneys' fees), as determined by the court. *Id.* § 3730(d)(1). Moreover, if the Government decides to pursue its claim in some forum other than a False Claims Act suit — such as an administrative penalty action — the relator has the same rights in that proceeding that he would have in court. *Id.* § 3730(c)(5).

In short, where the Government decides not to join, the relator conducts the suit as if he were the Attorney General, except that unlike the Attorney General he takes no oath of office, he bears no loyalty to the Government or continuing responsibility for implementing its policies, and he receives up to thirty percent of the suit's proceeds. If the Government enters the suit, the relator continues to represent the United States, subject to the court's (not the Attorney General's) control. This arrangement carries out the purpose that underlay the 1986 Amendments. Congress's "overall intent in amending the qui tam section of the False Claims Act is to encourage more private enforcement suits." S. Rep. No. 345 at 23-24. In order to do that, Congress decided to "deputize ready and able people ... to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government." 132 Cong. Rec. 29,322 (1986).

B. The Statute's Impact

The heart of the statute's impact derives from the fact that the qui tam provisions interfere with the Attorney General's discretion whether to initiate a suit under the False Claims Act. That interference adversely

affects both the Government's law enforcement powers and its contracting powers.

1. The Government's Enforcement Role

a. *The decision to initiate litigation.* First and most obviously, the qui tam mechanism removes from the Department's hands the decision whether and when to commence an action. Once a relator files his complaint, we have 60 days within which to decide whether to join. This is true even if we are pursuing an investigation that is far from ready for decision whether to prosecute.[2] In several cases, district courts already have refused to grant us extensions in order to avoid interference with ongoing criminal investigations. *See, e.g., United States ex rel. McCoy v. California Medical Review Inc.*, 723 F. Supp. 1363 (N.D. Cal. 1989).[3] If a stay is unavailable, the civil case proceeds with or without us, sometimes alerting targets of criminal investigations; sometimes resulting in disclosure of key information in our possession, including our litigating positions; and sometimes complicating attempts to prepare a comprehensive plea arrangement and civil settlement.

In addition, informal avenues of redress and adjustment can be cut off. Instead, the Government may be forced to choose quickly between leaving the suit wholly to the relator or taking the very serious step of charging fraud against a private person.[4] Such a charge is a serious matter, whether brought by the Department or a relator. In many cases prosecutorial discretion would counsel against our bringing a False Claims Act suit; for example, we might find that although a contractor was technically liable, it has fired the employees responsible for the fraud. A relator, however, is interested only in money, not in the faithful execution of the laws. He has taken no oath of office, has no obligation of loyalty to the Government or its interests, and has no continuing responsibility for the governmental programs at issue. Rather, he holds a personal financial stake that in all other contexts would disqualify him from representing the Government's interests.

United States ex rel. Hyatt v. Northrop Corp., No. CV 87-6892 KN (Jrx), 1989 U.S. Dist. LEXIS 18940 (C.D. Cal. Dec. 27, 1989), provides an

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[2] Contrary to our experience, the Senate Committee believed that "with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision" of fraud actions running into millions or billions of dollars. S. Rep. No. 345 at 24-25.

[3] This accords with the legislative history, which states that "the Committee does not intend that criminal investigations be considered an automatic bar to proceeding with a civil fraud suit." S. Rep. No. 345 at 25. Instead, the Senate Committee stated that if the Government obtains an initial stay, "the court should carefully scrutinize any additional Government requests for extensions by evaluating the Government's progress with its criminal inquiry." *Id.*

[4] In some circumstances, we may be considering enforcement action less draconian than a treble-damages-plus-penalties action under the False Claims Act. Once a relator has ensured that there will be a treble-damages action, however, we may be forced either to scrap a single-damage suit or attempt to handle it in conjunction with the other.

example of a case in which the qui tam provisions have allowed a relator to force a suit that this Department would not have pursued. In that case, eight employees are suing Northrop for alleged fraud in the manufacture of inertial measurement units ("IMUs") for the MX (Peacekeeper) Missile. They seek restitution of $1 billion, $250 million in compensatory damages, and $5 million in punitive damages. Two of the eight relators had filed an earlier qui tam action against Northrop that was dismissed because the information on which it was based was already in the Government's possession. The pending suit makes numerous allegations of fraud, including that Northrop knowingly delivered defective IMUs to the Air Force, that it failed to test or inspect all components properly, and that it misrepresented the performance of operation audits and responsive corrective action. In fact, the Civil Division's memorandum reviewing the relators' suit notes that the complaint is so broad that it encompasses nearly every action undertaken by Northrop in the course of the manufacture and delivery of the IMUs.[5] The Civil Division declined to enter the relators' action because extensive investigations of Northrop's operations by the U.S. Attorney and the Air Force failed to produce evidence of fraud. *See* Civil Division Memo at 8-15. Moreover, the Air Force's records show that the actual performance of the allegedly defective IMUs has far exceeded expectations, thus rebutting the relators' claims of fraud. *See id.* at 12. Nevertheless, the relators are permitted by the qui tam provisions to continue to pursue their suit on behalf of the Government to satisfy their personal purposes, whether for harassment or in hopes of forcing Northrop to pay them a settlement award.

b. *The conduct of litigation.* When we do enter a case, the relator retains his rights to participate, which often are exercised in ways adverse to the government's interests. The Civil Division has already encountered claims by relators that they, as representatives of the United States, are entitled access to our investigative files and personnel. Moreover, all disputes between us and the relator over the conduct of the case — from discovery to witness selection to cross-examination — are decided by the court. This leaves open the question whether the Act has transferred the executive power to the relator or the district judge, but it is clear that that power has been transferred away from the Attorney General.[6]

When we do not intervene, the Department nevertheless must spend resources monitoring cases that it had for good reason decided not to bring. Because it is never possible to tell what prejudice we might suffer

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[5] *See* Memorandum for John R. Bolton, Assistant Attorney General, Civil Division, from Michael F Hertz, Director, Commercial Litigation Branch, at 7 (the "Civil Division Memo"), recommending that the Department decline to enter the relators' suit.

[6] This arrangement, by which the relator looks over our shoulder at trial, is precisely what Congress intended. At trial, the relator is to act as "a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason " S Rep No 345 at 26

from a relator's conduct, we must keep close track of these cases. Other difficulties will also arise; for example, the Civil Division has informed us that in one case a qui tam relator sought to depose a government investigator who had worked on a grand jury probe of a contractor other than the qui tam defendant.

c. *Judgment and settlement.* Perhaps the most important interference comes if we seek to settle a case. If we negotiate a settlement but the relator objects, the *court* must determine whether the arrangement is "fair, adequate and just" under the circumstances — a judicial role that to our knowledge is unique.[7] The perverse results this provision can have are reflected in the court's action in *Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), *cert. denied*, 488 U.S. 901 (1988). In that case, a relator claimed that General Electric had presented false statements to the Defense Department. Many of General Electric's records were indeed incorrect, but the inaccurate accounting system involved had resulted in net *undercharges* to the Government. We negotiated a settlement under which General Electric would pay a substantial penalty and waive its counterclaims growing out of the undercharges. The relator objected, and the district court refused to accept the settlement, lecturing us on the inadequacy of our investigation into the matter, even though the Defense Department was already quite familiar with the situation.[8] A few years later, we succeeded in settling for the original figure.

Where we do not enter a qui tam action, the relator either litigates the case to judgment, which binds the United States, S. Rep. No. 345 at 27, or settles it, likewise binding the Government. This may be quite significant. For one thing, a qui tam relator, who has no enforcement interest, may allege far more corruption than he can prove. Even if that corruption were real, if the relator could not prove it, a judgment against him on those issues would bar us from acting later. In addition, relators such as discharged employees may bring a qui tam count in conjunction with private causes of action. To settle the private claims, the relator may have an incentive to trade the qui tam elements, since he receives only a frac-

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[7] Even the Tunney Act, 15 U.S.C. § 16(e), which subjects antitrust *consent decrees* to judicial review as to the public interest, does not apply to settlements, which heretofore were entirely outside the court's jurisdiction There are very serious doubts as to the constitutionality even of the Tunney Act it intrudes into the executive power and requires the courts to decide upon the public interest — that is, to exercise a policy discretion normally reserved to the political branches Three Justices of the Supreme Court questioned the constitutionality of the Tunney Act in *Maryland v. United States*, 460 U.S 1001 (1983) (Rehnquist, J , joined by Burger, C.J., and White, J , dissenting).

[8] In *United States ex rel Stillwell v Hughes Helicopters, Inc* , 714 F. Supp. 1084 (C D Cal 1989), the defendant argued that the qui tam mechanism was unconstitutional on its face and pointed to the district court's conduct in *Gravitt* as an example of an illicit transfer of authority to the courts. The judge in *Stillwell*, in upholding the qui tam provisions (which he presumed to be constitutional, since they had not been challenged by the executive branch), replied that the *Gravitt* court's views of our conduct were entirely reasonable *Id.* at 1092-93 n.8. This may indicate that in some qui tam cases the courts will not need to second-guess our decision to settle, because they will be able to dispose of the issue by second-guessing our investigative zeal

tion of any payment attributed to them. We must therefore carefully review every qui tam settlement and, if it is defective, try to persuade the judge to reject it.

Moreover, the collateral effects may go beyond barring further False Claims Act litigation. In *United States v. Halper*, 490 U.S. 435 (1989), the Supreme Court held that civil penalties under the False Claims Act can represent punishment for purposes of the Double Jeopardy Clause. The Court specifically left open the question whether a qui tam suit qualifies as a suit by the Government for these purposes. *Id.* at 451 n.11. If it does, we may be foreclosed by the relator from bringing subsequent criminal prosecutions.[9]

2. The Government as Contractor

Transfer of control over the Government's litigation to private persons affects not only our litigation function, but every aspect of the Government's work that can be implicated in a suit under the False Claims Act. Any Government contract can give rise to a False Claims Act action. For that reason, every routine decision that an agency makes as a contracting party is now subject to the relator's influence.

Any complex contract naturally will produce issues of construction between the parties. In the case of Government contracts, the agency concerned must decide whether contract deviations constitute a breach, and sometimes whether a breach amounts to fraud. In making these decisions, it is frequently in the Government's interest, as it would be in the interest of any contracting party, to avoid excessive concern over minor failings that might threaten a useful course of dealing with the other party. In the Government's case, especially, the agency must carefully consider such matters where the contract involves important military or national security matters, particularly if there are a limited number of qualified contractors, or the contractor's performance otherwise has been adequate or even excellent.

Under the 1986 Amendments, however, all such policy decisions potentially are thrown into the public forum. Relators who have no interest in the smooth execution of the Government's work have a strong dollar stake in alleging fraud whether or not it exists. The possibility of a qui tam suit will therefore lead to a hardening of positions by the Government and the contractor: the contractor must be certain not to be too candid, while the Government must be scrupulous about even its least significant rights, in order to avoid later second-guessing by a relator and a court. The ripple effects of qui tam in the Government's contracting flexibility thus could be enormous.

[9] There will also be the nice question of when jeopardy attaches in a False Claims Act suit

III. QUI TAM SUITS ARE UNCONSTITUTIONAL

A. Appointments Clause Violation

We believe that qui tam suits brought by private parties to enforce the claims of the United States plainly violate the Appointments Clause of the Constitution. Art. II, § 2, cl. 2. The Supreme Court has made clear that exercises of significant governmental power must be carried out by "Officers of the United States," duly appointed under the Appointments Clause. *E.g.*, *Morrison v. Olson*, 487 U.S. 654, 670-77 (1988); *Buckley v. Valeo*, 424 U.S. 1 (1976). It is well established that "conducting civil litigation in the courts of the United States for vindicating public rights" is at the core of executive power and "may be discharged *only* by persons who are 'Officers of the United States.'" *Id.* at 140 (emphasis added). *See also United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (the Attorney General "is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government"); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1868) ("[S]o far as the interests of the United States are concerned, [all suits] are subject to the direction, and within the control of, the Attorney-General.").

The Supreme Court has, to date, steadfastly adhered to the requirements of the Appointments Clause. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 482-89 (1989) (Kennedy, J., concurring) (Appointments Clause must be strictly applied; no "balancing" where a power has been committed to a particular Branch of the Government in the text of the Constitution). Even in *Morrison v. Olson*, the Court insisted on strict compliance with the Clause's terms, upholding the use of special prosecutors only after concluding that (i) the prosecutors were "inferior" officers, (ii) they were duly appointed by a "Court of Law" in accordance with the Appointments Clause, and (iii) they remained subject to sufficient executive control in the initiation and prosecution of cases.

In *Buckley*, the Court held that Congress violated the Constitution when it attempted to vest civil litigation authority in a commission whose members had not been duly appointed under the Appointments Clause. The Court said that "[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.'" 424 U.S. at 138. The qui tam provisions in the False Claims Act are equally unconstitutional. Qui tam relators are not appointed in any of the ways prescribed by the Appointments Clause and hold no commission under the United States. Yet these relators exercise significant governmental authority by suing to enforce the rights of the United States in the name of the United States. Just as Congress cannot vest litigation authority in commission members who have not been duly

appointed, it cannot vest such litigation authority in self- selected private bounty hunters who operate without accountability and without commitment to the United States' interests.

There can be no doubt that qui tam relators are exercising significant governmental power. Private relators are empowered to level fraud charges against other private citizens and hail them into court to answer for these alleged public offenses, with the possibility of collecting not only damages but substantial civil penalties. In so doing, the relators are empowered to overrule the judgment of executive officials as to whether the contractor has, in fact, committed fraud and whether it is appropriate under the circumstances to prosecute the Government's claim. Where the Attorney General determines not to proceed with a suit, the relator is empowered to prosecute the suit in the Government's name, controlling all aspects of the litigation and binding the United States by the judgment. If the Attorney General later decides to intervene, the relator remains in control. Even if the Attorney General enters the suit at the outset, the relator remains a party and is empowered to challenge not only the litigation judgments of the Government but also any attempt to dismiss or settle the case.

It is also beyond dispute that the claim the relator litigates is that of the United States. Qui tam relators historically were understood to be suing in a representative capacity. They were viewed as standing in the shoes of the Government and suing on behalf of the Government to enforce the rights of the Government. Note, *The History and Development of Qui Tam*, 1972 Wash. U.L.Q. 81, 83-84 ("Washington University Note"). The qui tam provisions in the False Claims Act are based precisely on that premise. The Act provides that one who files a false claim "is liable *to the United States Government* for a civil penalty ..., plus 3 times the amount of damages which the *Government* sustains." 31 U.S.C. § 3729(a) (emphasis added). In authorizing qui tam suits, the Act provides that the suit shall be brought "*for the United States Government*" and "*in the name of the Government.*" *Id.* § 3730(b)(1) (emphasis added).

The history of the False Claims Act demonstrates that the Act has always been understood to be what it seems to be: an authorization for private persons to bring suits on behalf of the Government. Speaking in support of the Act when it was adopted, Senator Howard explained that it was necessary to deal "speedy and exemplary justice" to "the knave and the rogue" who committed war fraud against "the Government, who is the real sufferer in all cases." S. Rep. No. 291, 78th Cong., 1st Sess. (1943) (quoting 1863 debates).

Similarly, the discussions in 1943, when Congress considered eliminating the qui tam action altogether, leave no doubt as to the nature of a qui tam action. Speaking in defense of the mechanism, Senator Murray, after complaining about the Department of Justice's failure to prosecute antitrust cases, said that "if a fraud has been perpetrated ... and the Attorney

General is failing to take advantage of [evidence of it], *any private citizen in the United States should be entitled to bring up the case in court.*" 89 Cong. Rec. 7575 (1943) (emphasis added). In a like vein, Senator Revercomb asked, "[w]hat harm can be done by saying to the Department of Justice, 'If you do not perform your duty some citizen of this country is going to rise and perform it for you?' " 89 Cong. Rec. 7598 (1943).

The 1986 debates reflect the same understanding. Speaking in the House, Representative Brooks gave a straightforward explanation of qui tam: "The False Claims Act contains provisions which allow citizens to bring suits for false claims on behalf of the Government." 132 Cong. Rec. 22,336 (1986). Representative Bedell described the statute as giving informers "standing to bring suit ... on behalf of the Government." 132 Cong. Rec. 22,340 (1986). Senator Grassley, the main force in the Senate behind the 1986 Amendments, explained that the "False Claims Act allows an individual knowing of fraud[] ... to bring suit on behalf of the government ...." 131 Cong. Rec. 22,322 (1985). In perhaps the most telling description, Representative Berman, one of the bill's principal drafters, offered the following statement: "[T]his is precisely what this law is intended to do: deputize ready and [willing] people ... to bring to justice those contractors who overcharge the government." 132 Cong. Rec. 29,322 (1986).

Indeed, the Solicitor General appears to concede that the qui tam device violates the Appointments Clause to the extent a qui tam relator is suing in a representative capacity. Taranto Memo at 8. To surmount this constitutional barrier, the Solicitor General argues that a qui tam action is not a suit based on the government's claim but is really a private suit based on the relator's private cause of action for the contingent monetary award Congress offered for successfully litigating the suit. The Solicitor General thus would argue that, when the relator prosecutes a case, he is not exercising governmental authority, but merely litigating his own private claim. The Solicitor General suggests an analogy to private antitrust actions or private title VII actions where both the private party and the government can bring substantially identical suits. *Id.*

This argument is untenable because it flatly contradicts the history of qui tam actions, the language and structure of the False Claims Act, and the Act's legislative history. All of these sources make abundantly clear that the relator is suing in a representative capacity to enforce the claim of the United States and that his statutory award is not relief for injury suffered, but a reward for his services. *See supra* pp. 215, 222-23.

In antitrust and title VII actions, the private plaintiff alleges that the defendant's conduct has invaded his personal legal rights, causing *him* direct injury. The title VII plaintiff claims that he has been personally harmed by discriminatory practices. The antitrust plaintiff claims that he has been economically harmed by a price-fixer's illegal conduct. Such private plaintiffs have their own independent causes of action to redress

these invasions of their rights, which incidentally vindicate the public interest. Under the False Claims Act, however, the government is the only party who has suffered injury as a result of the contractor's alleged fraud. Thus, the relator's suit under the False Claims Act vindicates the injury to the government and that injury alone.

It is clear that the real party in interest represented by the relator is the government, because the relator's suit binds the United States by res judicata.[10] Even when the Attorney General does not participate in the suit, any judgment or settlement obtained by the relator has preclusive effect on the United States. In this respect, qui tam actions differ fundamentally from the private lawsuits cited by the Solicitor General, and indeed from all "private attorneys general" suits. These private actions do not bind the United States because the real plaintiff is the individual suing on his own independent claim. *See, e.g., Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 690 (1961) ("the Government is not bound by private antitrust litigation to which it is a stranger"). In a qui tam action, however, the relator is not really acting in a private capacity, but rather is standing in the government's shoes and is prosecuting the United States' claim.

The Solicitor General's argument that the relator is merely prosecuting his own private claim ultimately fails because it runs headlong into an Article III standing problem. As discussed below, the relator, especially when suing only in his personal capacity, has no "case or controversy" to present to the court because he can show no "injury in fact" as a result of the contractor's alleged fraud.

B. Article III Standing

Private qui tam actions violate the well-settled doctrine of Article III standing. The keystone of this modern standing doctrine, which has been carefully refined by the Supreme Court over the past 20 years, is the constitutional requirement of "injury in fact." The Supreme Court has repeatedly held that, at an "irreducible minimum," Article III requires a plaintiff in federal court to demonstrate that:

(1) he *personally* has suffered some actual or threatened injury;
(2) the injury was *caused* by the putatively illegal conduct of the defendant; and
(3) the relief sought likely will *redress* the injury.

E.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 482-83 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

[10] *See supra* p. 215-16.

A plaintiff cannot rely solely on abstract injury or generalized grievances shared by all citizens and taxpayers to establish standing. *Allen v. Wright*, 468 U.S. 737, 754 (1984); *Valley Forge*, 454 U.S. at 482-83. If the plaintiff himself has not suffered particularized harm that is "distinct and palpable," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974), there is no case or controversy under Article III. *See, e.g., Warth v. Seldin*, 422 U.S. 490 (1975); *Sierra Club v. Morton*, 405 U.S. 727 (1972). Under these well-established principles, qui tam suits are plainly unconstitutional to the extent they purport to be private actions because the relator has suffered no personal "injury in fact" as a result of the contractor's alleged fraud.

The Solicitor General argues that the relator's prospect of receiving a bounty is enough to satisfy Article III standing requirements. It is clear, however, that the mere expectation of a reward cannot be characterized under established Supreme Court precedent as an "injury" of any kind.[11] The only party who suffers injury as a result of the contractor's false claims is the government. The relator simply seeks to stand in the government's shoes to sue for an invasion of the government's rights. The monetary payment he seeks is not judicial relief to redress his injury, but a reward for bringing the case. Mere financial incentive to bring the suit does not satisfy the constitutional standard.

The Supreme Court has expressly rejected this argument in *Diamond v. Charles*, 476 U.S. 54 (1986). There, a physician argued that he had standing to continue defending an abortion statute because the trial court had already awarded attorneys' fees against him. Only he was left to defend the statute, and only by vindicating the statute could he avoid paying the fees. Although the Court recognized that the physician had a financial stake in the outcome of the litigation, it held that financial interest alone is not sufficient to confer standing. *Id.* at 69-70. Citing Valley Forge to stress that the plaintiff's injury must be a "result of the putatively illegal conduct," the Court stated that "Art. III standing requires an injury with a nexus to the substantive character" of the underlying claim; an interest that is merely "a byproduct of the suit" is not sufficient. *Id.* at 70-71. Just as an attorney with a contingency fee arrangement does not

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[11] This view is supported by two Supreme Court cases holding that an informer's prospective interest in his reward does not give him a judicially cognizable interest sufficient to allow him to intervene in a case being prosecuted by the government. In both cases, the statute at issue gave the informer a share of the proceeds of the government's recovery, but did not authorize direct suit by the informer. In *United States v. Morris*, 23 U.S. (10 Wheat.) 246 (1825), the Court ruled that customs officers who had a right to a share of forfeited property as a reward had no right to intervene in the forfeiture proceeding to prevent the United States from remitting the property to the owner. The Court ruled that

> [t]he forfeiture is to the United States, and must be sued for in the name of the United States. . . . In all this, [the collector] acts as [an] agent of the government, and subject to the authority of the secretary of the treasury, who may direct the prosecution to cease . . . . [T]he right [of the customs officer] does not become fixed, until the receipt of the money by the collector.

Id. at 290. *Accord Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868) (following *Morris*).

have standing on his own to pursue his client's claim, the relator does not have standing to pursue his claim for a share of the False Claims Act damages. The monetary recovery must be directed at redressing an injury suffered by the plaintiff as the result of the invasion of a substantive legal right. As the Assistant to the Solicitor General observes, *Diamond v. Charles* is consistent with:

> case or controversy law generally [which] requires that there be a legal dispute — and that the plaintiff have a claim of legal right and the defendant an alleged legal duty to the plaintiff — that precedes and is independent of the lawsuit itself.

Taranto Memo at 4.

Nor does the fact that Congress has specifically authorized uninjured persons to bring qui tam actions in any way cure the Article III deficiency. Congress is bound by Article III's "case or controversy" restriction on judicial power and cannot abolish the constitutional requirement of "injury in fact." Congress cannot confer standing on persons who fail to meet that test.

Congress can, of course, enact statutes creating new substantive legal rights, the invasion of which can give rise to the kind of particularized injury necessary to create standing. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). In no event, however, "may Congress abrogate the Art. III minima: plaintiff must always have suffered 'a distinct and palpable injury to himself'... that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 100. In enacting the qui tam provisions of the False Claims Act, however, Congress has not created any substantive legal right for qui tam plaintiffs the invasion of which creates Article III injury. Those qui tam provisions simply permit the relator to sue on behalf of the United States, whose substantive rights *have* been genuinely invaded. As the words of the statute make clear, a qui tam suit is an action brought to recover "damages which the *Government* sustains because of the [contractor's fraudulent] act." 31 U.S.C. § 3729(a) (emphasis added).

Qui tam suits thus differ fundamentally from "private attorneys general" suits or citizens' suit provisions in other statutes. The Supreme Court has strictly adhered to the "injury in fact" requirement in interpreting those statutes, holding that only those who can demonstrate their own personal injury from the claimed illegal conduct are allowed standing to sue to protect the public interest in conjunction with their own. *See. e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981); *Sierra Club v. Morton*, 405 U.S. at 737 ("[I]njury is what gives a person standing to seek judicial review ..., but once review is properly invoked, that person may argue the public interest in support of

his claim.... It is in [this] sense that we have used the phrase 'private attorney general.'"). Qui tam suits also differ from those cases in which the Supreme Court has permitted litigants to raise the rights of others under so-called jus tertii or "third party" standing. In those cases, the Court has strictly adhered to the "injury in fact" requirement, allowing a plaintiff to assert the rights of third parties *only* if the plaintiff showed that the challenged action also injured him. *See Craig v. Boren*, 429 U.S. 190, 192-97 (1976); Charles A. Wright, *The Law of Federal Courts* 72 (4th ed. 1983).

Significantly, the Solicitor General's own office cannot agree on whether the mere prospect of a bounty is sufficient to create standing. The Deputy Solicitor "counsel[s] against" making such an argument because: (1) "it cannot be reconciled with recent Supreme Court decisions"; (2) it cannot "account for the requirement of redressability which the Court has stressed in recent decisions"; and (3) it "would be in some tension with our usual posture [in standing cases], which has generally been to insist on a formalistic, corrective-justice type model of standing." Memorandum for the Acting Solicitor General, from Thomas Merrill, Deputy Solicitor General at 3 (Apr. 5, 1989). The Assistant to the Solicitor General admits that the standing issue is "close" and "the hardest question" and that the bounty theory "stands in uneasy relation to prevailing principles of standing." Taranto Memo at 3 n.1.

To surmount qui tam's obvious conflict with established standing doctrine, the Solicitor General proposes to argue that qui tam actions must be recognized as "cases or controversies" within the meaning of Article III because they were known in England prior to the Revolution and seem to have been used to a limited degree in the early years of the Republic. This historical argument is fundamentally flawed in several respects.[12]

First, the status of historical qui tam actions as cases or controversies is irrelevant to the validity of the Solicitor General's proposed reformulation of qui tam as a truly private suit by the relator. Qui tam as it existed at the time of the framing involved actions in which the relator sued in a representative capacity to enforce a public penalty on behalf of the government. *See, e.g.*, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. at 102 (authorizing informers to collect penalties for official misconduct under Census Act). Although it may have violated separation of powers, such an action at least presented a case or controversy because the real party in interest — the government — had suffered an injury and thus had a cognizable claim. But it is mere sleight-of-hand to suggest that if qui tam in this sense was necessarily a case or controversy, so is qui tam in the very different sense proposed by the Solicitor

[12] This historical argument concerns the status of qui tam actions as cases or controversies. We discuss below, *see infra*, at pp. 232-38, the broader claim that history validates qui tam whether or not it can be accommodated to any particular constitutional principle, such as the requirements of Article III.

General, in which a relator who has not been injured sues for himself, not the government.

Next, it is far from clear that the Framers, had they examined the matter, would have concluded that qui tam as they knew it satisfied the case or controversy requirement. There is certainly no direct evidence that they thought so. Indeed, qui tam statutes that permitted an uninjured informer to sue, and actions brought by such informers, apparently were both fairly rare. Many statutes seem to have contemplated — and almost all suits actually brought seem to have been — actions either by public officials or injured parties.[13] Qui tam actions brought by pure informers thus probably would not have seemed a commonplace thing for the Framers, and we cannot assume that they would have thought that Article III had to bend to such actions.

Finally, the argument that anything that could go into court in 1787 must be a case or controversy has unacceptable consequences. At common law, the writs of prohibition, certiorari, quo warranto, and mandamus all were available to "strangers" who had no personal interest or injury in fact. *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?* 78 Yale L.J. 816, 819-25 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1269-71 (1961). But both mandamus and quo warranto are actions brought to challenge the conduct of government officials. Under the Solicitor General's regime, any person could use these writs to challenge or compel government action wholly unrelated to the person using the writ. The implications of this position are staggering.

In any event, the Solicitor General's historical argument proves too much. If this view were accepted, it would mean that Congress could create universal standing simply by attaching a penalty to the violation of any law and offering any person who sues a right to share in the proceeds. This would privatize the Executive power, allowing any private person to enforce the law against any other, while opening up the decisions by the Executive to unprecedented interference. For example, Congress could enforce its restrictions on the President's conduct of foreign policy (such as the Boland Amendment) through qui tam actions. All executive actions would be subject to judicial review at the instance of any intermeddler, and the limits on the federal judicial power would be set by Congress, not the Constitution.

C. Encroachment on Executive Powers

The President's power to execute the laws includes two aspects of

[13] We are aware of only one statistical survey of qui tam actions in America. That survey reflects that on the eve of the Revolution, of 70 informer suits brought under the navigation laws, 67 were brought by government officials, and only 1 was brought by an informer who appeared to have no injury of his own to redress. Lawrence A. Harper, *The English Navigation Laws* 170 (1939).

authority that are important here: the discretion to decide whether to prosecute a claim, and the control of litigation brought to enforce the government's interests. The qui tam provisions infringe on both. First, the provisions permit a private citizen to sue on behalf of the government, even though the Attorney General may have decided for legitimate reasons not to prosecute the claim. This power removes from the executive branch the prosecutorial discretion that is at the heart of the President's power to execute the laws. Second, the qui tam provisions vest in the relator a voice in crucial litigation decisions, even if the Attorney General decides to enter the suit. The Attorney General may not move to dismiss the suit, settle the action, or restrict the relator's participation except by permission of the court. *See* 31 U.S.C. § 3730(c). The court also decides whether discovery may be stayed to prevent interference with ongoing civil or criminal investigations. *Id.* These provisions vest core executive power in the judicial branch. Moreover, in suits in which the Attorney General declines to participate, the relator exercises full sway over the course of the government's litigation interests. The Attorney General can neither remove the relator from his "office" nor instruct him how to represent the government's interests.

This transfer by Congress of executive power away from the President to the relator and the court is impermissible even under the Supreme Court's most lenient standard for judging threats to separation of powers. In *Morrison v. Olson*, the Court held that restrictions on the Executive's power to supervise and remove an independent counsel did not violate separation of powers principles, but only because the Attorney General retained "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696. In upholding the independent counsel statute, the Court stressed four aspects of executive control. First, the Attorney General has control over initiation of prosecutions because he retains the "unreviewable discretion" to decline to request the appointment of an independent counsel. *See id.* at 695-96. Second, the Attorney General controls the breadth of the independent counsel's investigation because it is he who provides the statement of facts upon which the special court sets the counsel's jurisdiction. Third, the Attorney General retains the power to remove the independent counsel for "good cause" and thus has "ample authority" to ensure that the counsel is properly fulfilling his duties. *Id.* at 696. Fourth, the Act expressly requires that, once appointed, the independent counsel must comply with Justice Department policy unless it would be impossible to do so. *See id.*

The Court's analysis in *Morrison* highlights the unconstitutionality of the qui tam provisions. In contrast to the independent counsel statute, under the qui tam provisions the Attorney General loses all control over the decision whether to initiate a suit. Even where the Attorney General determines that initiating a suit is not warranted, the qui tam relator is

empowered to override his judgment and initiate the fraud action. When the Attorney General concludes that proceeding with a suit is not merited or otherwise not in the United States' interests, the fraud action nevertheless goes forward in the government's name, under the complete control of the self-interested relator. The Attorney General has no control over the breadth of the suit. He has no power to remove the relator no matter how irresponsible his suit becomes. He has no power to require the relator to adhere to the rules and policies of the Department of Justice, despite the fact that the relator is suing in the name of the United States.[14]

Further, if the Attorney General does not enter the suit within the first sixty days, his ability later to assert the interests of the United States are sharply curtailed. He cannot intervene unless he persuades the court that "good cause" exists. Even then, the private relator still has "the right to conduct the action," and the court may not "limit[] [his] status and rights." 31 U.S.C. § 3730(c)(3). Moreover, even where the Attorney General does enter the case during the first sixty days, he does not have the right to take over the litigation. The relator remains a full party entitled to participate in the case. Through his own conduct of the case, the relator effectively can overrule litigation decisions made by the Attorney General, and he is specifically empowered to challenge any effort by the government to settle or dismiss the suit. When a dispute arises between the Attorney General and the relator, the ultimate decision is left to the discretion of the court.

There is another fundamental difference between the qui tam provisions and the independent counsel statute. The independent counsel device was intended to address a narrow structural problem — the perceived conflict of interest when the Attorney General is called upon to investigate criminal wrongdoing by his close colleagues within the executive branch. The Court accepted the independent counsel device as an appropriate means of dealing with this intrabranch conflict. The device arguably does not unduly encroach on executive power because its very purpose is to investigate impermissible executive activity. Moreover, the device is narrowly tailored to achieve its purpose; it encroaches on the Executive only to the limited extent necessary to protect against a conflict of interest, while retaining executive control consistent with that objective.

Both the premise of the qui tam provisions and the means Congress has used to advance its goals are far more threatening to the executive branch. The legislative history of the 1986 Amendments shows that Congress was acting out of generalized distrust of, and dissatisfaction with, the way the executive branch was carrying out its law enforcement responsibilities. Senator Grassley felt that "the Government bureaucracy [was] ... unwilling to guard against or aggressively punish fraud." 131 Cong. Rec. 22,322 (1985). Representative Berman was equally candid:

[14] *See* the general discussion of the statute's provisions, *supra* pp. 215-17.

he supported qui tam because he thought that "the Department of Justice has not done an acceptable job of prosecuting defense contractor fraud." 132 Cong. Rec. 22,339 (1986). Later in the debate, he explained that the relator was being given full party status at trial "to keep pressure on the Government to pursue the case in a diligent fashion." 132 Cong. Rec. 29,322 (1986).[15]

The history of qui tam thus confirms that it is not a narrowly focused measure designed to cure a structural defect within the executive branch. Rather, Congress is simply attempting to substitute its judgment on how to execute the laws for that of the President. More narrowly tailored means are available to fulfill the legitimate purpose of enhancing enforcement of procurement fraud cases. Congress could provide greater resources and, to the extent it wanted to encourage informers, could provide for simple bounties for their information without giving them the authority to conduct the litigation.

In contrast, permitting Congress to choose its own private law enforcers violates separation of powers and establishes a basis for governance by tyranny. As Madison recognized, the legislative branch is the most powerful, and hence, potentially the most dangerous to the separation of powers, because

> it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere.

The Federalist No. 48, at 334 (James Madison) (Jacob E. Cooke ed. 1961). No question of "real-nicety" is involved here — in the qui tam provisions, Congress has extended its power far beyond the legislative sphere. Where, as here, Congress has provided for its law to be enforced by its own deputies, the essence of separation of powers has been violated, for "'[w]hen the legislative and executive powers are united in the same person or body,'... '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 326 (James Madison) (Jacob E. Cooke ed. 1961) (quoting Montesquieu).

Contrary to the Solicitor General's view, the Attorney General's right to

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[15] The legislators who supported the 1986 Amendments were echoing those who, in 1943, defeated repeal of the False Claims Act's qui tam provisions An opponent of qui tam, Senator Van Nuys, asked one of its friends, Senator Murray, whether he had "sufficient confidence in the man who is a member of the President's Cabinet, the Attorney General, to believe that he will conserve the best interests of the public?" Senator Murray replied that "[w]e have found that that cannot always be relied upon." 89 Cong. Rec 7575 (1943)

intervene and take over the case does not save the statute from violating separation of powers principles. The statute enables a private party with only a mercenary interest in a case to force a suit to be brought, even though the Attorney General already may have decided for legitimate policy reasons not to prosecute. The Supreme Court has recognized that the Executive has the exclusive authority to decide whether to prosecute a case, *United States v. Nixon*, 418 U.S. 683, 693 (1974), because only a unitary executive properly can balance the competing interests at stake, including law enforcement, foreign affairs, national security, and the overriding interest in just administration of the laws.

IV. HISTORY DOES NOT VALIDATE QUI TAM

In the face of qui tam's admittedly "grave dangers" to the President, the Solicitor General is prepared to disregard settled constitutional doctrine and decades of clear Supreme Court decisions in order to uphold the facial validity of qui tam. He claims this fateful step is compelled by qui tam's historical usage.[16] In fact, the historical argument is subject to decisive objections.

To begin with, the entire historical inquiry is essentially pointless, since the version of qui tam that the Solicitor General proposes to defend differs essentially from qui tam as it existed in history. Whatever else may have been true of it, historical qui tam was a proceeding in which the relator sued on behalf of the government, and once the suit was brought, there was no provision for government intervention. The Solicitor General recognizes that this violates the Appointments Clause and would substitute for it a new regime under which the relator sues on his own behalf and the government is entitled to enter the case. History does not contain that regime, and therefore cannot be invoked to support it.

Moreover, the historical argument fails on its own terms. We agree with the Solicitor General that certain kinds of constitutional questions will be influenced by certain kinds of historical practices. But an examination of the Supreme Court's use of history demonstrates, not that history invariably prevails, but that *close questions where the application of principle is unclear can be resolved by thoroughly considered, long-standing historical practices that can be reconciled with doctrine.* The constitutionality of qui tam, however, is not a close question, and the use of qui tam, far from being ingrained in our legal institutions, has been marginal at most. History cannot save qui tam.

First, usage alone — regardless how longstanding and venerable — cannot validate a practice that clearly violates constitutional principles.[17]

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[16] That usage, which we discuss more fully below, consists of the existence of qui tam in England and the enactment by early Congresses of a few qui tam provisions

[17] *See, e.g., Walz v Tax Comm'n*, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.").

The Constitution, not history, is the supreme law. The Court repeatedly has stated that "[s]tanding alone, historical [practice] cannot justify contemporary [constitutional] violations," *Marsh v. Chambers*, 463 U.S. at 790, even when the practice "covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n*, 397 U.S. at 678.

Qui tam is fundamentally irreconcilable with the doctrine of standing under Article III and the President's appointment powers and law enforcement functions under Article II. This is a case where, absent the invocation of history, there would be no question about the practice's unconstitutionality. The mere fact that the earliest congresses adopted a practice has never been enough to establish conclusively the practice's constitutionality. Indeed, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), struck down part of the Judiciary Act of 1789, a statute adopted by the First Congress. There are other examples of actions taken by the First Congress that later became viewed as unconstitutional. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (federal aid to sectarian schools viewed as unconstitutional despite grants of such aid by First Congress); *INS v. Chadha*, 462 U.S. 919, 982-84 n.18 (1983) White, J., dissenting) (use by First Congress of precursors to legislative veto held unconstitutional); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (declining to enforce First Congress statute giving courts non-judicial duties). *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) ("broad consensus" that Sedition Act of 1798 was unconstitutional); Paul M. Bator, *et. al., Hart & Wechsler's The Federal Courts and the Federal System* 65-67 (3d ed. 1988) (describing request by Thomas Jefferson for Supreme Court advisory opinions that was rejected as unconstitutional). Likewise, the same Congress that proposed the Fourteenth Amendment adopted a statute one week later reaffirming racial segregation of public schools in Washington, D.C. *See Marsh v. Chambers*, 463 U.S. at 814 n.30 (Brennan, J., dissenting).

Given qui tam's basic conflict with the Constitution, we believe any argument to sustain qui tam based solely on prior practice must fail. We are unaware of a single Supreme Court case that has upheld a past practice that could not be reconciled with principle. On the contrary, the Supreme Court has recognized that long-standing practice does not insulate even its own errors from correction.[18]

Historical practice *can* influence close cases where the implications of principle are not clear. In such close cases, the authority of a practice depends mainly on three factors: (1) whether there is evidence the Framers actually considered the constitutional implications of their

[18] *See, e.g., Shaffer v. Heitner*, 433 U.S. 186 (1977) (overruling *Pennoyer v. Neff*, 95 U.S 714 (1878)); *Brown v Board of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Graves v. New York ex ref. O'Keefe*, 306 U.S 466 (1939) (overruling *Dobbins v Erie County*, 41 U.S. (16 Pet.) 435 (1842)), *Erie R R v Tompkins*, 304 U S 64 (1938) (overruling *Swift v. Tyson*, 41 U S (16 Pet.) 1 (1842)).

actions; (2) whether the practice is so longstanding and pervasive that it has become "part of the fabric of society;" and (3) whether the practice can be reconciled with constitutional principles in a way that does not undermine settled doctrine. *See, e.g., Young v. United States ex rel. Vuitton et Fils S.A.; Marsh v. Chambers; Walz v. Tax Comm'n.* Even if the constitutionality of qui tam were a close question, however, the statute could not satisfy these three factors.

As to the first factor, the Court noted in *Marsh v. Chambers* that the weight to be accorded the actions of the First Congress depends on the extent to which the members actually reflected upon how the provisions of the new Constitution applied to the actions they were taking. "[E]vidence of opposition to a measure ... infuses [the historical argument] with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed" by principles embodied in the new Constitution. 463 U.S. at 791.

Early qui tam statutes have all the hallmarks of action "thoughtlessly" taken. As far as we are aware, the historical record shows *no evidence* that qui tam's constitutional implications were discussed or considered. On the contrary, because of the unique historical contexts in which qui tam statutes were adopted, the device's incompatibility with executive law enforcement functions would not have been immediately apparent. Qui tam simply did not bite hard enough for the Executive to recognize or resist it as a usurpation of its authority. Moreover, we know that members of the First Congress held erroneous assumptions about the extent to which, under the Constitution, English common law and its institutions had been carried over to the federal level of the United States.[19] The First Congress's early use of qui tam appears to have been nothing more than a manifestation of this initial confusion.

As to the second factor, the Court has relied on history to resolve borderline cases when the practice has been so pervasive as to become "part of the fabric of our society." *Id.* at 792. A brief survey of the history of qui tam demonstrates that it is a marginal practice that could be eliminated without leaving a trace.

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[19] For the first six years after the Constitution was adopted, virtually all persons who considered the issue believed that the Constitution permitted a federal common law of crimes. *See* Stewart Jay, *Origins of Federal Common Law Part One*, 133 U Pa L Rev 1003 (1985). The Framers presumably believed this because it was a practice with which they were familiar at common law in Britain and in the states. The federal common law of crimes was challenged only after a political dispute arose between the Federalist and Republican parties, which led the Republicans to begin to appreciate that the federal common law of crimes was inconsistent with the new Constitution's vesting of the legislative power solely in Congress Thomas Jefferson, who had approved a common law prosecution, became a vigorous advocate of the view that such prosecutions were unconstitutional Today, this is the conventional view of the matter. Indeed, it is worth noting that common law crimes and qui tam involve complementary errors: criminal common law is inconsistent with Congress's legislative power, while qui tam is inconsistent with the President's executive power. Both of those exclusive vestings of power were innovations introduced by the Constitution, the full implications of which were only slowly perceived

In name, qui tam originated at common law, but common law qui tam — which disappeared as early as the 14th century — required *injury in fact. See* Washington University Note, at 83-86. An aggrieved party sought to gain access to royal courts by arguing that the private injury he had sustained also was an affront to the king. By the end of the 14th century, the royal courts were hearing suits without the fiction of qui tam, and the device faded. *See id.* at 85. Common law qui tam thus supports the Solicitor General's position only if turned on its head: at common law, the actual injury was to the plaintiff, and it was a legal fiction that injury was also done the king; under the False Claims Act, the real injury is to the government, and the Solicitor General urges upon us the fiction that it is the private plaintiff who has a viable cause of action.

After the 14th century, qui tam became a creature of statute, under which injury in fact was often required. *See* Washington University Note, at 86. Some statutes, however, permitted private informers, regardless of injury, to prosecute a wrongdoer for violation of a penal law. Although the statutes of Parliament have only tangential bearing on the validity of a practice under our new Constitution, it nevertheless is noteworthy that even in England, qui tam proved a vexatious device that ultimately could not be reconciled with the institutions of free and responsible government. As in the early days of our Republic, statutory qui tam served a necessary expedient for a medieval English Government that did not yet have the machinery for effective local law enforcement.

Part of the decline of qui tam may be attributed to its history of abuse. One commentator noted that the device was used "as means to gratify ill will. Litigation was stirred up simply in order that the informer might compound for a sum of money. Threats to sue were an easy means of levying blackmail." 4 Holdsworth, *A History of English Law* 356 (1924). Lord Coke classed informers as "viperous vermin." He contended that "the king cannot commit the sword of his justice or the oil of his mercy concerning any penal statute to any subject." *See* Gerald Hurst, "*Common Informers*," 147 Contemp. Rev. 189-90 (1935). From the 16th century forward, the history of qui tam is one of retreat, as Parliament progressively restricted and curtailed its use. It ultimately was abolished there in 1951. *See* Washington University Note, at 83-88.

On this side of the Atlantic, qui tam never really gained a secure foothold, particularly at the federal level. It appears that six qui tam statutes, restricted to narrow enforcement areas, were enacted during the first four congresses. Adopted when the Executive was embryonic, these statutes were essentially stop-gap measures, confined to narrow circumstances where the Executive lacked the resources to enforce the law. Their intent was to assist a fledgling Executive, not supplant it. As the Executive's law enforcement capabilities gathered strength, qui tam rapidly fell into disfavor. Within a decade, "the tide had ... turn[ed]

against" qui tam, and Congress started curtailing its use. Leonard D. White, *The Federalists* 417 (1956).

The only other appreciable use of qui tam came during the Nation's greatest emergency, the Civil War. The unprecedented explosion in federal procurement, coupled with the extreme demands of war, prompted enactment of the False Claims Act. Following the war, qui tam again became dormant. By 1986, except for a flurry of activity during World War II, qui tam had become an anachronism.[20] We think a fair survey of the history of qui tam in the United States reveals it as, at best, a marginal and transitory device that never achieved prominence within our constitutional system because it was so fundamentally incompatible with that system.

Nor does the practice of qui tam meet the third criterion, under which the Court may uphold a practice that can be accommodated as a narrow and self-contained exception that does not threaten to undermine important constitutional principles. *See e.g., Young v. ref. Vuitton et Fils S.A.*. But qui tam is not capable of being contained as a narrow exception, restricted in a principled manner to its limited historic scope.[21] Qui tam's principle of private law enforcement is so fundamentally incompatible with the established doctrines of standing and separation of powers that if qui tam were accepted, these doctrines would be drained of any meaning. Qui tam is, by its nature, an exception that will consume the rule.

Qui tam thus does not have any of the characteristics that have led the Supreme Court to give an historical practice the benefit of the doubt in a close case. Moreover, there are two considerations specific to qui tam that reduce the authority of its historical pedigree. First, where separation of powers issues are at stake, we do not think it is appropriate to give prior *congressional* action dispositive weight in determining the constitutional-

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[20] For example, we are aware of only one case in this century under the qui tam provisions that apply to the Indian trade, and that was brought by a relator who had been personally injured. *See United States ex ref. Chase v. Wald*, 557 F.2d 157 (8th Cir.), *cert denied*, 434 U.S. 1002 (1977). Similarly, we are aware of only one 20th century action brought under the qui tam provision of the postal laws, which nominally remained in force until the creation of the Postal Service in 1970. In that case, the Eighth Circuit held that the statute did not provide a private right of action for the informer. *Williams v. Wells Fargo & Co Express*, 177 F. 352 (8th Cir. 1910). However, passage of the 1986 Amendments significantly increased awards and subsequently has resulted in a substantial increase in the number of qui tam suits.

[21] If we find that the historical practice of qui tam is per se constitutional because of its pedigree, then we must accept the entire practice as it actually existed, not merely those aspects of it that seem least objectionable to modern sensibilities. This would raise the possibility of criminal prosecutions by private persons, especially given that in England criminal qui tam was well known. *See* Washington University Note, at 87-89. In the United States, the penalty provision of the first Census Act, which authorized qui tam enforcement, allowed the penalty to be collected through an action in debt or by indictment or information — the latter two implying a criminal proceeding. Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102. Moreover, some of the early qui tam statutes, including the first Census Act, authorized private persons who had not been injured to sue public officials in qui tam to collect penalties for the officials' failure to perform their duty. *Id.* We could tolerate neither private criminal prosecution nor the general privatization of executive branch employee discipline. But if we conclude that we cannot accept some part of the historical practice, there is no reason to defend the remainder under the theory that history is necessarily correct.

ity of a later statute. Congress's aggrandizing enactments should not serve as conclusive precedent on the scope of Congress's own authority. The Framers recognized that, in a mixed government, it is the legislative body — the "impetuous vortex" — that is the branch most disposed to usurp the powers of the others. They also warned that "[the legislative department] can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments." *The Federalist No. 48*, at 334 (James Madison) (Jacob E. Cooke ed. 1961). It is true that many of the members of the early congresses had been involved in framing the Constitution. We cannot assume for that reason, however, that as congressmen they were above attempted encroachments on the other branches. Their actions are not sacrosanct and should be subject to careful examination for "masked" encroachments on co-ordinate branches. Our obligation to the Constitution requires that we adhere to the principles the Framers wrote into that document, not to the Framers' misapplications of those principles.[22]

Longstanding congressional practice gains somewhat more precedential value where accompanied by equally longstanding ratification by one or both of the other branches. But ratification requires more than unthinking acquiescence — it requires an informed and deliberate judgment that a particular practice is constitutional. Early Executive acquiescence to qui tam is easily explained. As suggested above, because of the unique historical context in which qui tam was adopted, its incompatibility with our constitutional framework was not immediately evident. An expedient measure — even one undergirded by a noxious principle — may, in a particular historical setting, appear benign and at first be welcomed without question because of its apparent functionality. It is only through experience, as the measure is applied through a range of circumstances, that the pernicious principle reveals itself and becomes fully understood. There is no doubt that the First Congress resorted, sparingly, to the expedient measure of qui tam. But we doubt the Framers or the First President would have embraced the underlying principle had they considered and fully understood its implications.

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[22] Genuine separation of powers, with three truly distinct and independent branches of government under a written constitution, was very new in 1789. It is therefore not surprising that early congresses enacted a number of measures that would today strike us as plainly unconstitutional. For example, the courts were given a number of non-judicial powers and duties, including the removal of U.S Marshals, who then as now were appointed by the President. Act of Sept. 24, 1789, ch 20, § 27, 1 Stat 72, 87 The First Congress also directed federal judges to substitute for French consuls in investigating shipwrecks of French vessels, Act of Apr 14, 1792, ch. 24, § 1, 1 Stat. 254, and to make reports to the Secretary of the Treasury on customs forfeitures, Act of May 26, 1790, ch 12, 1 Stat. at 122-23. *See generally* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev 123. Moreover, early congresses followed the colonial practice of treating the Secretary of the Treasury as if he were as much their officer as the President's, requiring that he prepare reports at the request of either House. Act of Sept 2, 1789, ch. 12, § 2, 1 Stat 65-66. This provision survives as 31 U S.C. § 331(d), which appears to be a clear violation of *INS v. Chadha*, 462 U.S. 919 (1983)

Second, we think a strong case can be made that *Morrison v. Olson* sharply undercuts any historical argument for qui tam. *Morrison* judges a practice's constitutionality by the *degree* to which the practice *actually interferes* with the Executive's functions. *See* 487 U.S. at 685-97. Under this balancing test, the early qui tam statutes arguably may have passed constitutional muster, while Congress's 1986 use of qui tam clearly does not. Early qui tam statutes involved little or no actual interference with the Executive. For practical purposes, they were confined to circumstances where the Executive's capacity to enforce the law was virtually non-existent — either because, as in the case of the 18th century statutes, the Executive was embryonic, or, as in the case of the Civil War statute, the Executive was overwhelmed and otherwise occupied. Those statutes were designed to aid, not supplant, the Executive. They reflect no ambition to control or override the Executive's official law enforcement activities. Prompted by necessity, they fell into disuse once necessity abated.

In contrast, the 1986 Amendments substantially interfere with the Executive's functions. The executive branch today is fully capable of policing claims against the government.[23] Indeed, procurement is now one of the most heavily regulated and policed sectors of public activity. In resuscitating the dormant qui tam device, Congress's express purpose was to interfere with the Executive's law enforcement activities, to displace official prosecutorial discretion with the mercenary motives of private bounty hunters. The narrow use of qui tam in the 18th century cannot validate the kind of encroachment qui tam causes today.

V. THE SOLICITOR GENERAL'S UNWISE STRATEGY

The Solicitor General's approach declines to face squarely the constitutional questions raised by the qui tam statute. Rather, it adopts the tactic of arguing that the statute is facially constitutional and constitutional as it has been applied so far, but reserving the right to argue a violation of separation of powers based on a balancing of interests if additional encroachment on the Executive's powers subsequently occurs. This approach employs both bad tactics and bad law.

First, the approach is tactically unwise because it forces us to forfeit the strongest objective arguments in favor of protecting executive branch interests. The Solicitor General advocates total relinquishment of the standing and Appointments Clause arguments; yet, as discussed above, under existing case law these arguments point clearly toward a conclusion that the statute is unconstitutional. Once those are abandoned, all that will remain to protect the President's interests will be the argument

[23] Even assuming the Executive lacks sufficient resources to investigate and prosecute such claims, there are other ways Congress can address the problem that would be constitutional, such as funding more Department of Justice resources targeted at those claims.

that at some undefined point, the subjective degree of encroachment on executive powers will have become unbearable. That sort of unprincipled balancing approach leaves the Executive entirely vulnerable to an adverse judicial decision.

Moreover, conceding standing itself weakens the separation of powers argument. To satisfy the standing requirements, we must accept the fiction that the relator and the Executive are coplaintiffs pursuing two separate claims. With that fiction in place, the encroachment on executive powers is difficult to resist, since the issue becomes framed in terms of the competing interests of two litigants rather than an infringement on separation of powers.

Second, the approach represents a completely disingenuous way of determining a statute's constitutionality. Although it is generally true that a statute should be construed when possible to avoid constitutional problems, portions of the statute cannot be twisted or ignored to reach that result. The Court recently reaffirmed the longstanding principle that in assessing the facial validity of a statute, it will not "'press statutory construction "to the point of disingenuous evasion" even to avoid a constitutional question.'" *Public Citizen v. United States Department of Justice*, 491 U.S. at 467 (quoting *United States v. Locke*, 471 U.S. 84, 96 (1985) (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933))). *Accord Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (reprimanding the plurality for "distorting the statute" to avoid invalidating it) (Blackmun, J., dissenting). Even the Solicitor General concedes that some provisions of the qui tam statute are facially unconstitutional, such as the grant to the court of the ultimate power to decide whether the government may settle or dismiss a qui tam suit when the relator objects. *See* Taranto Memo at 12. To argue, then, that these provisions must be ignored for now and later applied other than as written to avoid an as-applied challenge engages in the very sort of "disingenuous evasion" against which the Court has cautioned. Moreover, by conceding that the statute is constitutional as applied to date, the Solicitor General concedes the legality of the prime example of encroachment on executive powers — the Executive's ability to initiate suit and the discretion to decide which cases not to pursue.

Third, the Solicitor General's proposed balancing approach does not properly apply *Morrison v. Olson*. The Solicitor General advocates examining each case brought under the qui tam statute to ascertain the degree of that case's encroachment on executive powers. This method of analysis is completely inconsistent with the balancing approach used in *Morrison*, which looked instead at the potential impact of applying the statute according to its terms.

The Solicitor General also advocates a more global approach to analyzing the potential encroachment on executive powers. Under this approach, the Solicitor General recommends waiting to see if Congress

employs the qui tam method of enforcement in other statutory contexts. If so, the Solicitor General postulates that the cumulative burden on executive powers might be so great that the amendments to the False Claims Act then would be unconstitutional. This method of analysis has no basis in law. The Court has never determined the constitutionality of a statute based on the effect of other statutes. Moreover, there is no principled way to determine how many such statutes must be enacted before the encroachment achieves constitutional proportions.

Finally, the Solicitor General's piecemeal approach fundamentally conflicts with his historical argument. The Solicitor General contends in part that qui tam must be upheld because its historical acceptance by courts and Congress since this country's inception has been "ancient, regular, and unbroken." Taranto Memo at 4. In particular, the Solicitor General has pointed to the favorable treatment given an earlier version of the False Claims Act qui tam provisions in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). That version of the Act, however, did not contain the provisions introduced by the 1986 Amendments granting the court the ultimate authority to dismiss or settle a qui tam action in which the government has intervened. The Solicitor General acknowledges that his view of the statute's constitutionality ultimately depends upon a proper application of those provisions. *See* Taranto Memo at 12. The Solicitor General cannot consistently claim both that qui tam has historical constitutionality and that the current statute's validity rests on the proper application of provisions introduced in 1986. The two arguments cannot and do not coexist.

VI. CONCLUSION

For these reasons we recommend that you authorize the Civil Division to enter an appropriate case and present the executive branch's arguments against the constitutionality of qui tam.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Dual Office of Chief Judge of Court of Veterans Appeals and Director of the Office of Government Ethics

Federal law does not bar a single individual from serving simultaneously as the Chief Judge of the Court of Veterans Appeals and the Director of the Office of Government Ethics.

July 21, 1989

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF GOVERNMENT ETHICS

This responds to your request for the opinion of this Office whether you can serve simultaneously as the Director of the Office of Government Ethics and Chief Judge of the Court of Veterans Appeals. For the reasons set forth below, we conclude that you are not barred by federal law from holding both offices, since (we understand) you will receive only a single salary, the two positions are not incompatible, and no appropriation is being directed to any purpose other than that provided by law.[1]

Background

The Court of Veterans Appeals was created by section 301 of the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105, 4113, codified at 38 U.S.C. §§ 4051-4092. The court operates under Article I of the Constitution, and has exclusive jurisdiction to review decisions of the Board of Veterans Appeals. 38 U.S.C. § 4052(a). The court consists of a Chief Judge and from two to six associate judges, who are each to serve terms of 15 years. *Id.* § 4053. The President has recently appointed Judge Nebeker to be the Chief Judge of this court.

Judge Nebeker is also the Director of the Office of Government Ethics ("OGE"). The OGE "was established within the Office of Personnel Management ("OPM") by title IV of the Ethics in Government Act of 1978. The Office was created to 'provide overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and

[1] You have not requested our views on the appropriateness under the American Bar Association Code of Judicial Conduct (1972) of your serving simultaneously in these two positions, and we do not address the issue.

employees of any executive agency.' The OGE Director was given the authority and responsibility for developing rules and regulations regarding conflicts of interest, financial disclosure and ethical conduct by officers and employees in the executive branch; monitoring and investigating individual and agency compliance with financial disclosure requirements; interpreting conflict of interest rules and regulations; providing information on and promoting understanding of ethical standards in executive agencies; and ordering action by agencies and employees to comply with laws, rules, regulations and standards related to conflicts of interest and ethical conduct." H.R. Rep. No. 1017, 100th Cong., 2d Sess., pt. 1, at 8-9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4125, 4129-30. Under sections 3(a) and 10(b) of Office of Government Ethics: Reauthorization Act of November 3, 1988, Pub. L. No. 100-598, 102 Stat. 3031, OGE is to be removed from OPM and to be a separate executive agency, effective October 1, 1989.

We understand that Judge Nebeker will not be involved in adjudicating any cases before the Court of Veterans Appeals for some time after assuming his position there, and that his duties at the outset of his tenure will be largely or entirely administrative. We also understand that Judge Nebeker will have resigned from the Directorship of OGE before he begins to hear cases on the court. During the overlapping period in which he plans to serve both as Director of OGE and as Chief Judge, we understand that Judge Nebeker will draw a salary only as Chief Judge, which is the higher-paid of the two positions.

A. Dual Compensation

The Dual Compensation Act, 5 U.S.C. § 5533, repealed earlier legislation directed against dual office holdings and provides that, subject to exceptions, "an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week (Sunday through Saturday)." The Act merely prohibits the receipt of pay for more than one full-time dual government position (subject to certain exceptions). Accordingly, this Office has repeatedly opined that the Dual Compensation Act does not prohibit the holding of two offices simultaneously, and in fact impliedly permits it.[2] "The basic prin-

[2] *See, e g.*, Memorandum for Arnold Intrater, General Counsel, Office of White House Administration, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re· Dual Office of Executive Secretary of National Security Council and Special Assistant* (Mar 1, 1988) ("Intrater Memorandum"), Memorandum for Myer Feldman, Special Counsel to the President, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re· Fixing of Salary of Director of Office of Economic Opportunity* (Aug. 19, 1964) (dual appointment as Director of the Peace Corps and Director of the Office of Economic Opportunity). Approved dual appointments also include cases in which a job was created by statute and was subject to Senate advice and consent (as is the job of Chief Judge of the Court of Veterans Appeals). *See* Memorandum for George P. Williams, Associate Counsel to the President, from Leon Ulman, Acting Assistant Attorney General, Office of Legal Counsel, *Re. Dual Appointment* (June 24, 1974) (Special Representative for Trade Negotiations and Executive Director of the Council on International Economic Policy)

ciple is that there is no longer any prohibition against dual office-holding. It seems to us that it is not material how the dual tenure comes about, whether by successive appointments by and with the advice and consent of the Senate, by interim designation, or by concurrent nomination and appointment." Memorandum for John D. Ehrlichman, Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2 (Feb. 13, 1969). Thus, the statute is not a bar to Judge Nebeker's serving in the two capacities of Chief Judge of the Court of Veterans Appeals and Director of OGE, so long as he receives only one salary for the work he performs.[3]

B. Incompatibility

Where public policy would make it improper for one person to perform the functions assigned to two distinct offices, a problem of "incompatibility" arises. *See* Intrater Memorandum at 3. Such a problem could be presented if, for example, one office adjudicated matters in which the other was or was likely to be a party. *Id.* at 3-4. We perceive no such "incompatibility" problem here, however. The function of the Court of Veterans Appeals is to hear appeals from decisions of the Board of Veterans Affairs. The Office of Government Ethics is not a party to such appeals. (In any event, we understand that Judge Nebeker will not be hearing appeals on the court until after he has resigned as Director of OGE.) Further, the mere fact of being a federal judge does not prevent someone from holding another federal office. *See Mistretta v. United States*, 488 U.S. 361, 397-404 (1989) (Article III judges may undertake certain extrajudicial functions).[4]

C. Augmentation

31 U.S.C. § 1301(a) provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." This is not an absolute barrier to Judge Nebeker's being compensated by receiving a salary from one position while simultaneously serving in another position. *See United States v. Morse*, 292 F. 273, 277 (S.D.N.Y. 1922) (A. Hand, J.) (Special Assistant to Attorney General could be compensated by continuing to receive his

[3] We have also consistently construed the Dual Compensation Act to require that an individual who holds two offices must be paid the higher salary if it is fixed by law. *See* Intrater Memorandum at 2 n 3 The theory is that the dual office-holder would otherwise be waiving a right to compensation established pursuant to statute — which is unlawful. *See Glavey v. United States*, 182 U.S. 595 (1901), Intrater Memorandum at 3 n 8. We understand that Judge Nebeker will receive the Chief Judge's salary, which is higher than the salary of the Director of OGE, and which is fixed by statute, *see* 38 U.S.C. § 4053(e)(1).

[4] By its plain language, the Incompatibility Clause, U S Const art I, § 6, cl 2, applies only to members of Congress, *see* 17 Op Att'y Gen. 365, 366 (1882), and so is inapplicable here. An Article I judge is not a member of Congress

salary as special counsel to a government corporation). As we have opined before, *see* Intrater Memorandum at 6, so long as Judge Nebeker performs substantial responsibilities for both positions, there is no requirement that he devote full time to either position.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

The President's Authority to Convene the Senate

Article II, section 3 of the Constitution gives the President a broad grant of authority to convene Congress or either House of Congress "on extraordinary occasions." The language and purpose of the clause make plain that the President may exercise this authority to convene the Senate during an intra-session break

July 26, 1989

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

The Constitution grants to the President the authority to "on extraordinary Occasions, convene both Houses, or either of them." U.S. Const. art. II, § 3. This is stated as a broad grant of authority, and it has, accordingly, been exercised almost fifty times by various Presidents. Most recently, President Truman convened both Houses of Congress to consider the questions of inflation and foreign aid. However, many of those times the President convened only the Senate, often for the purpose of considering whether to give its advice and consent to Presidential nominees. The most recent example was in 1933 when President Hoover convened the Senate so that it could consider President Roosevelt's nominees. To date, Presidents have used their special convening power only between sessions of Congress — either calling Congress into session earlier than scheduled or calling it back into session after the normal end-of-session adjournment. However, the language and purpose of the clause make plain that the President has the power to convene Congress or either House during an intra-session break.

The first President to convene the Senate was President Washington, who issued a "Summons" to the Senate immediately following the adjournment of the First Congress. President Washington's summons recited that "[c]ertain matters touching the public good require[] that the Senate be convened." 1 Senate Executive Journal 79-84. While the Senate was convened President Washington submitted a substantial number of civil and military nominations. President Washington convened the Senate again on the day of his second inauguration, immediately following the adjournment of the Second Congress. During this period, President Washington submitted to the Senate three nominations. *Id.* at 138. After the end of the Third Congress, he convened the Senate to consider the Jay Treaty, during which time he also submitted to the Senate a number of nominations.

The Senate was convened by the President many times throughout the 19th century, frequently for the purpose of confirming nominations.[1] In fact, Presidents uniformly convened the Senate for a special session that began on the day of their successor's inauguration. This was done because, prior to the Twentieth Amendment, one Congress would come to a close before the new President's inauguration. Had the preceding President not convened the Senate, it would not have been able to consider the new President's appointments until the start of its next session, which the Constitution sets as the first Monday of the following December.

Although Presidents have traditionally convened the Senate when Congress has been on intersession adjournment, the President's power to "convene both Houses" is not limited to such circumstances. President Truman was advised, and we agree, that "there is nothing in the Constitution to indicate, nor is there any basis for believing, that the President's power to convene the Congress on extraordinary occasions depends on the precise nature of the recess or adjournment, that is, whether the adjournment is sine die, until a day certain, or until the majority leaders of the Congress find it in the public interest to reassemble the two Houses."[2]

Both the text of the Constitution and the purpose of the provision indicate that the President's constitutional power to convene either House extends to periods within sessions of Congress. His power is stated in the broadest possible terms; it is not limited only to when Congress is not in session.[3] This is appropriate to the purposes of the clause — namely, to ensure that the President can summon Congress to Washington so that Congress and the President *together* may face a matter of national import. As Justice Story said in his *Commentaries on the Constitution*:

> The power to convene congress on extraordinary occasions is indispensable to the proper operations, and even safety of the government. Occasions may occur in the recess of congress requiring the government to ... provide for innumerable ... important exigencies ....

Joseph Story, 3 *Commentaries on the Constitution* § 1556 (1833).

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[1] *See, e.g.*, Proclamation No 51, 11 Stat. 798 (1858) (President Buchanan); Proclamation No 53, 11 Stat 799 (1859) (same), Proclamation No. 1, 12 Stat. 1257 (1860) (same); Proclamation No. 18, 12 Stat. 1269 (1863) (President Lincoln), Proclamation No. 26, 13 Stat 752 (1865) (same); Proclamation No. 10, 14 Stat. 821 (1867) (President Johnson), Proclamation No 1, 16 Stat. 1125 (1869) (President Grant); Proclamation No. 1, 17 Stat. 949 (1871) (same), Proclamation No 12, 18 Stat 855 (1875) (same); and Proclamation No. 44, 32 Stat 2036 (1903) (President Roosevelt).

[2] Memorandum for the Attorney General, from George T Washington, Assistant Solicitor General, *Re: Authority of the President to Call a Special Session of the Congress* at 1 (Oct 17, 1947)

[3] In fact, the Constitution expressly contemplates indeterminate periods of adjournment within a session. For instance, Article I states that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const art. I, § 5 Thus, because the President's power to convene Congress is unlimited, it applies to times when Congress is adjourned but in session

Moreover, to contend the President lacks the power to convene when Congress is in session but adjourned is to contend that the President may not during time of war, for example, summon Congress to Washington if Congress chooses to remain absent. Such a contention would also allow Congress, by remaining formally in session but adjourned for most of the time, to defeat the President's constitutional power to convene Congress.

In sum, the Senate has been convened many times and for many reasons. It has considered both nominations and treaties during those times. The Constitution places no limitation on when the President may convene either or both Houses. We therefore conclude that the President has the power to convene the Senate during the planned August adjournment.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Common Legislative Encroachments On Executive Branch Authority

This memorandum lists and briefly discusses a variety of common provisions of legislation that are offensive to principles of separation of powers, and to executive power in particular, from the standpoint of policy or constitutional law.

July 27, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSELS' CONSULTATIVE GROUP*

This memorandum provides an overview of the ways Congress most often intrudes or attempts to intrude into the functions and responsibilities assigned by the Constitution to the executive branch. It highlights ten types of legislative provisions commonly included in proposed legislation that weaken the Presidency. It is important that all of us be familiar with each of these forms of encroachment on the executive's constitutional authority. Only by consistently and forcefully resisting such congressional incursions can executive branch prerogatives be preserved. Of course, the methods of intruding on executive power are limited only by Congress's imagination; thus, our ten examples are illustrative rather than exhaustive. This Office is always pleased to assist in reviewing legislation for any possible encroachments on the President's authority.

1. Interference with the President's Appointment Power

The Appointments Clause is an essential aspect of separation of powers. By permitting the President or his direct subordinates to appoint the officials within the executive branch, the Appointments Clause helps ensure that those who make policy are accountable to the President.

a. The Appointments, Incompatibility and Ineligibility Clauses

The Appointments Clause of the Constitution, Article II, Section 2, Clause 2, provides that "Officers of the United States" must be appointed by the President with the advice and consent of the Senate, or, where

*Editors Note: This memorandum has been superseded *See* Memorandum for the General Counsels of the Federal Government from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: The Constitutional Separation of Powers between the President and Congress* 1 n.1 (May 7, 1996) (to be published).

authorized by Congress, by the President alone, the courts, or the Heads of Departments. These methods of appointment are exclusive; officers of the United States therefore cannot be appointed by Congress, or by congressional officers. *Buckley v. Valeo*, 424 U.S. 1, 126, 141 (1976) (per curiam). Moreover, the scope of the term "officer" is broad: anyone who "exercis[es] significant authority pursuant to the laws of the United States" or who performs "a significant governmental duty ... pursuant to" the laws of the United States is an officer of the United States, *Buckley v. Valeo*, 424 U.S. at 126, 141, and therefore must be appointed pursuant to the Appointments Clause.

Notwithstanding the requirements of the Appointments Clause, Congress frequently establishes and directs commissions, agencies, boards, and other entities to perform operational responsibilities, and requires appointment of their members in a manner incompatible with the Appointments Clause. President Reagan repeatedly had to stress, in signing bills into law, that such commissions may perform only advisory, investigative, informative, or ceremonial functions and may not perform regulatory, enforcement, or other executive responsibilities.[1]

Similar problems have frequently arisen in connection with commemorative commissions, where the violation of the Appointments Clause frequently has been compounded by making Members of the Senate or House members of those commissions, in violation of the Incompatibility Clause of the Constitution, Article I, Section 6, Clause 2. Pursuant to that Clause, no person holding any office of the United States may be a Member of either House of Congress.[2] Members of Congress may constitutionally participate on such commissions only in an advisory or ceremonial capacity.[3] Where the members of a commission appointed in violation of the Appointments or Incompatibility Clauses constitute a majority of the Commission, the Commission itself may perform only advisory or ceremonial functions.[4] Any proposal to establish a new Commission should be reviewed carefully to determine if its duties include executive functions. If they do, the members of the Commission must be appointed pursuant to the Appointments Clause.

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[1] An example of such a signing statement relates to the United States Commission on Civil Rights Act of November 30, 1983, 19 Weekly Comp Pres Doc. 1626, 1627 (1983).

[2] The appointment of Members of the Senate or the House to newly created positions also violates the Ineligibility Clause, that part of Article I, Section 6, Clause 2, pursuant to which "[n]o 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."

[3] *See, e.g.*, signing statement dated September 29, 1983, relating to the establishment of the Commission on the Bicentennial of the United States Constitution, 19 Weekly Comp. Pres Doc. 1362 (1983).

[4] *See, e.g.*, signing statement dated August 27, 1984, relating to the establishment of a Commission on the Commemoration of the First Legal Holiday Celebrating the Birth of Martin Luther King, Jr., 20 Weekly Comp Pres. Doc 1192 (1984).

b. Other Inroads on the President's Appointment Power

Congress also frequently imposes such significant limitations on whom the President may appoint that Congress effectively makes the appointment itself. For example, Congress often legislatively directs the President to nominate an official from among individuals named in lists submitted by the Speaker of the House and the President Pro Tempore of the Senate or other officers of Congress. Such requirements are an unconstitutional attempt to share in the appointment authority which is textually committed to the President alone. The requirement that the President (or other executive officials) appoint persons who will exercise significant authority under the laws of the United States from lists submitted by State Governors or other persons not appointed in accordance with the Appointments Clause suffers from the same constitutional defect.[5]

Congress also imposes impermissible qualifications requirements on principal officers. For instance, Congress will require that a fixed number of members of certain commissions be from a particular political party. These requirements also violate the Appointments Clause. The only congressional check that the Constitution places on the President's power to appoint "principal officers" is the advice and consent of the Senate. As Justice Kennedy recently wrote for himself and two other members of the Court:

> By its terms, the [Appointments] Clause divides the appointment power into two separate spheres: the President's power to 'nominate,' and the Senate's power to give or withhold its 'Advice and Consent.' No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for [the] appointment.

Public Citizen v. Department of Justice, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring).

c. Delegation of Federal Executive Power

One of the gravest new threats to executive branch power is Congress's growing penchant for assigning the executive power to persons who are not part of the executive branch. We believe the assignment of such powers poses a substantial threat to the executive branch, regardless whether the power is assigned to members of the legislative branch, state officials, or private citizens. The assignment of such powers away from the executive branch necessarily weakens the executive branch in relation to the

[5] In fact, a person who is given the authority to draft such lists from which an appointment must be made would be exercising significant authority for purposes of the Appointments Clause.

legislative and judicial branches, and it raises substantial Appointments Clause and other separation of powers questions.

One current example of Congress assigning executive branch power can be found in the so-called "qui tam" provisions, such as those found in the False Claims Act, 31 U.S.C. §§ 3729-3733. In these qui tam provisions, Congress authorizes *any* person to prosecute — on behalf of the United States and in the name of the United States — a civil fraud action for treble damages and penalties against any person who allegedly makes a false claim to the United States Government. The qui tam plaintiff is empowered to sue on the Government's behalf even if he has sustained no personal injury. As a bounty for prosecuting the fraud, the qui tam plaintiff receives up to thirty percent of any damages and penalties recovered, with the balance paid into the United States Treasury.

We believe such provisions must be vigorously resisted. The power to litigate the claims of the United States is committed by the Constitution to the executive branch. It is well established that "conducting civil litigation in the courts of the United States for vindicating public rights" is at the core of Executive power and "may be discharged *only* by persons who are 'Officers of the United States'." *Buckley*, 424 U.S. at 140 (emphasis added); *see also United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (the Attorney General "is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government"); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1868) ("[S]o far as the interests of the United States are concerned, [all suits] are subject to the direction, and within the control of, the Attorney General.").

2. Hybrid Commissions

Congress often creates commissions composed of members or appointees of the legislative and executive branches. These commissions are not clearly a part of either branch. As noted above, if the Commission is to exercise significant authority, the Constitution requires that its members be appointed pursuant to the Appointments Clause. Even if its functions are merely advisory, however, we believe that the establishment of such hybrid commissions is inconsistent with the tripartite system of government established by the framers of our Constitution. Thus, the Department of Justice has frequently included in its bill comments the following:

> The creation of a Commission that is not clearly legislative, judicial, or executive, tends to erode the structural separation of powers. As established by this bill, the Commission could not be considered to be a part of any of the three Branches and would be in the difficult position of having to

> serve two masters. Although the Branches of Government are not "hermetically sealed" from one another, (*Immigration and Naturalization Service v. Chadha*, 462 U.S. 921 (1983)), the separation of powers suggests that each branch maintain its separate identity, and that functions be clearly assigned among the separate branches. The Commission does not mesh with this constitutional structure.

In many instances, the problems created by a hybrid commission are aggravated by the fact that the commission's membership is to contain more representatives of the legislative branch than of the executive branch. In such cases, the Department has to the imbalance, made an additional objection in our bill comments to the following effect:

> In any event, the representation on the Commission of the Executive and Legislative Branches lacks the proper balance. According to the bill, the Commission would comprise one member of the Executive branch, twelve Members of Congress, and five members from the private sector. In our view, the proper relationship between the two co-equal Branches would require that they be equally represented on a Commission of this type in terms of numbers as well as rank.

3. Attempts to Constrain the Removal Power

The President, as the head of a unitary executive branch, has a duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, to coordinate and supervise his subordinates, and to ensure that the executive branch speaks with one voice. *See generally Myers v. United States*, 272 U.S. 52, 163-64 (1926). The President's power to remove subordinates is essential to carrying out these responsibilities. The constitutional limitations on congressional restrictions on the President's removal authority "ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison v. Olson*, 487 U.S. 654, 690-91 (1988).

A recent example of Congress considering a bill that would severely undermine the President's ability to faithfully execute the laws is the proposal to make the Social Security Administration an independent agency by limiting the President's removal powers with respect to its officers. There are literally hundreds of other examples and variations on the theme of restrictions on the President's removal power. Because the power to remove is the power to control, restrictions on removal power strike at the heart of the President's power to direct the executive branch and perform his constitutional duties. In particular, the inability to

remove officers erodes significantly the President's responsibility to "take Care that the Laws be faithfully executed."

We recognize that the Court upheld restrictions on the executive branch's authority to remove an Independent Counsel in *Morrison v. Olson*. The Court stated that the constitutionality of a "for cause" removal provision turns on whether the removal restrictions "impede the President's ability to perform his constitutional duty" and that the functions of the officer whose removal is limited must be analyzed in that light. *Id.* at 691. The Court relied upon three primary points in upholding the "for cause" removal restrictions on the Independent Counsel. The Court reasoned that the "for cause" removal provision was constitutional because the Independent Counsel: (1) is an inferior officer under the Appointments Clause; (2) enjoys only limited jurisdiction and tenure; and (3) lacks policy making or significant administrative authority.

A comparison of the status and functions of the independent counsel, and the status and functions of the officers proposed to be subject to removal restrictions will often show the proposed restriction to be distinguishable from *Morrison*. Moreover, the Independent Counsel was performing a function — the prosecution of high level government officials — where there was perceived to be a conflict of interest within the executive branch. Whether distinguishable or not, the power of the executive branch will be best preserved by vigorous opposition to such restrictions.

4. Micromanagement of the Executive Branch

There has recently been an unabashed willingness by Congress to micromanage foreign affairs and executive branch internal deliberations. For example, S.J. Res. 113, concerning the FSX aircraft, contained detailed provisions intruding into internal executive branch deliberations, including specific directives to a particular executive agency to solicit and consider comments or recommendations from another agency and to make certain recommendations to the President. It also required that the President consider these recommendations. Such provisions clearly constitute an inappropriate intrusion by Congress into executive branch management and an encroachment on the President's authority with respect to deliberations incident to the exercise of executive power. Similarly, bills that require a particular executive agency to be excluded from a policy or executive decision unconstitutionally infringe upon the unitary executive and must, therefore, be resisted. Finally, bills that prohibit executive agencies from taking actions to reorganize or consolidate offices within their agencies or that prohibit agencies from expending funds on activities that are clearly part of the agency's mission constitute an indefensible interference with the day-to-day management of the executive departments.

While Congress has a free hand in determining what laws the President is to enforce, we do not believe that Congress is constitutionally entitled

to dictate *how* the executive branch is to execute the law. Congress' recent interest in determining the precise organizational structure of executive branch departments and the chain of command with respect to internal deliberations seriously threatens the executive branch's ability to effectively and efficiently fulfill its obligations. If continued, this pattern would result in the executive branch being substantially controlled and administered by the legislative branch.

5. Attempts to Gain Access to Sensitive Executive Branch Information

Congress consistently attempts to obtain access to the most sensitive executive branch information and is not always receptive to arguments that the executive branch, like Congress and the courts, must enjoy some measure of protection for confidential exchanges of information if it is to function effectively. Last month, this Office provided you with a memorandum that focused on executive privilege. In addition to overt efforts to obtain privileged information, Congress often includes in bills language that purports to require that "all information" or "all reports" regarding a specific subject be made available to a particular congressional committee or other entity that is not part of the executive branch. Such efforts should be resisted, however, as an unconstitutional encroachment on the President's constitutional responsibility to protect certain information. Therefore, it should always be recommended that such provisions include the phrase "to the extent permitted by law." A typical statement of this Department's position regarding a requirement to make available any or all information and reports is as follows:

> The Department objects to the breadth of this amendment and its failure to recognize the President's constitutional right and duty to withhold from disclosure certain information. The President must retain the authority to withhold in the public interest information whose disclosure might significantly impair the conduct of foreign relations, the national security, the deliberative processes of the executive branch or the performance of its constitutional duties. Accordingly, the Department recommends that the committees' right to obtain such information be qualified by the phrase "to the extent permitted by law."

6. Concurrent Reporting Requirements

In the past year, Congress has increased significantly its use of concurrent reporting requirements in an effort to insert itself into the executive branch decisionmaking process. A concurrent reporting requirement requires an agency simultaneously to transmit to Congress a budget rec-

ommendation or legislative proposal that it transmits to OMB or the White House.

In some instances, a concurrent reporting requirement has even been applied within a department. For example, in 1982 Congress attempted to require the Federal Aviation Administration Administrator to transmit to Congress any budget recommendations or legislative proposals that were transmitted by the Administrator to the Secretary of Transportation. We advised that this provision was unconstitutional.[6]

Concurrent reporting requirements may breach the separation of powers by disrupting the chain of command within the executive branch and preventing the President from exercising his constitutionally guaranteed right of supervision and control over executive branch officials. Moreover, such provisions infringe upon the President's authority as head of a unitary executive to control the presentation of the executive branch's views to Congress. Accordingly, such concurrent reporting requirements should be opposed. However, if enacted, the requirement to transmit reports to Congress should be construed as applying only to "final" recommendations that have been reviewed and approved by the appropriate superiors within the executive branch, including OMB, and if necessary, the President.

7. Legislative Vetoes

In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court held that Congress may only exercise legislative power by passing a bill and presenting it to the President. Thus, the Court held unconstitutional a statutory provision that allowed one House to veto and overrule a decision made by the Attorney General with respect to a deportation. Congress must abide by a delegation of authority to an executive branch official, such as whom to deport, until that delegation is legislatively altered or revoked. Attempts to make particular executive branch decisions contingent upon congressional action or to take binding actions without compliance with the constitutional requirement of presentment are unconstitutional. Efforts to "veto" executive action without complying with the presentment requirement are known as "legislative vetoes." Despite the presentment requirement, Congress has continued to include some forms of legislative veto devices in legislation. *Chadha*, however, clearly stands for the proposition that Congress can only affect the obligations and duties of others through the legislative process and that bills requiring an executive official to take, or not to take, a particular action must be presented to the President. Any leg-

[6] Memorandum for John Fowler, General Counsel, Department of Transportation, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re Statutory Requirements for the FAA Administration to Provide Certain Budget Information and Legislative Recommendations Directly to Congress* (Nov. 5, 1982)

islation that subjects executive action to veto or approval by the Houses of Congress or their committees is unconstitutional.

8. Requirements that Legislation be Submitted to Congress

Under Article II, Section 3 of the Constitution, the President is directed to recommend for legislative consideration "such Measures as he shall judge necessary and expedient." Despite this Clause, Congress frequently attempts by statute to control the executive's legislative priorities by requiring that the President or his subordinates recommend legislative measures on certain subjects. Because the President has plenary exclusive authority to determine whether and when he should propose legislation, any bill purporting to require the submission of recommendations is unconstitutional. If enacted, such "requirements" should be construed as only a recommendation to the President that he submit legislative proposals.

9. Attempts to Restrict the President's Foreign Affairs Powers

Since the 1970s, Congress has increasingly attempted to assert itself in the area of foreign affairs at the expense of the authority traditionally exercised by the President.[7] The President has the responsibility, under the Constitution, to determine the form and manner in which the United States will maintain relations with foreign nations. *E.g.*, U.S. Const. art. II, §§ 1-3; *Haig v. Agee*, 453 U.S. 280, 291-92 (1981); *Baker v. Carr*, 369 U.S. 186, 212-13 (1962); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). It has long been recognized that the President, both personally and through his subordinates in the executive branch, determines and articulates the Nation's foreign policy. *See* Statement of John Marshall, 10 Annals of Cong. 613 (1800); *Curtiss-Wright*, 299 U.S. at 320 ("the President [is] the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress"). This authority encompasses the authority to make treaties on such terms as the

[7] The history of recent congressional action in this area was succinctly summarized in the following excerpt from an article by Senator John G. Tower, Chairman of the Senate Armed Services Committee.

> The 1970's were marked by a rash of Congressionally initiated foreign policy legislation that limited the President's range of options on a number of foreign policy issues. The thrust of the legislation was to restrict the President's ability to dispatch troops abroad in a crisis, and to proscribe his authority in arms sales, trade, human rights, foreign assistance and intelligence operations. During this period, over 150 separate prohibitions and restrictions were enacted on Executive Branch authority to formulate and implement foreign policy. Not only was much of this legislation ill conceived, if not actually unconstitutional, it has served in a number of instances to be detrimental to the national security and foreign policy interests of the United States.

John G. Tower, *Congress Versus the President: The Formulation and Implementation of American Foreign Policy*, 60 Foreign Aff., 229, 234 (Winter, 1981-1982)

President deems advisable and to discuss any issue with another sovereign nation and to recommend to it such courses of action as the President believes are in our Nation's interest.

Accordingly, provisions that would prohibit officers or employees of the United States government from soliciting funds or material assistance from foreign governments (including any instrumentality or agency thereof), foreign persons, or United States persons, for the purpose of furthering any military, foreign policy, or intelligence activity are unconstitutional. Similarly, any provision that purports to prohibit, or to require, consultation between the United States and another sovereign nation would be unconstitutional. No limitations on the President's authority to discuss certain issues with foreign governments, or to recommend or concur in courses of action taken by other nations, should be sanctioned.

10. Restrictions on the President's Power to Make Recess Appointments

In addition to frequent attempts to place restrictions on the power of the President to appoint officers of the United States under the Appointments Clause, Congress has occasionally attempted to constrain his power under Article II, Section 2, Clause 3 to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Thus, for example, a provision in an appropriations bill several years ago purported to mandate continued funding for grantees of the Legal Services Corporation unless action was taken by directors confirmed by the Senate. This provision interfered with the President's recess appointment power to the extent that it purported to disable recess appointees from performing functions that could be performed by directors confirmed by the Senate. This trend is dangerous for presidential powers because the recess appointment power is an important counterbalance to the power of the Senate. By refusing to confirm appointees, the Senate can cripple the President's ability to enforce the law. The recess appointment power is an important resource for the President, therefore, and must be preserved.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions

A proposed statutory provision that would oblige the President to notify Congress of any and all covert actions (other than those for the purpose of intelligence-gathering) to be funded out of the Reserve for Contingencies, regardless of the circumstances, would unconstitutionally infringe upon the President's constitutional responsibilities, including his duty to safeguard the lives and interests of Americans abroad.

July 31, 1989

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This is in response to your request for our opinion on the constitutionality of a proposed amendment to section 502 of the National Security Act, 50 U.S.C. § 414. That amendment would prohibit the expenditure or obligation of any funds from the "Reserve for Contingencies" for any covert action in a foreign country (other than for the purpose of intelligence-gathering) if the President has not first notified the appropriate congressional committees of the proposed expenditure. For the reasons stated below, we believe such a requirement is an unconstitutional condition on the President's authority to conduct covert activities abroad pursuant to the President's constitutional responsibilities, including his responsibility to safeguard the lives and interests of Americans abroad.

Title 22, section 2422, of the United States Code, prohibits the expenditure of funds

> 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.

The proposed amendment would further limit the President's ability to conduct certain intelligence activities important to the national security of the United States. It would add as a proviso to section 502 of the

National Security Act, 50 U.S.C. § 414, a requirement that "no funds from the Reserve for Contingencies may be expended for any operation or activity for which the approval of the President is required by section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. § 2422), or for any significant change to such operation or activity, for which prior notice has been withheld."

We believe the proposed amendment is unconstitutional because it would oblige the President to notify Congress of *any and all* covert actions to be funded out of the Reserve for Contingencies, regardless of the circumstances. It would apply even if the President is directing an extremely sensitive national security activity within his exclusive responsibility under the Constitution. We need not define all that is comprehended within the grant to the President of "the executive Power ... of the United States of America," U.S. Const. art. II, § 1. At a minimum, that power encompasses the authority to direct certain covert actions without first disclosing them to Congress, among which are those actions necessary to protect the lives and property of Americans abroad. Early judicial recognition of this authority of the President to take action to protect Americans abroad came during a mid-nineteenth century revolution in Nicaragua. On the President's orders, a naval gunship bombarded a town where a revolutionary government had engaged in violence against Americans and their property. Of this action it was said:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property ....
>
> Now, as it respects the interposition of the executive abroad, *for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president.*

Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186) (emphasis added). At least to the extent the amendment would limit that authority, it is unconstitutional.

The courts have also recognized that the President must be able to act secretly in order to meet his constitutional responsibilities in foreign affairs. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-21 (1936), the Court expressly endorsed President Washington's refusal to provide the House of Representatives with information about treaty negotiations even after the negotiations had been concluded. A fortiori, such information could be withheld during the negotiations.

The Court has more recently emphasized that the core presidential responsibility for protecting confidential national security interests extends beyond matters concerning treaties and into diplomatic and military secrets such as covert actions. *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) (recognizing the "President's interest in preserving state secrets"). This conclusion is rooted in the original conception of the President's Office, as described by John Jay in the Federalist. There, he spoke of the need for "perfect *secrecy* and immediate *dispatch*" in the field of diplomacy and intelligence gathering.[1] He continued:

> The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet *he will be able to manage the business of intelligence in such manner as prudence may suggest.*

Id. at 392-93 (emphasis added).

We believe that because the Constitution permits the President, where necessary, to act secretly to achieve vital national security objectives abroad, a rigid requirement of prior notice for covert operations impermissibly intrudes upon his constitutional authority.

As the *Durand* court recognized, the grant of executive power is the principal textual source of the President's discretion to act for the Nation in foreign affairs. From the First Congress on, this grant has been construed to afford the President discretion to act in the field of foreign affairs. This broad power in matters of foreign policy stands in contrast to his comparatively limited authority to act alone in the domestic context. President Washington, for example, asserted the President's prerogative to communicate with Citizen Genet when he sought something for a consul, and addressed that request to "the Congress of the United States." It was President Washington who asserted the President's authority to determine the status of foreign representatives when he later demanded Citizen Genet's recall. President Washington also determined, without consulting Congress, that the United States would remain impartial in the war between France and Great Britain; he also refused to share with the House of Representatives sensitive information about the negotiation of the Jay Treaty with Great Britain. The First Congress recognized that the conduct of our foreign affairs was to be primarily the responsibility of the President, and for that reason located the State Department in the executive branch. The Supreme Court has recognized that the President alone is empowered to negotiate with foreign countries on behalf of the United States. In *Curtiss-Wright*, 299 U.S. at 319, the Court stated:

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[1] *The Federalist*, No 64, at 392 (John Jay) (Clinton Rossiter ed , 1961).

> Not only ... is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

Id. These examples could be expanded upon, but all buttress the conclusion that the President's authority with respect to foreign affairs is very broad, and that certain foreign affairs powers, such as the power to act (secretly if need be) to protect Americans abroad, inhere in his Office.

Congress attempts to justify under its power of the purse requiring prior notification of all covert actions to be paid for out of the Reserve for Contingencies. Congress's authority incident to its power over the purse is broad, and generally includes the power to attach conditions to appropriations, but its power is by no means limitless. For example, Congress appropriates money for all federal agencies in all three branches of government. But the fact that Congress appropriates money for the Army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces. Nor does it follow from Congress' legislative establishment of executive branch departments and its appropriation of money to pay the salaries of federal officials that Congress can constitutionally condition creation of a department or the funding of an officer's salary on being allowed to appoint the officer. Interpreting the appropriations power in this manner would in effect transfer to Congress all powers of the branches of government. The Framers' carefully worked out scheme of separation of powers, of checks and balances, would be rendered meaningless. Accordingly, however broad the Congress' appropriations power may be, the power may not be exercised in ways that violate constitutional restrictions on its own authority or that invade the constitutional prerogatives of other branches. As the Supreme Court has said, "Lacking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. *Neither can it supplant the Executive in what exclusively belongs to the Executive.*" *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (emphasis added).

This well-established doctrine of unconstitutional conditions further prevents Congress from using its power over the appropriation of public funds to attach conditions to executive branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs. Just as an individual may not be required to waive his constitutional

rights as a condition of accepting public employment or benefits, so the President cannot be compelled to give up the authority of his Office as a condition of receiving the funds necessary to carrying out the duties of his office.[2]

Congress has also justified such reporting requirements on the basis of its need for information to carry out its legislative function. This oversight power, however, is neither explicit, *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927), nor "unlimited," *Watkins v. United States* 354 U.S. 178, 187 (1957). It can be exercised only to further a legitimate legislative function traceable to one of Congress' enumerated powers. *See McGrain*, 273 U.S. at 173-74. There is no enumerated power in the Constitution giving Congress the authority to require the President first to report to a congressional committee prior to undertaking covert activities which are exclusively within his province. Any legislative purpose that would be served by informing Congress about a covert action can be served by notice after the covert action has been initiated or completed.[3]

Moreover, even in cases in which it can be assumed that Congress has a legitimate legislative basis for the requested information, it does not follow that the President invariably should give Congress prior notice of certain covert actions. As President Tyler recognized in 1843, "[i]t can not be that the only test is whether the information relates to a legitimate subject of [congressional] deliberation." 4 James D. Richardson, *Messages and Papers of the Presidents* 220, 223 (1897). A President is under no obligation to communicate information to Congress if to do so would impair his ability to execute his own constitutional duties. *United States v. Nixon*, 418 U.S. 683, 710 (1974). Under some circumstances, prior notice to Congress could well frustrate the President's ability to discharge those duties.

In concluding that the amendment is unconstitutional, we are not denying that Congress has a legitimate role in the formulation of American foreign policy. Nor are we denigrating the value of consulting with members of Congress prior to the initiation of a covert operation. We simply believe Congress does not require prior notification of all intelligence activities paid for out of the Reserve for Contingencies in order to perform its legislative function. Therefore, it lacks the constitutional authority to impose a rigid requirement of notice in all circumstances.

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[2] The doctrine of unconstitutional conditions has wide application throughout the law For a good general statement of the doctrine, see *Frost & Frost Trucking Co v. Railroad Commission*, 271 U.S. 583, 594 (1926)

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel the surrender of all It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

[3] For instance, post-action notification will suffice to inform Congress about actions of foreign nations and merchants so that it may regulate "foreign commerce "

Conclusion

We conclude that a requirement of prior notice for all covert operations funded from the Reserve for Contingencies unconstitutionally infringes on the President's constitutional responsibilities, including his duty to safeguard the lives and interests of Americans abroad.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Applicability of the Service Contract Act to Volunteer Workers at the National Oceanic and Atmospheric Administration

Pursuant to 28 U.S.C. § 512, the Office of Legal Counsel has jurisdiction to resolve a legal dispute between the Departments of Commerce and Labor where the request for the opinion was made by the General Counsel of Commerce under authority delegated from the Secretary of Commerce.

The Service Contract Act prohibits contractors operating the National Oceanic and Atmospheric Administration library from using voluntary, uncompensated employees. Commerce may petition the Secretary of Labor for an exemption to permit the use of volunteer employees under the NOAA contract

July 31, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF COMMERCE

This letter responds to Robert H. Brumley's request of June 10, 1988 for the opinion of this Office as to the applicability of the Service Contract Act ("SCA" or "Act") to a contract to operate the National Oceanic and Atmospheric Administration ("NOAA") library in part by using voluntary, uncompensated help to perform tasks that fall within the type of services otherwise covered by the Act. For the reasons set forth below, we conclude that the Act applies to such contracts and that the contractor or subcontractor may not use volunteer employees to perform tasks associated with operating the library.

I. Background

Congress enacted the Service Contract Act in 1965 "to provide labor standards for the protection of employees of contractors and subconrtactors [sic] furnishing services to or performing maintenance service for Federal agencies." S. Rep. No. 798, 89th Cong., 1st Sess. 1 (1965). The Act, as codified at 41 U.S.C. §§ 351-358, implements this goal by requiring contractors and subcontractors on contracts greater than $2,500 to pay workers at least the minimum wage. Section 351(a)(1) provides:

> (a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia

> in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:
>
> > (1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality .... In no case shall such wages be lower than the minimum specified in subsection [351](b) of this section.

41 U.S.C. § 351(a)(1).

Section 351(b) mandates that in no circumstances shall wage levels fall below the national statutory minimum wage:

> *No contractor* who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder *shall pay any of his employees* engaged in performing work on such contracts *less than the minimum wage* specified under section 206(a)(1) of title 29.

Id. § 351(b)(1) (emphasis added). "Service employee" is defined in the Act as "*any person engaged in the performance of a contract entered into by the United States* and not exempted under section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States ... and ... include[s] all such persons *regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.*" *Id.* § 357(b) (emphasis added).[1] The Act prescribes penalties for noncompliance ranging from payment of compensation due underpaid employees to cancellation of the contract. 41 U.S.C. § 352(a).

The rationale for this unqualified approach to fair labor standards under the SCA was that service contracts represented "the only remaining category of Federal contracts to which no labor standards protections

[1] The legislative history of the SCA elaborates somewhat on this definition. According to the House Report, "'Service employee' means guards, watchmen, and any person engaged in a recognized trade or craft or other skilled mechanical craft, or in manual labor occupations, and any other employee for whom experience in such occupations is the paramount requirement." H.R Rep. No. 948, 89th Cong., 1st Sess. 5 (1965); *see also* S. Rep. No 798 at 2.

appl[ied]." H.R. Rep. No. 948, 89th Cong., 1st Sess. 1 (1965). Congress was concerned with preventing contractors from undercutting their competitors for government service contracts by reducing labor costs. As the House Report explained:

> The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level. When a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages.

Id. at 2-3.

The current disagreement between the Department of Commerce ("Commerce") and the Department of Labor ("Labor") arose when Commerce received a contractor's proposal to use voluntary, uncompensated employees to perform tasks covered by the Service Contract Act in operating the NOAA library. Commerce initially determined that the Act did not apply to such a contract.[2] Labor then advised Commerce by letter that the Act covered such contracts.[3] In reply, Commerce advised Labor that it had complied with Labor's interpretation of the SCA in awarding the NOAA contract. Commerce added, however, that its compliance required it to pay an additional $140,164 in the contract price, and that it intended to raise the issue with the Department of Justice.[4] On June 10, 1988, Commerce requested an opinion from this Office, stating that it believes Labor's position on this issue to be in error and that "it is likely that this question will arise on other procurements or in the course of recompetition of [the NOAA library contract]."[5]

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[2] Memorandum for William Matuszeski, Director, Office of A-76 Activities, NOAA, from James K White, Assistant General Counsel for Finance and Litigation, Department of Commerce (Nov. 16, 1987).

[3] Letter for J. Curtis Mack, II, Acting Administrator, NOAA, from Paula V Smith, Administrator, Wage and Hour Division, Department of Labor (Dec. 7, 1987) Smith reiterated this position in a letter to Mack dated January 22, 1988.

[4] Letter for Paula V. Smith, Administrator, Wage and Hour Division, Department of Labor, from William E Evans, Under Secretary, NOAA (Apr 15, 1988)

[5] Letter for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Robert H Brumley, General Counsel, Department of Commerce at 2 (June 10, 1988).

II. Discussion

A. Jurisdiction

The authority of the Attorney General to resolve this dispute between the Departments of Commerce and Labor is well-established. By law, "[t]he head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department." 28 U.S.C. § 512.[6] Here, there is no doubt that the question presented — whether Commerce, consistent with the SCA, can enter into a contract for the operation of the NOAA library that provides for the use of voluntary services — "aris[es] in the administration of [the Commerce] department." *See, e.g., Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities*, 12 Op. O.L.C. 89, 91 n.4 (1988) ("[I]nterpretation of statute that will affect contracts entered into by department is a legal question 'arising in the administration of the department' within meaning of ... 28 U.S.C. 512.").[7]

The Solicitor of Labor challenges our jurisdiction to entertain Commerce's request for an opinion under 28 U.S.C. § 512 on the grounds that, inter alia, Commerce's request was not made by the Secretary of Commerce and addressed to the Attorney General. Letter for John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, from Monica Gallagher, Associate Solicitor, Fair Labor Standards Division, Department of Labor at 2-4 (July 14, 1989).[8] This argument, however, completely ignores the fact that agency heads execute many of their important functions through delegation. A written request addressed from the General Counsel of Commerce to the Assistant

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[6] In addition to the statutory authority set forth in 28 U.S.C. § 512, Executive Order No. 12146, 3 C.F.R. 409 (1979), confers authority on the Attorney General to resolve disputes between executive agencies. Executive Order No. 12146 provides in pertinent part:

> 1-4. Resolution of Interagency Legal Disputes.
>
> 1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.
>
> 1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is a specific statutory vesting of responsibility for a resolution elsewhere.

[7] By statute, the NOAA is "under the jurisdiction and subject to the control of the Secretary of Commerce." 15 U.S.C. § 1511(a).

[8] The Solicitor of Labor also contends that we have no jurisdiction to respond to Commerce's request under Executive Order No. 12146. Executive Order No. 12146, however, augments the authority conferred on the Attorney General under 28 U.S.C. § 512 by, among other things, empowering the Attorney General to address questions raised by executive agencies not within one of the executive departments. *See* Memorandum for the Secretary of Housing and Urban Development, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 6 & n.1 (Aug. 6, 1987). Because we conclude that we have jurisdiction to entertain Commerce's request under 28 U.S.C. § 512, we need not address the scope of our authority under Executive Order No. 12146.

Attorney General for the Office of Legal Counsel may be entertained under section 512.[9]

B. Applicability of the Service Contract Act to Volunteer Workers

We believe that the SCA applies to the contract at issue here because, although the Act does not expressly advert to volunteer workers, the plain meaning of the Act's unqualified proscription of subminimum wages does not admit of any such exception.

The statutory command in the SCA is simple and direct: "No contractor ... shall pay any of his employees ... less than the minimum wage." 41 U.S.C. § 351(b)(1). The Senate Report accompanying the bill put the matter just as starkly: "Persons covered by the bill must be paid no less than the prevailing rate in the locality as determined by the Secretary, including fringe benefits as an element of the wages. No less than the applicable minimum wage provided in the Fair Labor Standards Act, as amended, can be paid." S. Rep. No. 798 at 2.[10]

Commerce contends that "the Act is not intended to apply to prohibit volunteer services" apparently because the Act is silent with respect to volunteer workers, and both the Act and its implementing regulations implicitly refer to the payment of classes of "wage earning employees." Letter for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Robert H. Brumley, General Counsel, Department of Commerce at 1 (June 10, 1988). In our view, although the Act does not mention volunteer workers per se, the plain meaning of the statutory scheme that Congress has adopted does not permit such an exception.

The SCA clearly directs that, with respect to "any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees," no contractor "shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of title 29 [the Fair Labor Standards Act]." 41 U.S.C. § 351(b)(1).[11] In turn, the term "service

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[9] The General Counsel of Commerce has been delegated broad authority to "appear[] on behalf of the Secretary" in legal proceedings and to "prepar[e] ... all papers relating to matters on which the opinion of the Attorney General is desired." Department of Commerce, DOO No. 10-6 §§ 4.01(3), (5) (July 3, 1963). The Assistant Attorney General for the Office of Legal Counsel has been charged with, among other things, "rendering informal opinions and legal advice to the various agencies of the Government." 28 C.F.R. § 0.25(a) (1989); *see also* 28 U.S.C. § 510.

[10] *See also* H R. Rep No 948 at 4 ("No contractor holding a service contract shall pay any of his employees performing the work on such contracts less than the minimum wage specified by section 6(A)1 of the Fair Labor Standards Act of 1938.").

[11] The command in the Fair Labor Standards Act, which covers employers providing contract services that are not covered by the SCA, is equally direct

> Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of

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employee" is defined in relevant part as meaning "*any person engaged in the performance of a contract entered into by the United States* and not exempted ... and ... include[s] all such persons *regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.*" *Id.* § 357(b) (emphasis added); *see also* 29 C.F.R. §§ 4.113, 4.150, 4.155.

Commerce does not explain, nor can we discern, how an exception for volunteer workers can be carved out of this broad definition of "service employee" without doing violence to the plain meaning of the Act. Under section 357(b), a "service employee" is defined as *any* person who performs work on a service contract entered into by the United States. Furthermore, section 357(b) expressly provides that the nature of an employee's contractual relationship with his or her employer has no bearing on the employee's covered status for purposes of the Act. Accordingly, we do not see any basis for ignoring the plain meaning of the Act and interpreting it as implicitly applying only to wage-earning employees, particularly in light of the maxim of statutory construction that "remedial labor statutes like the Service Contract Act are to be liberally construed." *Menlo Service Corp. v. United States*, 765 F.2d 805, 809 (9th Cir. 1985).

Indeed, as the Solicitor of Labor points out, construing the SCA in this manner could potentially invite a range of abuses: "permitting the use of 'volunteers' removes equality from the competitive bidding process and encourages contractors, if they wish to be low bidder, to replace their employees with 'volunteers' or to induce their employees to accept some form of 'volunteer' status.... These results are contrary to the intention of Congress in enacting the SCA to increase the protection of workers in the service industry and to discourage contractors from reducing the compensation of workers." Letter for John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, from Monica Gallagher, Associate Solicitor, Fair Labor Standards Division, Department of Labor at 7-8 (July 14, 1989).

Finally, we note that the use of volunteer workers under the SCA — such as Commerce proposes with respect to the NOAA library contract — may be considered on a contract-by-contract basis pursuant to a request for a variance or exemption from the Act's minimum wage requirements in accordance with the standards set forth in 41 U.S.C. § 353(b) and the regulations at 29 C.F.R. § 4.123(b). *See* Letter for John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel,

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[11] (. continued)
his employees whose rate of pay is not governed by the Service Contract Act of 1965 .. or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the [minimum wage] rates provided for in subsection (b) of this section
29 U.S.C. § 206(e)(1).

from Monica Gallagher, Associate Solicitor, Fair Labor Standards Division, Department of Labor at 8 (July 14, 1989).[12] Accordingly, the Secretary of Commerce may petition the Secretary of Labor for an exemption to permit the use of volunteer employees under the NOAA contract.

III. Conclusion

Our review of the Service Contract Act and its legislative history persuades us that the Act does not permit the implication of an exemption for contracts that provide for services rendered by volunteer employees. Commerce remains free, of course, to petition the Secretary of Labor for an exemption specifically relating to the NOAA contract.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

[12] According to the Solicitor, Commerce has neither requested such an exemption nor provided Labor with the information necessary to evaluate such a proposal. *Id.* at 8-9 & n 6

Intrasession Recess Appointments

The President may make appointments under the Recess Appointments Clause during an intrasession recess of the Senate that is of substantial length A 33-day summer recess is of sufficient length to permit the President to make recess appointments.

An officer appointed under the Recess Appointments Clause during an intersession recess may serve until the end of the next session of Congress after the recess.

5 U.S.C. § 5503 does not prohibit salary payments to a recess appointee whose nomination a committee refused to send to the full Senate and whose nomination was not returned to the President prior to an adjournment.

August 3, 1989

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to your request that this Office determine whether the President can make appointments under the Recess Appointments Clause, Article II, Section 2, Clause 3 of the Constitution, during the impending intrasession recess of the Senate, which we understand will extend from August 4 to September 6, 1989. The question arises because a committee failed, by an even vote, to recommend confirmation of a nominee and then refused to send the nomination to the floor for consideration by the full Senate. You asked us to address four discrete issues: (1) whether the President can appoint someone during a recess of 33 days; (2) when during the recess the President may make such an appointment; (3) how long the recess appointee may serve; and (4) whether one who has been subject to such committee action may receive his salary under 5 U.S.C. § 5503, which prohibits Treasury disbursements to pay salaries of recess appointees until they are confirmed by the Senate unless, inter alia, "at the end of the session" the nomination was "pending before the Senate for its advice and consent." We discuss each issue in turn.

We conclude that the President is authorized to make intrasession recess appointments during a recess of substantial length, and we believe that the 33 days of this recess would be of sufficient length to permit the President to make recess appointments. Such appointments could be made at any time during the recess, but ideally would be made as early as possible in the recess. Appointees could serve until the end of the next session of Congress after the recess. Finally, we conclude that 5 U.S.C. §

5503 would not prohibit salary payments to a recess appointee whose nomination a committee refused to send to the full Senate and whose nomination was not returned to the President prior to adjournment.

I. CONSTITUTIONAL ANALYSIS

A. Length of Recess Necessary for Appointment

Article II, Section 2, Clause 3 of the Constitution provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." The Department of Justice has long interpreted the term "recess" to include intrasession recesses if they are of substantial length. In 1921, Attorney General Daugherty held that the President had the power to make appointments during an intrasession recess of the Senate lasting from August 24 to September 21, 1921. 33 Op. Att'y Gen. 20 (1921). The opinion concluded that there was no constitutional distinction between an intersession recess and a substantial adjournment during a session. It held that the constitutional test for whether a recess appointment is permissible is whether the adjournment of the Senate is of such duration that the Senate could "not receive communications from the President or participate as a body in making appointments." *Id.* at 24 (quoting S. Rep. No. 4389, 58th Cong., 3d Sess. (1905); 39 Cong. Rec. 3823 (1905) (statement of Sen. Spooner)). Attorney General Daugherty admitted that by "the very nature of things the line of demarcation cannot be accurately drawn." *Id.* at 25. But, he concluded:

> the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. Every presumption is to be indulged in favor of the validity of whatever action he may take.

Id.

Attorney General Daugherty's opinion was cited and quoted with approval by the Comptroller General in 28 Comp. Gen. 30, 34-36 (1948), and reaffirmed by Acting Attorney General Walsh in 1960 in an opinion on an intrasession summer recess lasting from July 3 to August 8, 1960. 41 Op. Att'y Gen. 463, 468 (1960). In 1979, this Office reaffirmed the opinions of Attorney General Daugherty and Acting Attorney General Walsh, 3 Op. O.L.C. 314, 316 (1979), and, in 1982, again reaffirmed Acting Attorney General Walsh's opinion, 6 Op. O.L.C. 585, 588 (1982).

Acting on this advice, Presidents frequently have made recess appointments during the traditional summer and election intrasession recesses,

which typically last for about one month.[1] Recently this Office advised that recess appointments could be made during a 24-day intrasession summer recess.[2] Ultimately, resolution of the question whether an adjournment is of sufficient duration to justify recess appointments requires the application of judgment to particular facts. Given past practice, however, a recess of 33 days is clearly long enough to permit a recess appointment.

B. When the Appointment Can Be Made

Given that the rationale for treating substantial intrasession adjournments as "recesses" for purposes of the Recess Appointments Clause is that substantial adjournments prevent the Senate from acting on nominations, one might expect that the appointment must be made early in the recess. Nonetheless, there appears to be no authority for such a proposition and, indeed, in 1983, this Office advised that a recess appointment could be made at 11:30 a.m. on the day the Senate was to reconvene at 12:00 noon after a 38-day recess. *See* Memorandum for the Files, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel (Oct. 19, 1983). Despite the apparent lack of adverse precedent, however, it would seem prudent to make any appointment as early in the recess as possible.

C. Duration of the Recess Appointment

The duration of the recess appointment depends on the meaning of the term "next session" in the Recess Appointments Clause. It is clearly established that the "End of their [the Senate's] next Session" is not the end of the meeting of the Senate which would begin when the Senate returns from its adjournment, but rather the end of the session following the final adjournment of the current session of Congress. *See* 41 Op. Att'y Gen. at 469-70. Because the current session of Congress is the first session of the 101st Congress, a recess appointment made during one of its intrasession recesses would not expire until the end of the following session. This would be the second session of the 101st Congress, which will probably end in late 1990.

II. STATUTORY ANALYSIS

Although the President has the constitutional power to make appointments during the intrasession recess of the Senate, 5 U.S.C. § 5503 pro-

[1] *See, e g.*, 41 Op Att'y Gen. 463, 468 (1960), 33 Op. Att'y Gen. 20 (1921); 6 Op. O.L.C. 585, 588 (1982); 3 Op O.L.C. 314, 316 (1979)

[2] Memorandum for the Files from Herman Marcuse, Attorney-Adviser, Office of Legal Counsel (July 6, 1984). Thus Office has cautioned against a recess appointment during an 18-day intrasession recess Memorandum for the Files from Herman Marcuse, Attorney-Adviser, Office of Legal Counsel (Jan. 28, 1985).

hibits the payment of salaries to recess appointees, with certain exceptions. Section 5503 provides:

> (a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply —
>
> (1) if the vacancy arose within 30 days before the end of the session of the Senate;
>
> (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or
>
> (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.
>
> (b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

The vacancy for which the individual in question was nominated did not arise within 30 days before the end of the session; nor would subsection (a)(3) apply with respect to the individual in question, since it only applies if a different person is recess appointed than the one who was nominated prior to the recess. The question, therefore, is whether the nominee satisfies the requirements of subsection (a)(2).[3] The critical inquiry under this subsection is whether a nomination a committee has

[3] Section 5503(a)(2) requires that the nomination have been pending "at the end of the session." We believe that the term "at the end of the session" refers to the end of any period during which Congress is conducting business, not solely to the final adjournment of a formal session of Congress *See* Memorandum for the Attorney General, from John O McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re. Recess Appointments* at 8-9 (July 7, 1988) The Comptroller General has agreed with our conclusion that Congress did not intend the statutory term "session" to be read narrowly to refer only to the formal sessions of Congress: "the term 'termination of the session' [has] ... been used by the Congress in the sense of any adjournment, whether final or not, in contemplation of a recess covering a substantial period of time " 28 Comp Gen. 30, 37 (1948).

refused to report favorably to the full Senate and refused to send to the floor is still "pending before the Senate for its advice and consent."[4] To our knowledge there is neither caselaw nor relevant legislative history on this specific question. We believe, however, that a nomination must be regarded as having been "pending before the Senate" if, under any circumstance, the Senate could have acted on the nomination. Under this common- sense interpretation, a nomination that was not reported out of committee, and which was neither acted upon by the full Senate following an order of discharge nor returned to the President by the Senate, would have been "pending before the Senate" at the end of the session.

The Senate has the inherent power to discharge from a committee any matter it wishes including nominations as recognized by Senate Rule XVII 4(a). Thus, any nomination that a committee refused to vote out for floor consideration would have been subject to discharge and consideration by the full Senate. Given this, we believe that such a nomination would have been "pending before the Senate" for purposes of section 5503(a)(2).

Senate Rule XXXI clearly supports this interpretation of the term "pending before the Senate." Under this rule, there are two circumstances in which the President must resubmit a nomination if it is to be considered: (1) where a nomination has been voted on by the full Senate and rejected, and (2) where a nomination has been returned. In both circumstances, the President is notified, either by notification of the vote, or by his receipt of the returned nomination. The rules of the Senate nowhere state or even suggest that the President must resubmit a nomination not reported out, and there is no provision for notifying the President that he must do so. The clear inference from this rule is that a nomination that a committee refuses to report to the floor, but that has not been returned to the President, remains pending before the Senate.

The Senate rules provide that "at the time of taking [an] adjournment" for more than 30 days, all nominations are to be returned to the President and will not be reconsidered unless resubmitted by him. Senate Rule XXXI(6).[5] It might be argued that upon return to the President under this rule, a nomination is no longer pending before the Senate. Even were this the case, however, a recess appointee whose nomination the committee

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[4] Under a similar provision in the annual Treasury Department and Postal Service appropriations bill, compensation is prohibited when the Senate, as opposed to a particular Senate committee, has voted not to approve a nomination Section 606 of the appropriations bill provides: "No part of any appropriation for the current fiscal year contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person " Treasury, Postal Service and General Government Appropriations Act of 1989, Pub L. No 100-440, § 606, 102 Stat. 1721, 1752 (1988). Because the full Senate has not voted on the nomination at issue, this provision is clearly inapplicable

[5] Senate Rule XXXI(6) provides that nominations "neither confirmed nor rejected during the session at which they are made" and nominations "pending and not finally acted upon *at the time of [an] adjournment or recess* [of more than 30 days] shall be returned by the Secretary to the President" and will not be reconsidered unless resubmitted by the President (Emphasis added)

refused to report out to the full Senate and whose nomination was returned pursuant to the rule would not be prohibited from receiving compensation under section 5503. Since nominations may be returned pursuant to rule XXXI only if they were "pending ... at the time of ... adjournment or recess" from session, any nomination returned pursuant to the rule would necessarily have been returned *after* the end of the session, and thus would have been pending *at* the end of the session. Thus, the subsection (a)(2) requirement that the nomination have been "pending at the end of the session" would be satisfied.

In sum, we do not believe that the committee's split vote on the nominee or the return of the nomination pursuant to Senate Rule XXXI would alter the status of the nomination as "pending before the Senate for its advice and consent" "at the end of the session" for purposes of section 5503. Therefore, subsection (a)(2) would permit a recess appointee to be paid a salary during the pendency of his recess appointment.[6]

III. CONCLUSION

We conclude that the President may exercise his power under the Recess Appointments Clause during the August 1989 recess. We also conclude that when a Senate committee has voted not to send a nomination to the floor, and the Senate has not discharged the nomination from committee or returned it to the President prior to adjournment, the nomination was "pending before the Senate for its advice and consent" for purposes of 5 U.S.C. § 5503(a)(2), and thus the recess appointee would not be prohibited from being paid a salary during the course of his recess appointment.

J. MICHAEL LUTTIG
Acting Assistant Attorney General
Office of Legal Counsel

[6] If the statute were to preclude the President from paying a recess appointee in these circumstances, it would raise serious constitutional problems because of the significant burden that an inability to compensate an appointee would place on the textually committed power of the President to make recess appointments *See Public Citizen v United States Department of Justice*, 491 U.S. 440, 482 (1989) (Kennedy, J., concurring).

Compensation of Government Employees for Referring Potential Job Applicants

The provision of monetary awards or administrative leave to government employees who refer potential job candidates for certain difficult-to-fill vacancies in the government is not barred by 18 U.S.C. § 211, which prohibits the receipt of anything of value in consideration for helping a person obtain government employment.

August 17, 1989

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

This responds to your request of March 28, 1989, for the opinion of this Office on the applicability of 18 U.S.C. § 211 to a proposal that the Department of Housing and Urban Development ("HUD") provide monetary awards or administrative leave to employees who refer potential candidates for certain hard-to-fill clerical positions. We understand that, because of difficulties experienced in recruiting clerical staff, HUD is interested in implementing a program that would encourage its employees to assist in recruitment. Under the terms of the proposed program, the Department would pay small cash awards or grant small amounts of administrative leave to employees who refer potential job candidates who are eventually hired. Before implementing the program, however, you have asked us to determine whether the restrictions of section 211, which generally prohibit the receipt of anything of value in consideration for helping a person obtain employment, bar the creation of such a program. For the reasons below, we conclude that 18 U.S.C. § 211 does not bar the Department from providing incentive payments to employees who have referred potential job applicants.

Section 211 provides, in full:

> Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, *in consideration of the promise of support or use of influence in obtaining for any person any appointive office* or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

> Whoever solicits or receives any thing of value *in consideration of aiding a person to obtain employment* under the United States either by referring his name to an executive department or agency of the United States or by requiring the payment of a fee because such person has secured such employment shall be fined not more than $1,000, or imprisoned not more than one year, or both. This section shall not apply to such services rendered by an employment agency pursuant to the written request of an executive department or agency of the United States.

18 U.S.C. § 211 (emphasis added).

In our view, section 211 does not prohibit HUD from agreeing to award its employees for referring potential candidates to the agency. Both its text and purpose show that section 211 seeks only to prevent candidates for federal employment from having to pay influence-peddlers or employment agencies to obtain government positions. Thus, the section's restrictions prohibit agreements to promote a candidacy before an agency, but not agreements to promote the agency before potential candidates.

Section 211's first paragraph, enacted in 1926, prevents influence-peddling in employment by prohibiting anyone from soliciting or accepting payments "in consideration of the promise of support or use of influence in obtaining for any person any appointive office." 18 U.S.C. § 211. On its face, then, the section prohibits only payments for the promise of support or use of influence if the support or influence is used to "obtain[] for any person any appointive office." HUD's proposed payments, however, would not be in consideration of its employees' influence on HUD but in consideration of the employee's contributions to the department's recruitment of job candidates. Accordingly, the payments would not be prohibited under the plain terms of section 211's first paragraph.

That HUD's proposed payments are not prohibited by the first paragraph of section 211 is also supported by the 1926 Committee Report, which states that "[t]his bill seeks to punish the purchase and sale of public offices." H.R. Rep. No. 1366, 69th Cong., 1st Sess. 1 (1926). The bill was needed because

> [c]ertain Members of Congress have brought to the attention of the House both by speeches on the floor and statements before the Judiciary Committee a grave situation, disclosing corruption in connection with postal appointments in Mississippi and South Carolina. It is believed that this bill will prevent corrupt practices in connection with patronage appointments in the future.

Id. In light of the statute's purposes, it is clear that HUD's proposed payments are not the type of payments Congress intended to prohibit in 1926.[1]

The second paragraph of section 211 was added in 1951 to extend the original prohibition to include situations where payments are made "in consideration of aiding a person to obtain employment under the United States." 18 U.S.C. § 211. The amendment was intended "to prohibit private employment agencies from soliciting or collecting fees for helping applicants to obtain employment in any executive department or agency of the United States Government." H.R. Rep. No. 784, 82d Cong., lst Sess. 1-2 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1767. Prior to the amendment's enactment, it was feared that such practices were not prohibited because employment agencies generally do not use "influence" to obtain jobs for their customers. H.R. Rep. No. 784 at 2, *reprinted in* 1951 U.S.C.C.A.N. at 1768. Because "no American citizen should have to register with an employment agency and no American citizen should have to pay a fee in order to obtain a job with his own Government," the Civil Service Commission had "long sought such legislation." *Id.*

For reasons similar to those explained above, HUD's proposed payments would also not be prohibited by the second paragraph of section 211. Payment of a cash reward to an employee for assisting in the Department's recruitment efforts would not be "in consideration of *aiding a person* to obtain employment," 18 U.S.C. § 211 (emphasis added), but in consideration of *aiding the Department* to fill a particular job vacancy. Moreover, we note that Congress deliberately "exempted from the general prohibition" regarding employment agencies "those cases where jobs are filled by private agencies upon the written request of the Government agency concerned." H.R. Rep. No. 784 at 2, *reprinted in* 1951 U.S.C.C.A.N. at 1768. This exception to the prohibition suggests that Congress had no intention of limiting the ability of agencies to recruit potential employees.

In conclusion, we believe that it is clear that section 211 does not prohibit HUD from implementing its proposed program to provide cash awards or other benefits to employees who refer potential job candidates for certain difficult-to-fill vacancies.[2]

JOHN O. McGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

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[1] Our interpretation of the first paragraph of section 211 is consistent with that of the Supreme Court. "The evil at which the statute is directed is the operation of purchased, and thus improper, influence in determining the occupants of federal office." *United States v Hood*, 343 U.S 148, 150 (1952), *see also United States v Shirey*, 359 U.S 255, 262 (1959)

[2] The Office of Personnel Management reached the same conclusion in 1966 Memorandum for John D Roth, Director, Federal Incentive Awards Program, from John S. McCarthy, Assistant General Counsel, Civil Service Commission (Apr. 25, 1966).

Department of Justice Authority Regarding Relocations, Reorganizations, and Consolidations

The provisions of 1989 supplemental appropriations legislation for the Department of Justice did not prohibit the Department from considering or planning for relocations, reorganizations, and consolidations that had not been previously reported to Congress.

Under the same legislation, the Department was also permitted to complete relocations, reorganizations, and consolidations that were begun prior to June 30, 1989.

August 28, 1989

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION, JUSTICE MANAGMENT DIVISION

This responds to your request of July 11, 1989, for our opinion on the effect of section 105 of the new law providing supplemental appropriations for the Department of Justice.[1] Specifically, you have asked whether the Department may engage in the consideration of and planning for relocations, reorganizations and consolidations that have not previously been reported to Congress. You have also asked whether the Department may obligate and expend funds to implement reorganizations which were reported to Congress prior to June 30, 1988, the effective date of section 105. This latter question is asked in the context of the reorganization of the Office of Policy Development ("OPD") which was reported to Congress on June 5, 1989.

For the reasons set forth below, we believe that the Department may plan relocations, reorganizations and consolidations. We also believe that the Department may complete the effectuation of relocations, reorganizations and consolidations that were begun prior to June 30, 1989. Because the reorganization of OPD was begun before June 30 and indeed largely completed by that date, section 105 does not affect that reorganization.

I. Background

Prior to the enactment of section 105, the Department's reorganizations were governed by two provisions. The first, enacted as section 8 of the Department's 1980 Authorization Act, requires the Department to

[1] Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub L No 101-45, 103 Stat. 97 ("Supplemental Appropriations Act" or "Act").

notify the House and Senate Judiciary Committees "a minimum of 15 days before" undertaking significant reprogramming, reorganizations and relocations.[2] The second, contained in the Department's most recent appropriations bill, requires fifteen days notice for the Appropriations Committee as well.[3]

The Department has consistently complied with the fifteen-day notice requirement. Recently, however, certain congressmen indicated that the notice provisions were part of an "unwritten agreement" that reorganizations would not be implemented unless the Appropriations Committees had actually approved the proposal. H.R. Rep. No. 89, 101st Cong., lst Sess. 44 (1989). Because of the Department's failure to comply "with the understanding that any proposals are subject to the approval of the Appropriations Committees," *id.* at 45, a new provision was added to the Department's 1989 Supplemental Appropriation Act, *see supra* note 1, to bar all reorganizations within the Department until the end of the fiscal year:

> None of the funds provided in this or any prior Act shall be available for obligation or expenditure to relocate, reorganize or consolidate any office, agency, function, facility, station, activity, or other entity falling under the jurisdiction of the Department of Justice.

Supplemental Appropriations Act, § 105, 103 Stat. at 122.

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[2] Pub. L. No. 96-132, § 8, 93 Stat 1040, 1046 (1979). The section directs "each organization of the Department of Justice" to provide notice in writing before

(1) reprogramming of funds in excess of $250,000 or 10 percent, whichever is less, between the programs within the offices, divisions, and boards as defined in the Department of Justice's program structure submitted to the Committees on the Judiciary of the Senate and House of Representatives,

(2) reprogramming of funds in excess of $500,000 or 10 percent, whichever is less, between the programs within the Bureaus as defined in the Department of Justice's program structure submitted to the Committees on the Judiciary of the Senate and House of Representatives,

(3) any reprogramming action which involves less than the amounts specified in paragraphs (1) and (2) if such action would have the effect of significant program changes and committing substantive program funding requirements in future years;

(4) increasing personnel or funds by any means for any project or program for which funds or other resources have been restricted;

(5) creation of new programs or significant augmentation of existing programs,

(6) reorganization of offices or programs, and

(7) significant relocation of offices or employees.

Id at 1046-47 The provision has been incorporated into subsequent appropriation bills. *See, e g* , Pub L No. 100-459, § 204(a), 102 Stat. 2186, 2199 (1988) (FY 1989)

[3] Section 606(a) of Pub L No 100-459 states·

> None of the funds provided under this Act shall be available for obligation or expenditure through a reprogramming of funds which: (1) creates new programs, (2) eliminates a program, project or activity, (3) increases funds or personnel by any means for any project or activity for which funds have been denied or restricted; (4) relocates an office or employees; (5) reorganizes offices, programs, or activities; or (6) contracts out or privatizes any functions or activities presently performed by Federal employees; unless the Appropriations Committees of both Houses of Congress are notified fifteen days in advance of such reprogramming of funds.

102 Stat. at 2227

II. Analysis

A. Planning

Your first question is whether section 105 prevents the Department from "engaging in consideration of and planning for relocations, reorganizations and consolidations that have not yet been reported to Congress."[4] We do not believe that it does. The statute forbids the Department to "relocate, reorganize or consolidate" — all verbs that connote action and implementation. Section 105 does not mention planning or preparation for proposals.

Nor does the sparse legislative history, *see* H.R. Rep. No. 89, 101st Cong., 1st Sess. (1989), suggest that Congress intended to prevent the Department from even thinking about future options. The prohibition was aimed at the Department's refusal to abide by the

> unwritten agreement that they *will not go forward* with reorganizations if the Appropriations Committees disapprove their proposals. In the past several months, the Justice Department and the SBA have proposed reorganizations which have not been approved by the Committees. The conferees have learned that both the Justice Department and the SBA *plan to go ahead* with their proposals contrary to the wishes of the Committees. The conferees agree that the only alternative left in this situation is to prohibit all reorganizations for the remainder of fiscal year 1989.

Id. at 44 (emphasis added). Read in context, this language confirms our conclusion that the statute was aimed at actual reorganizations, not the proposal of a reorganization.[5] We therefore believe that the Department may continue to take all the steps that precede a reorganization, relocation or consolidation, up to and including notice to Congress that it has a proposal under consideration.

B. Reorganization of the Office of Legal Policy

As noted above, prior to the passage of section 105, the Department was authorized to implement its proposed reorganizations fifteen days after notifying Congress. The Department notified Congress about the proposed reorganization of the Office of Legal Policy ("OLP") as OPD on

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[4] Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Harry H. Flickinger, Assistant Attorney General for Administration (July 11, 1989).

[5] Indeed, unless the Department continues to plan and propose reorganizations, relocations, and consolidations, it is difficult to see how it will be able to demonstrate to Congress that it is willing to consult over these matters

June 5, 1989. The Department was therefore authorized to implement the reorganization fifteen days later, June 20. Section 105 was signed into law on June 30. Because OPD had largely completed its reorganization by June 30, we do not believe that section 105 affects its reorganization.

By its terms section 105 applies only to reorganizations undertaken after June 30, 1989, not to reorganizations that were completed by June 30, 1989. Moreover, the legislative history confirms that Congress' purpose in enacting section 105 was to protect what it perceived to be its oversight prerogatives by precluding future reorganizations without full congressional approval. Accordingly, section 105 was not intended to undo past Department actions. We conclude therefore that section 105 affects only reorganizations which the Department had not substantially completed by June 30.

Thus, whether section 105 applies to OLP depends on whether the Department had substantially completed the reorganization of OLP into OPD by June 30. We have been advised that the Department had taken all the significant steps necessary to reorganize OLP by that date. The Attorney General had signed a new organization chart reflecting the existence of OPD within the Department. Mr. Boyd had moved from his previous job in the Department to become the Director of OPD. A former Deputy Assistant Attorney General in OLP had been named Deputy Director of OPD. New stationery using the OPD letterhead had been ordered and put into use, and the new title "OPD" rather than "OLP" had been used in official documents. We believe that these steps, which were completed by June 30, constituted the reorganization of OLP into OPD.[6] Therefore, we believe that OLP's reorganization into OPD was complete when section 105 became law. Because section 105 is prospective in application, we do not believe that section 105 applies to the OLP reorganization.

We recognize that Representative Smith sent a letter, dated June 27, 1989, stating that the Appropriations Committee of the House of Representatives did not approve of the reorganization. This letter, however, had no legal effect on the Department's authority to effectuate the reorganization. Even if it had been sent within fifteen days of the notice given by the Department on June 5, the letter could not affect the Department's authority to execute the law. That can only be affected by passage of a new law, not by the disapproval of a congressional committee. *INS v. Chadha*, 462 U.S. 919 (1983).

III. Conclusion

For the reasons stated above, we believe that Department officials may continue to study and plan for any future reorganizations, including all

[6] Indeed, we are not aware of any other steps that are necessary in order to create OPD.

preparations that would previously have preceded congressional notification. We also believe that section 105 was not intended to undo essentially completed reorganizations. Because OLP's reorganization into OPD was complete by June 30, 1989, the reorganization is unaffected by the passage of section 105.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws

The Commission on Railroad Retirement Reform is not an agency in the executive branch for purposes of determining what obligations members of the Commission may have under the laws governing conflicts of interest and financial disclosure.

Because the Commission is not part of the executive branch for these purposes, the Office of Legal Counsel is without authority to advise the Commission regarding the obligations of its members under whatever conflicts laws may apply to them.

September 14, 1989

MEMORANDUM OPINION FOR THE EXECUTIVE DIRECTOR
COMMISSION ON RAILROAD RETIREMENT REFORM

You have asked for our opinion whether the Commission on Railroad Retirement Reform ("Commission") should be regarded as an agency in the executive branch for purposes of determining what obligations members of the Commission may have under the laws governing conflicts of interest and financial disclosure. *See* 18 U.S.C. §§ 201-211; 5 U.S.C. app. §§ 201-211; 2 U.S.C. §§ 701-709. We have examined the relevant statutory provisions and the legislative history of the Commission and have concluded that the Commission should not be considered part of the executive branch for the purposes as to which you have inquired. Accordingly, we are unable to advise the Commission's members regarding their obligations under applicable conflict of interest and financial disclosure laws.

Analysis

The Commission was established by section 9033 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330, 1330-296 to 1330-299. The status within the government of an office created by statute is a matter of statutory interpretation, controlled by legislative intent. *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 892-93 (3d Cir.) (Becker, J., concurring in part) (regarding Comptroller General), *modified*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988). Neither the statute nor its legislative history, however, expressly provide the branch of the government within which the Commission fits, either for purposes of determining the applicable

ethics and disclosure regulations or otherwise.[1] Therefore, inferences must be drawn from the structure and purpose of the Commission as provided by the statute.

Four of the Commission's seven officers are appointed by the President, and the Speaker of the House of Representatives, the President pro tempore of the Senate, and the Comptroller General each appoint one of the remaining three members. § 9033(c)(1)(A)-(C).[2] The Commission is directed to

> conduct a comprehensive study of the issues pertaining to the long-term financing of the railroad retirement system ... and the system's short-term and long-term solvency. The Commission shall submit a report containing a detailed statement of its findings and conclusions together with recommendations *to the Congress for revisions in, or alternative to, the current system.*

§ 9033(b) (emphasis added). The Commission's study must consider various factors relating to the economic outlook for the railroad industry and its retirement system, as well as "any other matters which the Commission considers would be necessary, appropriate, or useful *to the Congress in developing legislation* to reform the system." § 9033(b)(5) (emphasis added). The Commission is further directed to transmit the report to the President and to each chamber of the Congress by October 1, 1989. § 9033(f).[3]

With the possible exception of the transmission of its report to the President, the Commission performs only "investigative and informative" functions that could be undertaken by a congressional committee and that are removed from the administration and enforcement of public law. *See Buckley v. Valeo*, 424 U.S. 1, 126, 137-38 (1976). The Commission's members therefore need not be officers of the United States, appointed in conformity with the Appointments Clause of the Constitution, Article II, Section 2, Clause 2.[4] *Id.* Rather, the Commission's functions, broadly

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[1] The statute's sole ethics provision, an undesignated subpart of the subsection governing the Commissioner's manner of appointment and qualifications, states only that "[a]ll public members of the Commission shall be appointed from among individuals who are not in the employment of and are not pecuniarily or otherwise interested in any employer . or organization of employees." § 9033(c)(1).

[2] Although the President's power to remove officials would be of decisive importance in determining whether those officials are executive officers, *see Bowsher v. Synar*, 478 U.S 714, 726-30 (1986); *Mistretta v United States*, 488 U.S 361, 423 (1989) (Scalia, J., dissenting), the statute at issue here makes no express provision for removal of Commissioners, merely providing that "[a] vacancy in the Commission shall be filled in the manner in which the original appointment was made " § 9033(c)(1)

[3] Congress later extended this deadline by one year in section 7108 of the Technical and Miscellaneous Revenue Act of 1988, Pub. L No. 100-647, 102 Stat. 3342, 3774

[4] The provisions of the statute relating to provision of personnel or information by federal agencies to the Commission do not, in our view, vest the Commission or its Chairman with the ability to "exercis[e]

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considered, are of the sort characteristically exercised by agencies of either the executive branch, *see* U.S. Const. art. II, § 3 ("[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient ...."); *Applicability of the Hatch Act to the Chairman of the Native Hawaiians Study Commission*, 6 Op. O.L.C. 292, 295 (1982) ("[T]he making of recommendations to Congress is not a purely legislative function, but falls squarely within the duties and powers of the Executive."), or the legislative branch. *See Buckley v. Valeo*, 424 U.S. at 137-38; *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).[5]

If the Commission were deemed because of these duties to be part of the executive branch, however, other provisions concerning the manner in which the Commission is to execute these duties, as well as the manner of appointment of the Commissioners, could raise serious constitutional questions with respect to the statute. As noted above, section 9033(b) requires the Commission to "submit a report containing a detailed statement of its findings and conclusions together with recommendations to the Congress for revisions in, or alternatives to, the current system." This requirement is recapitulated in section 9033(f), which provides that "[t]he Commission shall transmit a report to the President and to each House of the Congress [that] shall contain a detailed statement of the findings and conclusions together with recommendations to the Congress for revisions in, or alternatives to, the current system." This requirement is recapitulated in section 9033(f), which provides that "[t]he Commission shall transmit a report to the President and to each House of Congress [that] shall contain a detailed statement of the findings and conclusions of the Commission, *together with its legislative recommendations*." (Emphasis added.)

It has been the longstanding view of the Department of Justice that Article III, Section 3 of the Constitution vests in the President plenary and

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[4] (...continued)
significant authority pursuant to the laws of the United States," *Buckley v Valeo*, 424 U.S. at 126, because they do not either directly or indirectly involve the exercise by the Commission of authority over or on behalf of third parties. *See Currin v Wallace*, 306 U S 1, 15 (1939) Indeed, for the most part these provisions merely permit federal agencies to respond to the requests of the Commission or its Chairman. Section 9033(d)(4) provides that "[u]pon request of the Commission, the Railroad Retirement Board and any other Federal agency *may* detail, on a reimbursable basis, any of the personnel thereof to the Commission to assist the Commission in carrying out its duties under this section " (Emphasis added) Similarly, section 9033(e)(1) provides that "[t]he Commission may, *as appropriate*, secure directly from any department or agency of the United States information necessary to enable it to carry out this section Upon request of the Chairman of the Commission, the head of such department or agency shall, *as appropriate*, furnish such information to the Commission." (Emphasis added.)

[5] The fact that the Commission is required to provide its report both to Congress and the President, and thus might be said to be vested with "[o]bligations to two branches[, is] not .. impermissible and the presence of such dual obligations does not prevent [its] characterization as part of one branch " *Bowsher v. Synar*, 478 U S. at 746 (Stevens, J , concurring in the judgment)

exclusive discretion concerning legislative proposals submitted by the executive branch to the Congress. Thus, Congress may not require executive branch officials to submit legislative proposals to the Congress. *See, e.g., Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 640 (1982) (legislation mandating submission of legislative proposals trenches on President's Article II, Section 3 authority). Similarly, the Department has repeatedly opined that statutes purporting to require that executive branch officials submit reports directly to Congress, without any prior review by their superiors, would raise serious constitutional questions by impairing the President's constitutional right to direct his subordinates. *See, e.g., id.*; *Inspector General Legislation*, 1 Op. O.L.C. 16, 17-18 (1977) (concurrent reporting requirements in inspector general legislation offends President's Article II power to direct); *see also Myers v. United States*, 272 U.S. 52, 163-64 (1926) ("Article II grants to the President the executive power of the Government, *i.e.*, the general administrative control of those executing the laws ...."); *Congress Construction Corp. v. United States*, 314 F.2d 527, 530-32 (Ct. Cl.), *cert. denied*, 375 U.S. 817 (1963). The above-referenced reporting provisions of the statute would involve both of these infirmities if the Commission were treated as an executive branch agency.[6] In addition, this Office has expressed the view that provision of advice and recommendations to the executive branch is an executive function, *The President's Power to Remove Members of the Federal Council on the Aging*, 5 Op. O.L.C. 337, 343 (1981), and therefore congressional appointment of those performing such a function would raise constitutional questions. *See* Letter for Alexander H. Platt, General Counsel, National Economic Commission, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel (June 22, 1988).[7]

Against the background of such constitutional questions we are obliged to "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). *See also International Ass'n of Machinists v. Street*, 367 U.S.

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[6] Although the Department of Justice has narrowly interpreted such broadly worded provisions in statutes unquestionably applying to executive branch agencies in the past to avoid raising these constitutional issues, *see, e.g.*, 41 Op. Att'y Gen. 507, 525 (1960), 6 Op. O.L.C. at 643, it would be anomalous to so construe the reporting provisions of this statute, where the basis for such a construction — the applicability of such provisions to an executive branch entity — is itself in dispute.

[7] The fact that a majority of its members are appointed by the President, although of some significance, is not in our view dispositive of the Commission's status, particularly where, as in this case, three of the President's four appointees are to be "appointed on the basis of recommendations made by" representatives of railroad employers, railroad employees, and commuter railroads, respectively. § 9033(c)(1)(A)(i)-(iii). The remaining Presidential appointee is to be appointed from among "members of the public." § 9033(c)(1)(A)(iv). *Cf.* § 9033(c)(1)(B) (Speaker's appointee from among members of the public); § 9033(c)(1)(C) (President pro tempore's appointee from among members of the public); § 9033(c)(1)(D) (Comptroller General's appointee from among members of the public with expertise in retirement systems and pension plans). We express no opinion concerning the validity of these appointment provisions.

740, 749-50 (1961); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). In our view, it is reasonable to construe the two reporting provisions as contemplating that the Commission's report would be prepared principally for Congress' benefit, with the President as an incidental recipient. The statute's detailed reporting provision makes no reference to the President and expressly states that the Commission is to submit a report of its findings, conclusion, and recommendations "to the *Congress*," including, inter alia, "any other matters ... necessary, appropriate, or useful to the *Congress*." § 9033(b) (emphasis added). *Cf.* 31 U.S.C. § 719(a) (Comptroller General, a legislative officer, is required to provide Congress with annual report but must also provide it to President upon his request); *see generally Bowsher v. Synar*, 478 U.S. at 745-46 (Steven J., concurring) (Comptroller General's responsibilities to executive branch, including responsibility to provide President with reports upon request, do not prevent his being characterized as legislative officer); *Gannett News Service, Inc. v. Native Hawaiians Study Comm'n*, No. 82-0163 (D.D.C. June 1, 1982) (for purposes of Federal Advisory Committee Act, Native Hawaiians Study Commission advisory to Congress, not the President, although both receive copy of final factual report); *Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission*, 6 Op. O.L.C. 39, 41 (1982) ("That the President is to receive a copy of the [Native Hawaiians Study Commission] study, perhaps simply as a courtesy or for his general information, does not mean the study was intended to 'advise' him [for purposes of the Federal Advisory Committee Act].").

Moreover, most of the factors to be considered by the Commission in preparing its report relate to future legislation rather than nonlegislative purposes such as assisting the executive branch in its administration of existing programs.[8] These features of the bill strongly suggest that Congress created the Commission primarily to assist it, rather than the President, in considering these issues.[9] Because such a construction

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[8] This conclusion is also consistent with the sparse legislative history of the provision, which notes the Commission role as advisor to the Congress. *See* 134 Cong Rec. 14,647 (1988) (statement of Rep. Whittaker) ("The Commission can pave the way for a comprehensive, consensus approach to needed reforms, and can give the Congress the benefit of a studied, analytical approach to the problem . ").

[9] Our conclusion is supported by the fact that Congress has in the recent past created other commissions to assist it in legislating in this area. *See* Pub L. No. 91-377, § 7, 84 Stat 791, 792-94 (1970) (creating Commission on Railroad Retirement comprised of three Presidential and two congressional appointees to "recommend[] to the Congress ... changes in [the] . benefits thereunder;" its final report was to be submitted to Congress and the President), Pub L. No. 92-460, § 6, 86 Stat 765, 767 (1972) (requiring representatives of railway labor and management to submit to congressional committees and the Railroad Retirement Board a report containing joint recommendations); Pub. L. No. 93-69, § 107, 87 Stat. 162, 165 (1973) (requiring representatives of railway labor and management to submit to congressional committees a report containing "joint recommendations for restructuring the railroad retirement system ... [which] shall be . in the form of a draft bill"); Pub L No. 98-76, § 504, 97 Stat. 411, 441-42 (1983) (codified at 45 U S C § 362) (creating Railroad Unemployment Compensation Committee consisting of representatives of railway labor and management and the public, to submit "a report to the Congress concerning recommendations")

avoids the constitutional problems and is "not only 'fairly possible' but entirely reasonable," *Machinists v. Street*, 367 U.S. at 750, we are constrained to adopt it in this instance.[10]

Conclusion

Under these circumstances, we conclude that the Commission is not part of the executive branch of the government for the purposes as to which you have inquired. Consequently, we are without authority to advise the Commission regarding the obligations of its members under whatever conflicts laws may apply to them. *See* 28 U.S.C. §§ 511-513. We suggest that you consult with the responsible ethics counsels of the House of Representatives and the Senate in this regard.[11]

LYNDA GUILD SIMPSON
Deputy Assistant Attorney General
Office of Legal Counsel

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[10] The statute's housekeeping provisions appear to be of limited value in assessing Congress' intent. The General Services Administration, an agency within the executive branch, is directed to provide the Commission with administrative support services on a reimbursable basis, § 9033(e)(3), and federal agencies are authorized to provide personnel and information to the Commission. §§ 9033(d)(4), 9033(e)(1) In addition, the Commission is authorized to use the United States mails "in the same manner and under the same conditions as other departments and agencies of the United States." § 9033(e)(2). The Chairman of the Commission is also authorized, subject to some limitations, to procure temporary and intermittent services under 5 U S C. § 3109(b), an authority permanently available to specified agencies in all three branches of the government § 9033(d)(3). *See also* 5 U S.C § 5721(1) (defining "agency" for purposes of, inter alia, 5 U.S C § 3109 as an executive agency, military department, federal court or the Administrative Office of the United State Courts, the Library of Congress, the Botanic Garden, the Government Printing Office, or the District of Columbia Government) We regard these provisions as of limited relevance to the question before us.

[11] We are aware that other agencies within the executive branch have considered the Commission's status for purposes of the Federal Advisory Committee Act ("FACA"), 5 U S C. app. §§ 1-15, and of the Commission's funding. We do not regard either the Commission's unilateral action in filing a charter with the General Services Administration pursuant to FACA or the Commission's source of funding as necessarily reliable indicia of Congress' intent concerning the Commission's status within the government for purposes of the conflicts-of-interest and disclosure laws This office has suggested that the National Economic Commission, which was expressly made subject to FACA by the Congress, was nevertheless not a part of the executive branch, *see* Letter for Alexander W. Platt, General Counsel, National Economic Commission, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel (June 22, 1988) Similarly, although an agency's source of funding may sometimes be indicative of Congress' intentions as to its status, *see* 6 Op. O L C at 41 (provision funding a commission from Senate's contingent fund evidences intent that it advise Congress, not the President), the Commission's source of funding does not support such an inference The Commission's Fiscal Year 1989 appropriation, the first funding provided for the Commission, was contained in title IV, the "Related Agencies" portion of the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Act, 1989, Pub. L No. 100-436, 102 Stat. 1680, 1709, while the President's Fiscal Year 1990 budget included the Commission's budget proposal in the legislative branch appropriation, together with such entities as the Copyright Royalty Tribunal and the General Accounting Office. Budget of the United States Government, Fiscal Year 1990 — Appendix, at I-A25, I-A24, I-A20 (1989). Even if the contemporaneous legislative source of an agency's funding were indicative of Congress' intent as to its status either as a general matter or as regards applicable conflicts-of-interest or disclosure laws, moreover, inferences concerning Congress' intent in creating the Commission in December 1987 are less reliably drawn from funding enactments in 1988 and later. *See generally Consumer Prod Safety Comm'n v GTE Sylvania, Inc.*, 447 U S. 102, 117-18 & n.13 (1980)

Whether the Federal Trade Commission Has Authority to Prosecute Actions for Criminal Contempt

The Federal Trade Commission lacks authority to prosecute actions for criminal contempt, unless the Commission's attorneys receive special appointments from the Attorney General and become subject to his direction.

September 25, 1989

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

This memorandum responds to your request for the opinion of this Office as to whether the Federal Trade Commission ("FTC" or "Commission") has authority to prosecute actions for criminal contempt. We conclude that the Commission lacks authority to prosecute such actions, unless the Commission's attorneys receive special appointments from the Attorney General and become subject to his direction.

I.

A court of the United States has the power to "punish by fine or imprisonment ... such contempt of its authority, and none other, as ... [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3). Where an alleged criminal contempt arises from disobedience to a court order in a case that the Commission has brought or defended, the Commission asserts the authority, upon appointment by the court, to prosecute the contempt. *See* Letter for Robert N. Ford, Deputy Assistant Attorney General, Civil Division, from Amanda B. Pederson, Deputy Director of Consumer Protection, Federal Trade Commission at 1 (June 24, 1985) ("Pederson Letter"). The Civil Division and the Criminal Division both take the view that the Commission is without authority to conduct such prosecutions. *See* Letter for Amanda B. Pederson, from Robert N. Ford (June 10, 1985); Memorandum for Margaret Love, Attorney-Advisor, Office of Legal Counsel, from Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division (Oct. 28, 1985).

Under 28 U.S.C. § 516, the Attorney General, "[e]xcept as otherwise authorized by law," has control over "the conduct of litigation in which

the United States, an agency, or officer thereof is a party, or is interested." *See also* 28 U.S.C. § 519.[1] The principle that the Attorney General has plenary authority over such litigation applies with particular force in criminal cases. *See United States v. Nixon*, 418 U.S. 683, 694 (1974) ("Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government.") (citing 28 U.S.C. § 516). Therefore, the Commission may not bring an action for criminal contempt unless clearly "authorized by law" to do so. *Cf. United States v. International Union of Operating Eng'rs*, 638 F.2d 1161, 1162 (9th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980) (noting "a presumption against a congressional intention to limit the power of the Attorney General to prosecute offenses under the criminal laws of the United States," in rejecting argument that United States must exhaust administrative remedies before bringing criminal case).

We do not believe that the Commission is authorized by the FTC Act, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41-58), or any other statute to prosecute actions for criminal contempt. The Commission's statutory authority to litigate on its own behalf is confined to civil proceedings. *See* 15 U.S.C. § 56(a)(1)(A) & (a)(2) (stating that the Commission may "commence, defend, or intervene in" various kinds of "civil action[s]"); *see also* 15 U.S.C. § 56(a)(3)(A) (referring to "any civil action in which the Commission represented itself").[2] The FTC Act, however, expressly assigns to the Attorney General the responsibility for

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[1] This Office has previously concluded

> [A]bsent clear legislative directives to the contrary, the Attorney General has full plenary authority over all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties. Such authority is rooted historically in our common law and tradition, *see Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1866) and, since 1870, has been given a statutory basis. *See* 5 U.S.C. § 3106, and 28 U.S.C. §§ 516, 519. The Attorney General's plenary authority is circumscribed only by the duty imposed on the President under Article II, § 3 of the Constitution to "take Care that the Laws be faithfully executed."

Attorney General's Role as Chief Litigator for the United States, 6 Op. O.L.C. 47, 48 (1982) (citation omitted).

[2] 15 U.S.C. § 56(a) reads, in relevant part:

> (1) Except as otherwise provided in paragraph (2) or (3), if —
>
> (A) before commencing, defending, or intervening in, any civil action involving [sections 41 to 46 and 47 to 58 of this title] (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action, and
>
> (B) The Attorney General fails within 45 days after the receipt of such notification to commence, defend, or intervene in, such action;
>
> the Commission may commence, defend, or intervene in, and supervise the litigation or, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.
>
> (2) Except as otherwise provided in paragraph (3), in any civil action—
>
> ...
>
> the Commission shall have exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys

Continued

bringing any criminal cases arising from violations of the laws administered by the Commission:

> Whenever the Commission has reason to believe that any person, partnership, or corporation is liable for a criminal penalty under [sections 41 to 46 and 47 to 58 of this title], the Commission shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate criminal proceedings to be brought.

15 U.S.C. § 56(b).[3]

Indeed, in enacting amendments to 15 U.S.C. § 56 and related provisions in 1973, Congress took special care not to create ambiguities in the statute that might lead to the Commission's assuming a criminal jurisdiction. When the bill came from the Conference Committee, it included one provision (15 U.S.C. § 45(m)) that the parliamentarian of the House interpreted as allowing criminal prosecutions by the Commission. *See* 119 Cong. Rec. 36,813 (1973) (remarks of Sen. Stevens). To clarify the provision, the Senate returned to the version that it had originally passed, which plainly "applie[d] only to civil actions." *Id.*[4]

Nevertheless, the Commission argues that it has authority to bring actions for criminal contempt. The Commission does not claim any express statutory basis for this supposed authority. Instead, it contends that "the authority of [its] attorneys to prosecute the criminal contempt (if appointed by the court to do so) is an inherent part of their authority to prosecute the underlying action from which the contempt arises." Pederson Letter at 1. The Commission also relies on the Supreme Court's opinion in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). In that case, the Court held that the Commission, despite an absence of explicit statutory authority, could seek preliminary relief from the Court of Appeals pending the outcome of Commission proceedings in a merger case because "[s]uch ancillary powers have always been treated as essential to the

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[2] (.. continued)
designated by it for such purpose, unless the Commission authorizes the Attorney General to do so The Commission shall inform the Attorney General of the exercise of such authority and such exercise shall not preclude the Attorney General from intervening on behalf of the United States in such action and any appeal of such action as may be otherwise provided by law

15 U.S.C. § 56(a) 15 U S C. § 56(a)(3), to which these sections refer, deals with representation in civil actions before the Supreme Court

[3] As explained below, the Commission asserts that its power to prosecute contempts is incidental to its statutory power under the sections of the United States Code referred to in 15 U.S.C. § 56(b) Therefore, the Commission could not escape from the provision of 15 U.S C § 56(b) about certification to the Attorney General by arguing that liability for contempt is not "under [sections 41 to 46 and 47 to 58]" of title 15, as referred to in that provision.

[4] Although Congress substituted a new version of 15 U.S.C § 45(m) in 1975, the amended provision expressly applies only to civil actions and thus does not enlarge the scope of the section in that respect. *See* Pub. L No 93-637, tit. II, §§ 204(b), 205(a), 88 Stat. 2193, 2199, 2200-01 (1975).

effective discharge of the Commission's responsibilities." *Id.* at 607. Finally, the Commission contends that its authority may be justified by its consistent exercise of this authority in the past.

II.

The Commission's arguments do not establish its statutory authority to bring actions for criminal contempt.

A. The Commission has no authority to prosecute a criminal contempt as "an inherent part of [its] authority to prosecute the underlying action from which the contempt arises." Pederson Letter at 1. An action for criminal contempt is separate from the underlying civil litigation. As the Supreme Court explained in *Young v. United States ex rel. Vuitton*, 481 U.S. 787 (1987), the "criminal contempt proceedings arising out of civil litigation 'are between the public and the defendant, and are not a part of the original cause.'" *Id.* at 804 (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911)); *see Bray v. United States*, 423 U.S 73, 75 (1975).[5] Because the underlying civil action that Congress authorized the Commission to pursue is distinct from the criminal contempt action, there is no reason to infer that Congress intended the Commission's litigation authority to reach criminal contempt cases.

This conclusion is no mere matter of form but follows from the essentially different interests at stake in the underlying civil litigation and the subsequent criminal prosecution. Civil actions for injunctions vindicate the goals of the Federal Trade Commission Act or the Clayton Act; Congress explicitly entrusted the Commission with the duty of seeking those goals through litigation. An action for criminal contempt, however, is aimed at "vindicating the authority of the court" and "preserv[ing] respect for the judicial system itself." *Vuitton*, 481 U.S. at 800.[6] Prosecution of the criminal contempt, therefore, serves purposes different from those Congress directed the Commission to pursue in civil litigation.[7]

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[5] A prosecution for criminal contempt, for example, is not "affected by any settlement which the parties to the [underlying] equity cause made in their private litigation," but continues as a separate action. *Gompers v Bucks Stove & Range Co*, 221 U.S at 451

[6] The Supreme Court accordingly held in *Vuitton* that attorneys "appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated." 481 U.S. at 804, *see United States v. Providence Journal Co*, 485 U S. 693, 700 (1988) ("The action was initiated in vindication of the 'judicial Power *of the United States*,' U S. Const, Art. III, § 1 (emphasis added), and it is that interest, unique to the sovereign, that continues now to be litigated in this Court.").

[7] To be sure, a prosecution for criminal contempt, in some measure, will indirectly promote the statutory policies at stake in the underlying litigation. Future violations of orders requiring obedience to the statute administered by the Commission may be deterred by the prospect of punishment for contempt. But this indirect promotion of the statutory policies does not detract from the primary purpose of vindicating judicial authority in criminal contempt cases. It is the vindication of judicial authority (and not the Commission's authority) that justifies appointment of a prosecutor by the court in the first place. *See Vuitton*, 481 U.S. at 800-01, *Cheff v Schnackenberg*, 384 U S. 373, 378 (1966) (plurality opinion) ("Cheff was found in contempt of the Court of Appeals, not of the Commission.").

The Commission's argument, moreover, could lead to a widening circle of "incidental" criminal prosecutions by the Commission. Charges of perjury, bribery, or obstruction of justice, too, could grow out of civil proceedings brought by the Commission. To our knowledge, however, the Commission has never asserted authority to prosecute such crimes, and exercise of such authority would be clearly contrary to the requirement of the FTC Act that criminal charges be referred to the Attorney General.

Actions for criminal contempt, therefore, are separate from the underlying civil actions in which the orders alleged to be violated are issued. The Commission's authority to litigate the civil actions does not entail any "inherent" authority to bring actions for criminal contempt.

B. The Supreme Court's decision in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), does not support the authority claimed by the Commission to initiate actions for criminal contempt. *Dean Foods* merely held that the Commission could ask the court of appeals for a preliminary injunction against a merger, pending the outcome of administrative proceedings. Although the Commission had no explicit statutory power to seek this preliminary relief, the Court ruled that such power could be inferred:

> [T]he Commission is a governmental agency to which Congress has entrusted, *inter alia*, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have the incidental power to ask the courts of appeals to exercise their authority derived from the All Writs Act.

Id. at 606 (footnote omitted). This rationale does not justify the Commission's prosecution of actions for criminal contempt. An action for criminal contempt does not vindicate the laws whose enforcement "Congress has entrusted" to the Commission; it vindicates the authority of the court, in a proceeding separate from the underlying civil action. Moreover, without authority to seek a preliminary injunction, the Commission would be powerless to prevent illegal mergers. Thus, injunctive authority is necessary to accomplish the mission Congress has set for the FTC. On the other hand even without criminal contempt authority, the FTC can fully vindicate its decrees through its civil authority. Accordingly, the authority to prosecute criminal contempts cannot be fairly inferred from the FTC's general statutory authority.

Nor do we believe that the *Dean Foods* Court's observation, in dictum, that it had never been "asserted that the Commission could not bring contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has no statutory authority in

this respect," 384 U.S. at 607, suggests that the Commission enjoys the power to bring criminal contempt cases. The Court followed this observation by declaring that "[s]uch ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities." *Id.* Thus, this dictum can most sensibly be read as referring to civil contempt, since the other instances of the Commission's implied powers discussed by the Court — the power to seek preliminary relief from an appellate court and the power to defend Commission orders in judicial review proceedings — concern civil actions in which the Commission's authority and the policies of the statutes administered by the Commission would be vindicated. *See id.* at 606-07. Criminal contempt cases, as explained above, vindicate instead the authority of the court, in proceedings separate from the underlying civil actions.

Furthermore, the Eighth Circuit has reached the conclusion that *Dean Foods* "did not directly or indirectly concern itself with the possible conflict between the Commission and the Attorney General over which agency was the proper one to seek the exercise" of the appellate court's power to issue a preliminary injunction. *FTC v. Guignon*, 390 F.2d 323, 327 (8th Cir. 1968). The issue in *Guignon* was whether the Commission, on its own behalf, could seek to enforce discovery subpoenas or needed the "aid or consent" of the Attorney General. *Id.* at 324. The court decided that the Commission could not seek, on its own behalf, to enforce its discovery subpoenas but depended on the Attorney General to do so. Whether or not the court in *Guignon* was correct in making this ruling,[8] or in interpreting *Dean Foods* as not involving possible conflicts between the Commission and the Attorney General, *Guignon* demonstrates that *Dean Foods* should not be read as a general warrant for the Commission to assert implied powers that conflict with the Attorney General's statutory authority.

C. The Commission also argues that its authority to prosecute criminal contempts "is supported both by long and consistent usage and by the only decision of which [the Commission is] aware in which the issue [of agency authority] was expressly contested and resolved." Pederson Letter at 1. As an initial matter, we do not believe that usage alone can justify a practice unsupported in law — nor can a single district court decision. In any event, we do not believe that the usage or the case provides support for the Commission's claim of authority to bring criminal contempt actions.

As to the usage, the Commission cites seven reported cases in which it

[8] Two district court cases decided at approximately the same time as *Guignon* held that the Commission could seek to enforce its subpoenas without the consent and assistance of the Attorney General *FTC v. Kujawski*, 298 F. Supp. 1288, 1289 (N D. Ga. 1969); *FTC v. Continental Can Co* , 267 F. Supp. 713 (S.D.N.Y. 1967) Through later legislation, Congress made clear the Commission's statutory authority to bring actions to enforce subpoenas. *See* 15 U S.C § 56(a)(2)(D), Pub L. No. 93-153, tit. IV, § 408(g), 87 Stat 576, 592 (1973); Pub. L. No. 93-637, tit. II, § 204(a), 88 Stat. 2183, 2199 (1975).

prosecuted criminal contempts.[9] As the Commission concedes, Pederson Letter at 2-3, the courts in these cases did not address the Commission's authority to bring the actions. Nor did the Ninth Circuit consider the issue of statutory authority in a more recent case in which it sustained a finding of contempt and rejected the argument that, under *Vuitton*, the Commission was disqualified from prosecuting the contempt because it was an interested party.[10] *See FTC v. American Nat'l Cellular*, 868 F.2d 315 (9th Cir. 1989). Because these cases do not discuss the issue of statutory authority, they do not illuminate whether Congress intended the Commission to prosecute criminal contempts. *See United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950) (Nonexistent powers cannot "be prescripted by an unchallenged exercise.").

Nor has the usage in this area been consistent. In one instance of which we have been made aware, the Commission's lawyers received appointments as Special Assistant United States Attorneys, when a grand jury was conducting an investigation bearing on possible charges of criminal contempt. *See* Memorandum for D. Lowell Jensen, Deputy Attorney General, from Richard K. Willard, Acting Assistant Attorney General, Civil Division, at 1-2 (July 30, 1985); Memorandum for Richard K. Willard, Acting Assistant Attorney General, Civil Division, from John R. Fleder, Assistant Director, Office of Consumer Litigation (May 30, 1985); Pederson Letter at 3 n.3, 6; 28 U.S.C. § 515. The Commission suggests that this involvement by the Department of Justice does not destroy the consistency of the Commission's practice of representing itself because the Commission's attorneys "might properly prosecute the particular matter themselves." Pederson Letter at 3 n.3. That argument, however, is circular; it assumes that the Commission's lawyers could have brought an action. Absent the assumption that the Commission may prosecute a criminal contempt action, the involvement of the Department of Justice undermines the consistency of the very usage on which the Commission relies.

The Commission also argues that one case, *SEC v. Murphy*, Fed. Sec. L. Rep. (CCH) ¶ 99,688 (C.D. Cal. 1983), explicitly considered and upheld the authority of the Securities and Exchange Commission to bring criminal contempt actions under a statute similar to 15 U.S.C. § 56. The Court in *Murphy* did not discuss the different interests to be vindicated in criminal contempt action and the underlying civil case. Instead, the court based its holding on the absence of an explicit statutory prohibition against the

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[9] *FTC v. Hoboken White Lead & Color Works*, 67 F.2d 551 (2d Cir. 1933); *FTC v. Pacific States Paper Trade Ass'n*, 88 F.2d 1009 (9th Cir 1937), *In re Dolcin Corp.*, 247 F2d 524 (D C. Cir. 1956), *cert denied*, 353 U.S. 988 (1957), *In re P. Lorillard Co*, 1959 Trade Cas (CCH) ¶ 69,272 (4th Cir 1959); *In re Floersheim*, 316 F.2d 423 (9th Cir. 1963), *In re Holland Furnace Co.*, 341 F.2d 548 (7th Cir. 1965), *aff'd sub nom Cheff v Schnackenberg*, 384 U S. 373 (1966); *In re Whitney & Co.*, 273 F.2d 211 (9th Cir 1959).

[10] *Vuitton* held, under the Court's supervisory power, that counsel for an interested party in civil litigation underlying a contempt action should not be appointed to prosecute the contempt. *See* 481 U.S. at 802-09.

SEC's bringing the action and on the argument that "the SEC — not the United States Attorney, the Attorney General, or anyone else — is in the best position to know the specific prohibitions of the injunction and the particular circumstances which allegedly constitute the contempt of the injunction." *Id.* at 97,765. In *Vuitton*, however, the Court rejected the argument that an attorney's expertise justifies giving him control of a prosecution for criminal appointment. The Court held that, despite expert knowledge, counsel for an interested private party should not be allowed to prosecute a criminal contempt: "That familiarity may be put to use in *assisting* a disinterested prosecutor in pursuant to the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution." *Vuitton*, 481 U.S. at 806 n.17. Similarly, the Commission's knowledge of the underlying action cannot justify abandoning the principle that the Attorney General is to control the litigation of criminal cases on behalf of the United States. *See United States v. Nixon*, 418 U.S. at 694; 28 U.S.C. § 516. The single district court case addressing this issue — decided before *Vuitton* — is, therefore, unpersuasive.

In sum, the cases and practices on which the Commission relies do not establish that the Commission has implied authority to bring actions for criminal contempt. The cases involving the Commission itself do not touch on the issue at all; the usage in this area is not consistent; and the single district court case that might lead to an argument by analogy has been undercut by the later opinion of the Supreme Court in *Vuitton*.

III.

Finally, we address two arguments not advanced in the Pederson Letter. First, although the Pederson Letter cites Fed. R. Crim. P. criminal contempt actions, the Commission does not rely on Rule 42(b) as "authoriz[ing] by law" the Commission's initiation of actions for criminal contempt. Since the Pederson Letter, *Vuitton* has established that Rule 42(b) "does not provide authorization for the appointment of a private attorney" but "speaks only to the procedure for providing notice of criminal contempt." *Vuitton*, 481 U.S. at 793, 794 (emphasis omitted). Rule 42(b) thus offers no authority for the Commission to prosecute contempts.

Second, it might be argued that even if the Commission lacks statutory authority to bring actions for criminal contempt, a court, through the exercise of its authority to appoint prosecutors, could empower the Commission to prosecute a criminal contempt case. Any such argument would be groundless. In addition to the issue of the court's authority to appoint prosecutors, there is a separate question about whether the government attorneys have authority to accept appointment. The Commission is a creation of statute and thus must abide by the statutory limitations on the authority. *See Civil Aeronautics Bd. v. Delta Air Lines*, 367 U.S. 316, 322 (1961); *Oceanair of Florida v. United States Dep't of*

Transp., 876 F.2d 1560, 1565 (11th Cir. 1989). Prosecution of criminal contempts by Commission attorneys at the behest of a court would circumvent the Congressional determination to limit the Commission's authority to civil actions.[11]

IV.

We conclude that the Commission has no authority to bring actions for criminal contempt. Commission lawyers, however, may be appointed special attorneys subject to the Attorney General's direction, 28 U.S.C. § 515, and in that capacity could conduct prosecutions for criminal contempt in cases where the court had appointed the United States Attorney to prosecute.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

[11] We do not believe that the judiciary would have the constitutional authority to assign governmental attorneys to prosecute criminal contempts in contravention of limits on their statutory authority *Vuitton* sustained the appointment of private attorneys to prosecute criminal contempts, because a court's power to "punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Vuitton*, 481 U S at 796 Although the power of courts to vindicate their own authority, under the circumstances in *Vuitton*, arguably may be grounded in the Constitution, appointment of Commission attorneys hardly promotes judicial freedom from "complete dependence on other Branches."

Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts

The Anti-Lobbying Act prohibits substantial "grass roots" lobbying campaigns of telegrams, letters, and other private forms of communication designed to encourage members of the public to pressure Members of Congress to support Administration or Department legislative or appropriations proposals.

The Anti-Lobbying Act does not prohibit (1) direct communications between Department of Justice officials and Members of Congress and their staffs; (2) public speeches, appearances, and writings; (3) private communications designed to inform the public about Administration positions or to promote those positions, as long as there is no significant expenditure of appropriated funds; (4) the traditional activities of Department components whose duties historically have included communicating the Department's views to Congress, the media, or the public; or (5) communications or activities unrelated to legislation or appropriations, such as lobbying Congress or the public to support Administration nominees.

September 28, 1989

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

I. Introduction

You have requested our guidance concerning the extent to which the Anti-Lobbying Act, 18 U.S.C. § 1913 (the "Act"), imposes constraints on activities by executive branch employees that relate to legislative matters. Section 1913, which has not been the basis of a single prosecution since its enactment in 1919, prohibits the use of appropriated funds for activities designed to influence Members of Congress concerning any legislation or appropriation.

To summarize our analysis of this statute, we offer the following guidelines for you and the Department as to what lobbying activities are permitted and prohibited.

Permitted activities:

1. The Act does not apply to direct communications between Department of Justice officials and Members of Congress and their staffs. Consequently, there is no restriction on Department officials directly lobbying Members of Congress and their staffs in support of Administration or Department positions.

2. The Act does not apply to public speeches, appearances and writings. Consequently, Department officials are free to publicly advance Administration and Department positions, even to the extent of calling on the public to encourage Members of Congress to support Administration positions.

3. The Act does not apply to private communications designed to inform the public of Administration positions or to promote those positions. Thus, there is no restriction on private communications with members of the public as long as there is not a significant expenditure of appropriated funds to solicit pressure on Congress.

4. The Act does not circumscribe the traditional activities of Department components whose duties historically have included responsibility for communicating the Department's views to Members of Congress, the media, or the public.

5. By its terms, the Act is inapplicable to communications or activities unrelated to legislation or appropriations. Consequently, there is no restriction on Department officials lobbying Congress or the public to support Administration nominees.

Prohibited activities:

The Act may prohibit substantial "grass roots" lobbying campaigns of telegrams, letters and other private forms of communication designed to encourage members of the public to pressure Members of Congress to support Administration or Department legislative or appropriations proposals.

If a question should arise with respect to any activity not listed here, we would be happy to analyze whether the statute applies to it.

II. Discussion

Section 1913 of title 18 provides:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on

> the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.
>
> Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than $500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

Several limitations on the otherwise expansive scope of this provision appear from the statute's face.

First, the statute applies only to activities "intended or designed to influence ... legislation or appropriations." Thus, lobbying activities related to other matters, such as nominations and treaties, are not subject to the statute.

Second, the statute prohibits only lobbying that is conducted in the form of the provision of a personal service or advertisement, that is presented in written form, or that is communicated by telephone or "other device." Read in context, the prohibition on other "device[s]" does not appear to prohibit speeches or other verbal communications that are not relayed by telephone. Thus, we do not believe that the statute prohibits public speeches by executive branch employees aimed at generating public support for Administration policies and legislative proposals.

Third, the statute makes clear that it does not prohibit government officials from communicating "to Members of Congress on the request of any Member or to Congress, through the proper official channels" on matters those officials "deem necessary for the efficient conduct of the public business."[1] Thus, the statute does not bar contacts between Administration officials and Congress that are initiated by Members of Congress or that relate to requests for legislation or appropriations that the executive branch employee in the fulfillment of his official duties deems necessary to conduct the public business. Consistent with this provision, this Office and the Criminal Division previously have concluded that section 1913 does not apply to the lobbying activities of executive branch officials whose positions typically and historically entail an active effort to secure public support for the Administration's

[1] Congressman Good, who introduced the bill, was asked whether the bill was "intended .. to prevent the employees or officers of the Government from communicating directly with their Representatives in Congress." He replied, "No, that is expressly reserved.... They have, of course, the right to communicate, just as before, with their Members of Congress " 58 Cong. Rec. 404 (1919)

legislative program.[2] Such officials include presidential aides, appointees, and their delegees in areas within their official responsibility.[3]

This construction of section 1913 is strongly supported by the statute's exemption of lobbying activities that are conducted pursuant to an "express authorization by Congress." We believe that Congress' continued appropriation of funds for positions held by executive branch officials whose duties historically have included seeking support for the Administration's legislative program constitutes "express authorization by Congress" for the lobbying activities of these officials, and thus, that their activities are exempt from section 1913.[4] Officials whose activities are covered by this "express authorization" exception to section 1913 include the President, his aides and assistants within the Executive Office of the President, Cabinet members within their areas of responsibility, and persons to whom the Cabinet official traditionally has assigned such responsibilities.[5]

The legislative history to section 1913 sheds additional light on the type of activities that Congress intended to bar. Representative Good, who introduced the bill, described the statute's purpose as follows:

> [I]t will prohibit a practice that has been indulged in so often, without regard to what administration is in power — the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country, for this organization, for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation. The gentleman from Kentucky, Mr. Sherley, former chairman of this committee, during the closing days of the last Congress was greatly worried because he had on his desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to write Congressman Sherley for this appropriation and for that.

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[2] *See* Memorandum for Arthur B Culvahouse, Jr, Counsel to the President, from Charles J Cooper, Assistant Attorney General, Office of Legal Counsel, *Re Applicability of 18 U.S.C 1913 to Lobbying Efforts in Support of Ratification of INF Treaty* at 6 n 7 (Dec. 31, 1987) ("Culvahouse Memo"); Memorandum for John R Bolton, Assistant Attorney General, Office of Legislative Affairs, from Charles J Cooper, Assistant Attorney General, Office of Legal Counsel, *Re. Applicability of 18 U S.C. 1913 to Contracts Between United States Attorneys and Members of Congress in Support of Pending Legislation* at 5-6 (Oct. 27, 1987) ("Bolton Memo"), Memorandum for Paul Michel, Acting Deputy Attorney General, from John M Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Alleged Violations of 18 U S C 1913* at 2, 3-4 (Feb 20, 1980) ("Michel Memo"), Memorandum for Philip B Heymann, Assistant Attorney General, Criminal Division, from Thomas H Henderson, Jr, Chief, Public Integrity Section, Criminal Division at 8-10 (Oct. 15, 1979) ("Henderson Memo")

[3] *See* Michel Memo at 3.

[4] Culvahouse Memo at 6 n.7; Bolton Memo at 5-6, Henderson Memo at 8-10; Michel Memo at 2, 3-4

[5] We caution, however, against these officials engaging in "grass-roots" campaigns of the type mentioned in the legislative history to section 1913 *See infra* pp 303-04.

> Now, they use the contingent fund for that purpose, and I have no doubt that the telegrams sent for that purpose cost the Government more than $7,500. Now, it was never the intention of Congress to appropriate money for this purpose, and section 5 of the bill will absolutely put a stop to that sort of thing.

58 Cong. Rec. 403 (1919). These remarks demonstrate that Congress was concerned about the use of appropriated funds to implement "grass roots"[6] mass mailing campaigns at great expense.[7] Based on this legislative history, this Office consistently has concluded that the statute was enacted to restrict the use of appropriated funds for large-scale, high-expenditure campaigns specifically urging private recipients to contact Members of Congress about pending legislative matters on behalf of an Administration position. *See, e.g.*, Michael Memo at 5 (section 1913 was intended to "prohibit the Executive from using appropriated funds to create artificially the impression that there is a ground swell of public support for the Executive's position on a given piece of legislation").[8] Accordingly, we do not believe the statute should be construed to prohibit the President or executive branch agencies from engaging in a general open dialogue with the public on the Administration's programs and policies. Nor do we believe the statute should be construed to prohibit public speeches and writings designed to generate support for the Administration's policies and legislative proposals.

Because section 1913 imposes criminal penalties, it is appropriate that it be construed narrowly. Under the widely recognized "rule of lenity," criminal provisions subject to more than one reasonable construction should be interpreted narrowly, and ambiguity should be resolved in favor of lenience. *See, e.g., Bifulco v. United States*, 447 U.S. 381 (1980); 3 Sutherland, *Statutory Construction* §§ 59.03-59.06 (4th ed. 1973). In addition, a narrow construction of section 1913 is necessary to avoid the constitutional issues that would arise if the section were interpreted as

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[6] By "grass roots" lobbying we mean communications by executive officials directed to members of the public at large, or particular segments of the general public, intended to persuade them in turn to communicate with their elected representatives on some issue of concern to the executive. This type of activity is to be distinguished from communications by executive officials aimed directly at the elected representatives themselves, no matter how much incidental publicity those communications may receive in the normal course of press coverage *See* Memorandum for Robert J Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re· Anti-Lobbying Laws* at 10 (Nov 29, 1977) ("1977 Harmon Memo") ("As long as a federal official limits himself to public forums and relies upon normal workings of the press, he may say anything he wishes without fear of violating section 1913.").

[7] Our calculations indicate that an expenditure of $7500 in 1919 would be roughly equivalent to one of $50,000 today.

[8] Culvahouse Memo at 6 n.7; Bolton Memo at 5; 1977 Harmon Memo at 10-14.

imposing a broader ban.[9] In previous analyses of this statute, we have identified at least three serious constitutional problems that would arise if section 1913 were construed as a blanket prohibition on executive branch activities relating to legislation or appropriations.

First, construing section 1913 broadly to restrict executive branch contacts with Members of Congress would interfere with the President's constitutionally mandated role in the legislative process. Article II, Section 3, Clause 1 of the Constitution provides that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." This Clause imposes on the President a responsibility to recommend measures to Congress and constitutes a formal basis for the President's role in influencing the legislative process.[10] The President cannot be deprived of this capacity to explain why he believes particular measures are "necessary and expedient."

Second, legislation curtailing the President's ability to implement his legislative program through communications with Congress and the American people would infringe upon his constitutional obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.[11] It would be impossible for the President to fulfill this constitutional responsibility if he could not communicate freely with those who make the laws, as well as with those whose actions are governed by them.

Third, section 1913, if construed broadly, would weaken the constitutional framework established in Article II, which in general imposes on the President the duty to communicate with the American people. The President, of course, "is a representative of the people, just as the members of the Senate and of the House are." *Myers v. United States*, 272 U.S. 52, 123 (1926). Indeed, "on some subjects ... the President, elected by all the people, is rather more representative of them all than are the members of either body of the Legislature, whose constituencies are local and not country wide." *Id.* Because of his unique position as the only elected

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[9] *See* 1977 Harmon Memo, *supra* note 6 *See also* Letter for Leo Krulitz, Solicitor, Department of the Interior, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (July 18, 1978); Memorandum for Assistant Attorney General McConnell, from Deputy Assistant Attorney General Simms (Oct. 5, 1982) (forwarding a proposed draft report on S 1969, a bill to "prohibit the use of appropriations for the payment of certain lobbying costs").

[10] *See* Edward S Corwin, *The Constitution of the United States* 536 (2d ed. 1973) The early Presidents, Washington, Jefferson and Jackson among them, took an active role in their relations with Congress. "Today there is no subject on which the President may not appropriately communicate with Congress, in as precise terms as he chooses, his conception of its duty" *Id* at 537.

[11] Supreme Court precedent establishes that Congress may not interfere with the President's ability to carry out his constitutional prerogatives. *See*, for example, *Hart v. United States*, 118 U.S. 62 (1886), and *United States v. Klein*, 80 U S (13 Wall.) 128 (1872), invalidating congressional attempts to interfere with the President's pardon power. Even where, as here, Congress acts pursuant to its appropriations power, its authority is not absolute Congress may not, for example, use its appropriations power to establish a religion, *Flast v. Cohen*, 392 U.S. 83, 104-05 (1968), or to diminish the compensation of federal judges. *United States v. Will*, 449 U.S 200 (1980).

official with a truly "'national' perspective," *INS v. Chadha*, 462 U.S. 919, 948 (1983), it is necessary to the independent power of the executive branch that the President be able to communicate freely with the citizens of the United States, including on matters that relate to legislative affairs. Thus, reading section 1913 broadly to restrict all communications with the public with respect to legislation or appropriations would interfere with the executive's ability to perform his constitutionally imposed responsibilities.[12]

III. Conclusion

We conclude that section 1913 prohibits large-scale publicity campaigns to generate citizen contacts with Congress on behalf of an Administration position with respect to legislation or appropriations. It does not proscribe lobbying activities with respect to other matters, such as nominations or treaties. It does not prohibit speeches or other communications designed to inform the public generally about Administration policies and proposals or to encourage general public support for Administration positions. In addition, the statute does not prohibit contacts between executive branch officials and Members of Congress that either were initiated by the Member of Congress, or that relate to a request for legislation or appropriations that the employee deems "necessary for the efficient conduct of the public business." Finally, the statute does not prohibit lobbying activities expressly authorized by Congress, such as activities by executive branch employees whose official duties historically have included lobbying functions, for whose positions Congress has continued to appropriate funds.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

[12] To discharge these responsibilities effectively, the President must be permitted to employ the services of his political aides, appointees and other officials Any restrictions on the ability of such officials to assist the President necessarily undermines the President's ability to fulfill his constitutional responsibilities and amount to restrictions on the President himself. *See* Memorandum for Steve Markman, Assistant Attorney General, Office of Legal Policy, from John O McGinnis, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re. H R. 3400 - Application of Hatch Act to Senior Political Appointees and Presidential Aides* (Oct. 19, 1987) (Congress may not restrict the President's ability to communicate with the public by restricting those the President has chosen to assist him in this regard). In particular, the President must be permitted to employ the services of his political appointees and aides necessary to effectuate his constitutionally protected ability to communicate with his constituency concerning the decisions for which the President, as the politically accountable head of the executive branch, is alone responsible For these reasons, section 1913 must be construed narrowly as it relates to the ability of executive branch employees to communicate with the public on legislative matters

Seventh Amendment Restrictions on the Assessment of Punitive Damages

The Seventh Amendment does not prohibit federal legislation mandating that a judge assess the amount of punitive damages after a jury determines liability in a products liability case.

September 29, 1989

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

This responds to your request for the opinion of this Office concerning whether the Seventh Amendment prohibits federal legislation mandating that a judge assess the amount of punitive damages after a jury determines liability in a products liability case. For the reasons set forth below, we conclude that such legislation would not violate the Seventh Amendment.[1]

We believe that the Supreme Court's decision in *Tull v. United States*, 481 U.S. 412, 425-27 (1987), establishes that Congress may authorize a judge to determine the amount of punitive damages. In *Tull*, the Court held that while the Seventh Amendment guarantees a right to a jury trial to determine liability in actions seeking civil penalties authorized by the Clean Water Act, there is no corresponding right to have a jury determine the amount of the civil penalties. The Court explained:

> The Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the "substance of the common-law right of trial by jury." Is a jury role necessary for that purpose? We do not think so. "'Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of

[1] The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S Const. amend VII

> trial by jury, are placed beyond the reach of the legislature.'" The assessment of a civil penalty is not one of the "most fundament elements."

Id. at 425-26 (footnote and citations omitted). The Court observed that typically the amount of a civil penalty is specified by statute, and "[s]ince Congress itself may fix the civil penalties, it may delegate that determination to trial judges." *Id.* at 427. Accordingly, the Court held that "a determination of a civil penalty is not an essential function of a jury trial, and that the Seventh Amendment does not require a jury trial for that purpose in a civil action." *Id.* at 427.

The Fourth Circuit's recent decision in *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 740-42 (4th Cir. 1989), illustrates that *Tull* extends to the assessment of punitive damages. In *Shamblin's Ready Mix*, the court held that a judge may reduce the amount of punitive damages awarded by a jury without remanding for a new trial. The court concluded that "[t]he measure of damages in a cause of action for a tort is not a fundamental element of a trial." *Id.* at 742. The court found *Tull* dispositive:

> There is no principled distinction between civil penalties and the modern concepts of punitive damages. Both serve the same purposes to deter and punish proscribed conduct. *Cf. Tull*, 481 U.S. at 422 n.7, 107 S. Ct. at 1838 n.7. Consistent with *Tull*, we hold that the seventh amendment does not require that the amount of punitive damages be assessed by a jury.

873 F.2d at 742.[2]

We agree that punitive damages are indistinguishable from civil penalties for the purpose of the Seventh Amendment. Therefore, based on the Supreme Court's holding in *Tull*, we conclude that the Seventh Amendment does not bar federal legislation authorizing judges to assess the appropriate amount of punitive damages.

LYNDA GUILD SIMPSON
Deputy Assistant Attorney General
Office of Legal Counsel

[2] The recent decisions holding that a statutory cap on the amount of damages does not violate the Seventh Amendment provide another example of permissible restrictions on the role of a jury *See Davis v. Omitowoju*, 883 F.2d 1155, 1158-65 (3d Cir 1989); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989), *Franklin v. Mazda Motor Corp* , 704 F. Supp. 1325, 1334 (D. Md. 1989)

Sequestration Exemption for the Resolution Funding Corporation

"Backup" payments made by the Department of the Treasury to cover interest obligations of the Resolution Funding Corporation are not subject to sequestration under the Balanced Budget and Emergency Deficit Control Act of 1985.

October 3, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY
AND THE ACTING GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

This responds to your request of September 29, 1989, for the opinion of this Office on whether the Department of the Treasury ("Treasury") and the Office of Management and Budget ("OMB") are correct in their determination that "backup" payments made by Treasury to cover interest obligations of the Resolution Funding Corporation ("Refcorp") would not be subject to sequestration under the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, 2 U.S.C. §§ 901-922 ("Balanced Budget Act" or "Act"). The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA"), exempts Refcorp from any sequestration order under the Balanced Budget Act. We conclude that Treasury and OMB are correct that this exemption extends to Treasury's backup payments.

Refcorp is a privately capitalized corporation organized solely to provide funds to the Resolution Trust Corporation to resolve the financial problems of the thrift industry. Federal Home Loan Bank Act ("FHLB Act"), § 21B(a), as added by FIRREA, § 511(a), 103 Stat. at 394. In addition to receiving private funding from the thrift industry, Refcorp may issue "bonds, notes, debentures, and similar obligations in an aggregate amount not to exceed $30,000,000,000." § 21B(f)(1) of the FHLB Act, 103 Stat. at 400. Interest on these obligations is to be paid by Refcorp from four specified sources. *Id.* § 21B(f)(2). To cover shortfalls from these sources, Congress established a "Treasury [b]ackup," directing the Secretary of the Treasury to "pay to [Refcorp] the additional amount due, which shall be used by the [Refcorp] to pay such interest." *See* § 21B(f)(2)(E)(i) of the FHLB Act, 103 Stat. at 401-02. The FIRREA "appro-

priate[s] to the Secretary [of the Treasury] for fiscal year 1989 and each fiscal year thereafter, such sums as may be necessary to [fund]" Treasury's backup payments. *Id.* § 21B(f)(2)(E)(iii).

Treasury and OMB have concluded that Treasury's backup payments to Refcorp are not subject to sequestration under the Balanced Budget Act. That Act directs the President under certain circumstances to sequester appropriated funds to meet targeted budget reductions. 2 U.S.C. §§ 901-902. The Act defines "sequesterable resource" as

> new budget authority; unobligated balances; new loan guarantee commitments or limitations; new direct loan obligations, commitments, or limitations; spending authority as defined in section 651(c)(2) of [title 2]; and obligation limitations for budget accounts, programs, projects, and activities that are not exempt from reduction or sequestration under this subchapter.

Id. § 907(9). Congress has exempted from sequestration a number of "budget accounts and activities." *Id.* § 905(g). On August 9, 1989, Congress amended the Balanced Budget Act to add Refcorp to the list of "budget accounts and activities" that "shall be exempt from reduction under any order" issued under the Balanced Budget Act. FIRREA, § 743(a)(4), 103 Stat. at 437. The simple question posed is whether Congress intended by this amendment to exempt from sequestration Treasury payments to Refcorp made pursuant to § 21B(f)(2)(E) of the FHLB Act.

Refcorp is a "mixed-ownership Government corporation," *see* FIRREA, § 511(b)(1), 103 Stat. at 406 (amending 31 U.S.C. § 9101(2)(M) to include Refcorp), which, apart from the proceeds of obligations issued pursuant to § 511(a) of FIRREA, is funded only through investments by and assessments against the Federal Home Loan Banks, *id.* 103 Stat. at 396-97, 401; assessments against Savings Association Insurance Fund members, *id.* 103 Stat. at 400; and FSLIC Resolution Fund receivership proceeds. *Id.* OMB has advised us that for budget purposes Refcorp is a private corporation entirely outside the budget process. Thus Refcorp is not included in the calculation of the budget "deficit," 2 U.S.C. § 622(6), which forms the basis for sequestration under the Balanced Budget Act, 2 U.S.C. § 901(a)(1), and is not subject to the Balanced Budget Act. Consequently, there would have been no need to exempt Refcorp itself from reductions under the Balanced Budget Act. The only conceivable purpose of the exemption for Refcorp therefore must have been to ensure that payments to Refcorp such as the Treasury's backup payments would be exempt from reduction. Accordingly, we believe that the exemption must be understood as extending to these payments.

We recognize that Congress expressly exempted payments to other

funds and entities, *see* 2 U.S.C. § 905(g)(1)(A). We do not believe that Congress' failure to exempt the Treasury payments expressly, however, reflects an intent that they be sequesterable. If the amendment adding Refcorp were construed not to extend to the Treasury backup payments, it would be meaningless.

The legislative history provides no guidance as to Congress' intent in adding the exemption for Refcorp. H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 436 (1989). However, construing the exemption to encompass Treasury's backup payments furthers the indisputable congressional purpose of saving the thrift industry at the least cost to the government. Interpreting the exemption not to extend to the Treasury's payments could frustrate, if not defeat, the objectives of FIRREA by seriously undermining the marketability of the obligations issued by Refcorp, and/or forcing purchasers to demand a higher rate of return to offset the risk of sequestration.

For the reasons stated, we conclude that Treasury and OMB are correct in their determination that backup payments made by Treasury to cover interest payment obligations of Refcorp are not sequesterable under the Balanced Budget Act.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Use of Navy Drug-Detecting Dogs by Civilian Postal Inspectors

The Secretary of the Navy retains the discretion under the Posse Comitatus Act and Department of Defense regulations to authorize the United States Postal Inspection Service to use Navy drug-detecting dogs and their handlers to identify postal packages containing illegal narcotics

October 10, 1989

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

On March 25, 1988, your office requested our advice on whether the Navy may authorize the U.S. Postal Inspection Service to use Navy drug-detecting dogs, guided by Navy handlers, to identify postal packages containing illegal narcotics. Upon review of the provision of the Posse Comitatus Act contained in 18 U.S.C. § 1385, as well as related provisions in title 10, we conclude that the Secretary of the Navy has the discretion to authorize such a use of Navy dogs and their handlers.[1]

I. The Posse Comitatus Act

Congress enacted the Posse Comitatus Act ("Act") in 1878 to address Southern objections to the use of federal troops in civilian law enforcement during the Reconstruction era. In its current form, the central provision of the Act provides that:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,

[1] This conclusion is consistent with an earlier memorandum prepared by this Office *See Use of Department of Defense Drug-Detecting Dogs to Aid in Civilian Law Enforcement*, 13 Op. O.L.C 185 (1989) ("OLC Memorandum"). Several officials have sided with the contrary view of James F Goodrich, then-Under Secretary of the Navy, that "the requested support is in conflict with the provisions of the Posse Comitatus Act. The use of military dog handlers is considered to constitute direct involvement in law enforcement activities and is thus illegal." Memorandum for Commander in Chief of the U.S. Pacific Fleet, from James F. Goodrich, Under Secretary of the Navy, *Re Request for Loan of Military Dogs* (June 6, 1987). *See* Memorandum for Deputy Assistant Secretary of Defense for Drug Policy and Enforcement, from Robert L. Gilliat, Assistant General Counsel, Department of Defense, *Re· Use of Navy Drug Dog Detection Teams to Inspect U S Mails* (Jan. 20, 1988); Letter for Captain Howard Gehring, Director, National Narcotics Border Interdiction System, Office of the Vice President, from Stephen G Olmstead, Deputy Assistant Secretary, Drug Policy and Enforcement (Jan. 21, 1988)

> willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385. By its terms, section 1385 does not apply to the Navy; the words of the statute cover only the Army and the Air Force. Moreover, courts considering the issue have held that the Act does not apply to the Navy except by executive extension. *United States v. Roberts*, 779 F.2d 565, 567 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986); *United States v. Del Prado-Montero*, 740 F.2d 113, 116 (1st Cir.), *cert. denied*, 469 U.S. 1021 (1984). *See* Memorandum for State Department Legal Advisor, from Michael A. Carvin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Assignment of Marine Personnel to the U.S. Mission to the United Nations* at 8 (May 10, 1988). *See also United States v. Walden*, 490 F.2d 372, 374-76 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974) (suggesting that omission of Navy was a drafting oversight but conceding that Navy actions would not violate the letter of the Act).

As a matter of policy, the Department of Defense has extended the Posse Comitatus Act to the Navy through regulations. 32 C.F.R. § 213.10(c) (1988). Those regulations make clear, however, that the Secretary of the Navy retains the discretion to except situations from the Act's coverage "on a case-by-case basis."[2] *Id.* Thus, we conclude that under the Posse Comitatus Act, the Secretary, within his discretion, may authorize the use of Navy drug dogs and their handlers contemplated by the Postal Inspector.

II. 10 U.S.C. Chapter 18

In 1981, Congress revisited the question of military involvement in civilian law enforcement. Although Congress did not alter section 1385, it did add chapter 18 to title 10 of the U.S. Code to provide for certain types of military cooperation with civilian law enforcement officials. In particular, chapter 18 provides that the Secretary of Defense "may ... make available any equipment ... of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes." 10 U.S.C. § 372. No one has questioned (and we have no reason to doubt) that drug-detecting dogs are to be considered "equipment" for purposes of this provision. Thus understood, section 372 provides express authorization for that which section 1385 does not bar: the loaning of Navy dogs to civilian law enforcement authorities.

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[2] Exceptions that are likely to involve participation by Navy personnel in the "interdiction of a vessel or aircraft, a search or seizure, an arrest, or other activity that is likely to subject civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature" require the advance approval of the Secretary of Defense, as well. 32 C.F.R. § 213.10(c)(2)

In section 375, however, Congress provided that the provision of equipment to civilian law enforcement personnel under section 372 does not permit "*direct participation* by a member of the Army, Navy, Air Force, or Marine Corps in a search and seizure, an arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." 10 U.S.C. § 375 (emphasis added). Thus, some question remains whether section 375 would permit the Navy also to provide the Postal Inspector with the Navy dogs' handlers, without whom the dogs would be useless.[3]

For two reasons, we conclude that section 375 does not bar the Postal Inspector's use of the Navy dogs and their handlers. First, in the 1981 enactment, Congress made clear that nothing in the new provisions was to be "construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981." 10 U.S.C. § 378. Thus, Congress did not intend in 1981 to bar any military involvement in civilian law enforcement that had been permissible under section 1385 and the Department of Defense regulations enacted thereunder. The Conference Report confirms this conclusion. It states that:

> Section 378 clarifies the intent of the conferees that the restrictions on the assistance authorized by the new chapter [18] in title 10 apply only to the authority granted under that chapter. Nothing in this chapter should be construed to expand or amend the Posse Comitatus Act. In particular, because that statute, on its face, includes the Army and Air Force, and not the Navy and Marine Corps, the conferees wanted to ensure that the conference report would not be interpreted to limit the authority of the Secretary of Defense to provide Navy and Marine Corps assistance under, for example, 21 U.S.C. 873(b). However, nothing in this chapter was in any way intended to rescind or direct the recision of any current regulations applying the policies and terms of the Posse Comitatus Act to the activities of the Navy or Marine Corps.

H.R. Conf. Rep. No. 311, 97th Cong., lst Sess. 122 (1981).[4]

Second, section 375 prohibits only the "direct participation" of military forces in civilian law enforcement. Here, by contrast, Navy dogs and per-

[3] Although 10 U S.C. § 373(1) would permit Navy personnel to train civilian Postal Inspectors to handle the dogs, we understand that substitution of different human handlers is not practicable

[4] The provision cited as an example by the Conference Report specifies that, upon a request by the Attorney General, "it shall be the duty of any agency or instrumentality of the Federal Government to furnish assistance ... to him for carrying out his functions [concerning the control of drug trafficking]." 21 U.S C. § 873(b).

sonnel would merely identify packages containing drugs. As we understand the proposal, the actual "search and seizure" of the package would be performed by civilian Postal Inspectors.[5] The legislative history of section 375 shows that Congress intended that provision to bar only the exercise of military authority in direct confrontations with civilians.[6] During the hearings on chapter 18, for example, Representative Hughes, the Chairman of the Subcommittee on Crime, observed that:

> I can understand where you might have to have military personnel, actually operate [in a law enforcement capacity] under given circumstances. I understand that. But that is a long way from giving them the authority to make an arrest or to make a seizure.
>
> An assist, as opposed to a military person making an arrest or participating in a seizure is an important distinction.

Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 28 (1981). During the same exchange, William H. Taft IV, then-General Counsel of the Department of Defense, concurred with Representative Hughes's distinction by stating that:

> I think that you have correctly identified the significance of the arrest and the seizure actions.... I think that it is the arrests and the seizures, and active — putting, really, into a confrontation, an immediate confrontation, the military and a violator of a civilian statute, that causes us the greatest concern.

Id. at 30.

These observations were by no means novel. The Appendix of materials before the Subcommittee contains an opinion by this Office noting that the Posse Comitatus Act does not prohibit military assistance to civilian law enforcement where "there is no contact with civilian targets of law enforcement, no actual or potential use of military force, and no military control over the actions of civilian officials." *Id.* at 540, reprinting Letter for Deanne Siemer, General Counsel, Department of Defense, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal

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[5] The precise relationship between constitutional doctrines of "search and seizure" and the meaning of the same terms in section 375 remains unclear The Supreme Court has held, however, that the use of drug-detecting dogs to identify luggage containing drugs does not constitute a "search" for purposes of the Fourth Amendment *United States v Place*, 462 U S. 696, 707 (1983).

[6] This position is consistent with our earlier guidance concerning section 375. *See* OLC Memorandum, 13 Op. O.L.C at 186.

Counsel at 13 (Mar. 24, 1978).[7] Accordingly, where, as here, the Navy dogs and personnel will not be used in direct confrontations with civilians, section 375 would not bar their use in civilian law enforcement efforts.

III. Conclusion

We conclude that the Secretary of the Navy retains the discretion under the Posse Comitatus Act and Department of Defense regulations to authorize the use by the Postal Inspector of Navy drug-detecting dogs and their handlers to identify packages containing illegal narcotics. The provision in 10 U.S.C. § 375 restricting the direct participation of military personnel in civilian law enforcement efforts does not prevent the Secretary from authorizing the proposed use because (i) that provision does not limit the Secretary's authority under Department of Defense regulations to make exceptions to the application of the Posse Comitatus Act and (ii) the proposed use of the dogs and their handlers will not involve confrontation with civilians.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

[7] Subsequent congressional action with respect to section 375 confirms this understanding of the 1981 legislative history In 1988, Congress amended section 375 by deleting from the list of prohibited activities "interdiction of a vessel or aircraft." *See* 10 U.S C. § 375 note The Conference Report on the 1988 amendments states that Congress took such action "because the term 'interdiction' has acquired a meaning that includes detection and monitoring as well as a physical interference with the movement of a vessel or aircraft." H.R. Conf. Rep No. 989, 100th Cong., 2d Sess. 452 (1988). Congress thus clarified that such preliminary law enforcement tasks as "detection" do not come within section 375, whereas actual "physical interference" with a civilian remains barred by that provision's reference to "seizure[s]." *Id*

Expert Witness Agreements Between the Department of Justice and Employees of the Department of Veterans Affairs

As a general matter, employees of the Department of Veterans Affairs may enter into expert witness agreements with the Department of Justice for testimony that is unrelated to their official duties, so long as the requirements of 18 U.S.C § 205 are observed.

October 24, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF VETERANS AFFAIRS

This memorandum responds to your request for our opinion on the legality of agreements between the Department of Justice and employees of the Department of Veterans Affairs ("VA"), whereby VA employees agree to serve as expert witnesses on behalf of the federal government in return for the payment of expert witness fees.[1]

As described in your request, VA employees are sought as expert witnesses based on their expertise in a given field. You have indicated that the expected testimony would not constitute the performance of official duties, and has no relation to the VA or to the performance of official duties, either with the VA or any prior federal employer. You have further indicated that the VA does not object, as a general matter, to its employees providing expert testimony on their own time, and that it is contemplated that employees provide such testimony while on annual leave, on leave without pay or, if the employee in question is a part-time employee, outside the employee's regular time commitment to the VA.[2]

You indicated in your request that you believed that, on these facts, such expert witness agreements would be lawful.[3]

As set forth more fully below, we believe that such agreements, as a general matter, are lawful so long as the strictures of 18 U.S.C. § 205 are observed. Whether those requirements are satisfied in a given case must be determined in light of all the facts of that specific case.

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[1] Letter for Edwin Meese, Attorney General, from Thomas K. Turnage, Administrator, Veterans Administration (May 20, 1988) ("Turnage Letter").

[2] Turnage Letter at 1 Based on your description, we do not consider herein the special rules that might apply were the expert witness to be a lawyer

[3] Turnage Letter at 1-2

Discussion

Section 205 of title 18 of the United States Code governs in the case of federal employee-witnesses who testify otherwise than as part of their official duties. That section states in part:

> Whoever, being an officer or employee of the United States in the executive ... branch of the Government or in any agency of the United States, ... otherwise than in the proper discharge of his official duties —
>
> (1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or
>
> (2) acts as agent or attorney for anyone before any department, agency, [or] court ... in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest —
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 205.

Section 205(1) prohibits receipt of compensation for assisting in the prosecution of a "claim against the United States." Given that your request is limited to the legality of expert witness agreements pursuant to which VA employees give testimony on behalf of the federal government, section 205(1) would not apply.

Section 205(2) prohibits a government employee from serving as an "agent or attorney" in matters in which the United States is a party or has a substantial interest. We have opined with respect to this provision that "a witness, including an expert witness, would not be thought to act as 'agent or attorney' for another person within the ordinary meaning of those words." Letter for Arthur Kusinski, Assistant to the General Counsel, National Science Foundation, from Leon Ulman, Acting Assistant Attorney General, Office of Legal Counsel at 3 (May 13, 1976).[4]

[4] *See also* Bayless Manning, *Federal Conflict of Interest Law* 91 (1964) ("Under Section 205 it must be recalled that the government employee is not forbidden to render assistance short of acting as agent or attorney, or to receive compensation for it, unless it is in connection with a claim against the government "); Letter for Professor George A. Hay, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel at 1 (Mar. 12, 1980) (appearance as an expert witness does not constitute "acting as agent or attorney" under the similar language of 18 U.S.C. § 207(a))

That opinion also observed, however, that expert witnesses sometimes play such important roles in the preparation and execution of cases that their involvement might well rise to the level of acting as "agent or attorney" within the meaning of section 205(2):

> In some cases, expert witnesses can be expected to do considerably more than testify — they can be the architects of the case in preparation of specialized studies, development of theories, etc. Such pre-trial involvement, coupled with testimony at trial, might well rise to the level of acting as "agent or attorney" within the meaning of 18 U.S.C. § 205(2).

Id. at 4 n.3.

We do not interpret that opinion as suggesting that serving as an expert witness, by itself, can provide a basis for invoking the prohibitions of section 205. Rather, for the statute to apply, the expert witness must assume additional duties and functions beyond those associated with the preparation and offering of the expert testimony. Accordingly, employees of the VA serving as expert witnesses should avoid becoming so intimately involved with the preparation of a case as to suggest that they were serving as "agents or attorneys."

Section 5537 of title 5 is more problematic, however. Section 5537(a) provides that federal employees

> may not receive fees for service —
>
> (1) as a juror in a court of the United States or the District of Columbia; or
>
> (2) as a witness on behalf of the United States or the District of Columbia.

Interpretation of this provision turns largely on what Congress intended by "fees for service ... as a witness." The legislative history of section 5537 is of limited usefulness on this point.

As an initial matter, we note that you have construed the phrase as referring to the statutory witness fee, paid by the court to any witness for attendance.[5] Although this Office has never directly addressed the question, one of our opinions evidently assumes that is the proper construction of the phrase. Letter for Congressman John S. Wold, from Thomas E. Kauper, Acting Assistant Attorney General, Office of Legal Counsel at 2 (Dec. 2, 1969). The treatment of witness fees in the same section dealing with juror fees supports that interpretation. *See also*

[5] Turnage Letter at 2.

Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2678 (1983).

Even if "fees for service ... as a witness" is interpreted to include expert witness fees, however, we do not believe that expert witness fees are necessarily barred in all cases. As noted in your request,[6] Congress evidently viewed section 5537(a)(2) as a "corollary of the provision included by this bill in 5 U.S.C. § 6322(b)(1) [that] an employee performing this type of service is performing official duty." S. Rep. No. 1371, 91st Cong., 2d Sess. 9 (1970). Section 6322(b), in turn, defines the circumstances under which a federal employee witness will be deemed to be "performing official duty." Those circumstances, for present purposes, are limited to those in which the employee is "summoned, or assigned by his agency" to testify or produce official records on behalf of the United States or the District of Columbia. 5 U.S.C. § 6322(b)(1). Because this provision speaks of "being summoned" or "being assigned by the employee's agency," we believe that the definition contained in section 6322(b)(1) would not include the type of voluntary arrangement described in your request.[7]

Accordingly, we agree with your view that when an employee-witness is performing official duty as defined in 5 U.S.C. § 6322(b)(1), then pursuant to 5 U.S.C. § 5537(a)(2) he is not to receive witness fees. That interpretation is entirely consistent with the principle that public employees may not receive additional compensation for the performance of official duties. However, in those circumstances in which the expert testimony does not constitute the performance of official duty under section 6322, we believe the "corollary" ban on the receipt of fees imposed by section 5537 does not apply.

Conclusion

Based upon the general facts provided in your request, we are aware of no statute that would prohibit a VA employee from entering into an expert witness agreement of the type you have described, so long as the requirements of 18 U.S.C. § 205 are observed.

JOHN O. McGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

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[6] *Id.*

[7] Section 6322(b)(2) applies to those situations in which an employee is summoned or assigned by his agency to "testify in his official capacity or produce official records on behalf of a party other than the United States or the District of Columbia," and thus is not relevant here

Extraterritorial Effect of the Posse Comitatus Act

The Posse Comitatus Act does not apply outside the territory of the United States.

Although some language in Department of Defense regulations suggests that certain restrictions on the use of military assistance apply outside the land area of the United States, the better view is to read those regulations consistently with provisions in the underlying statute, passed subsequently to the Posse Comitatus Act, stating that no limitations beyond those imposed by the Posse Comitatus Act were intended to be enacted.

November 3, 1989

MEMORANDUM OPINION FOR THE ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS

You have asked for our advice whether the Posse Comitatus Act, 18 U.S.C. § 1385, applies outside the territory of the United States. We conclude that it does not. Neither the language, history, nor legislative history of the Act suggests that Congress intended for the Act to apply extraterritorially. Under these circumstances, established rules of statutory construction impose a presumption that the Act is to be construed as having only domestic effect. Such a construction is necessary to enable criminal laws with extraterritorial effect to be executed and to avoid unwarranted restraints on the President's constitutional powers. Additional legislation and accompanying Department of Defense regulations authorizing certain types of military assistance to civilian authorities contain some suggestion that restrictions on military assistance enumerated therein apply outside the land area of the United States. We believe, however, that the better view is that these rules must be read consistently with other provisions in the same legislation providing that no limitations beyond those imposed by the Posse Comitatus Act were intended to be enacted. The scope of the regulations will be subject to some uncertainty, however, until they are amended to expressly state these limits on their scope.

I. The Posse Comitatus Act

A. The Text of the Posse Comitatus Act Suggests the Act Applies Only Domestically.

The Posse Comitatus Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385. The statute prohibits both the use of the Army or Air Force as a posse comitatus and to "otherwise ... execute the laws." The first prohibition, on the use of the military as a posse comitatus, by definition should apply only domestically. A posse comitatus is defined as: "The power or force of the county; the entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and arresting felons, etc." *Black's Law Dictionary* 1046 (5th ed. 1979). This power of the local sheriff was well established in the United States in the nineteenth century, *see, e.g., Coyles v. Hurtin*, 10 Johns. 85 (N.Y. 1813); *Sutton v. Allison*, 47 N.C. 339 (1855), and had long been held to be available to United States Marshals within their districts. The power had been construed to include the right to call upon military personnel within the jurisdiction to aid civil enforcement efforts. *See, e.g.*, 16 Op. Atty. Gen. 162, 163 (1878) ("It has been the practice of the Government since its organization (so far as known to me) to permit the military forces of the United States to be used in subordination to the marshal of the United States when it was deemed necessary that he should have their aid in order to the enforcement of his process."). Thus, the portion of the Act prohibiting use of the military as a posse comitatus is a limitation on the power of civil enforcement authorities to include the military within the forces available for domestic law enforcement. As such, this portion of the Act logically has no relevance to law enforcement efforts conducted outside the territory of the United States.

The statute also prohibits the use of the Army or Air Force to "otherwise ... execute the laws." The structure of the Act suggests that this prohibition should be read in conjunction with the specific prohibition on use of the military as a posse comitatus. "Under the rule of ejusdem generis, where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980). In this context, the doctrine of ejusdem generis would direct that the words "or otherwise to execute the laws" should be read to refer to actions similar to those of including the military within a posse comitatus. Under this rationale, the "or otherwise" phrase, like the specific prohibition, should be read to have only domestic effect. *See Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U.S. 290, 295 (1902) (reading phrase "by certiorari or otherwise" in Supreme Court jurisdictional statute to "add

nothing to our power, for if some other order or writ might be resorted to, it would be ejusdem generis with certiorari"); *see also* J. Sutherland, *Statutes and Statutory Construction* § 273 (1891) ("The words 'other persons' following in a statute the words 'warehousemen' and 'wharfinger,' must be understood to refer to other persons *ejusdem generis, viz.*, those who are engaged in a like business.").

Thus, although the text does not expressly address whether the Act is to apply extraterritorially, the definition of the Act's key concept, together with the structure of the text, indicates that the Act has a strongly domestic orientation. This interpretation of the text is confirmed by an examination of the history surrounding the passage of the Posse Comitatus Act and well settled canons of construction concerning the extraterritorial application of federal legislation.

B. The History and Purposes of the Posse Comitatus Act Indicate That the Act was Intended Only to Address the Relationship Between the Military and Domestic Civil Authority.

The immediate impetus for the passage of the Posse Comitatus Act as a rider to the Army Appropriations Act of 1878 was the deep resentment of Southern Democrats toward the use of the federal military in the reconstruction period. After their surrender, the southern states were divided into military districts under the command of Army generals, who oversaw voter registration and supervised the election of delegates who organized the new state governments that would ratify the Fourteenth Amendment. *See generally* Major H.W.C. Furman, *Restrictions on the Use of the Army Imposed by the Posse Comitatus Act* ("*Restrictions*"), 7 Mil. L. Rev. 85, 93-94 (1960). The United States Army was also used extensively between 1866 and 1872 to suppress violent encounters between ex-Confederate soldiers and freedmen and to deter and punish the activities of the Ku Klux Klan and other secret societies. *See* Office of the Judge Advocate General, *Federal Aid in Domestic Disturbances*, S. Doc. No. 263, 67th Cong., 2d Sess. 90-155 (1923). Southern resentment of federal military interference reached a high water mark during the presidential election of 1876, when over 7000 deputy marshals were used to supervise the election, and President Grant ordered federal troops to the polling places in Louisiana, Florida, and South Carolina to prevent fraud and voter intimidation. *See Restrictions* at 90-91; Walter E. Lorence, *The Constitutionality of the Posse Comitatus Act* ("*Constitutionality*"), 8 U. Kan. City L. Rev. 164, 169-74 (1940).

In December 1876, the House of Representatives passed a resolution requesting that the President submit a report to Congress on the use of the Army in the 1876 election. The actions of the President were roundly criticized in the democratically controlled House, with Members expressing concern that "there has been a constant and persistent interference in

State matters by the Army." 5 Cong. Rec. 2117 (1877) (remarks of Rep. Banning); *see also id.* at 2112 ("American soldiers policemen! Insult if true, and slander if pretended to cover up the tyrannical and unconstitutional use of the Army by protecting and keeping in power tyrants whom the people have not elected.") (Remarks of Rep. Atkins). In response to these concerns, a rider was added to the Army appropriations bill prohibiting the use of the Army "in support of the claims, or pretended claim or claims, of any State government, or officer thereof, in any State, until such government shall have been duly recognized by Congress." *Id.* at 2152. The Senate deleted the rider, and when the House refused to recede from its position on the issue, the forty-fourth Congress adjourned without passing an Army appropriations provision. *See generally* Deanne C. Siemer & Andrew S. Effron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act* (*"Extraterritorial Effect"*), 54 St. Johns L. Rev. 1, 18-20 (1979).[1]

In the forty-fifth Congress, Congressman Kimmel proposed an amendment to the Army appropriations bill providing:

> [I]t shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a *posse comitatus* or otherwise, except in such cases as may be expressly authorized by act of Congress.

7 Cong. Rec. 3586 (1878). Kimmel's statement introducing the amendment identified two major concerns. First, quoting extensively from the writings of the Framers, he noted the danger to liberty of maintaining a large standing army at home in time of peace. Kimmel argued that under the Constitution, "the militia [is] to be a substitute for a standing army. The militia" — not the Army — "was to be called out to execute the laws, to suppress smugglers and insurrection, to quell riot and repel invasion." *Id.* at 3579. He contrasted the war powers in Article I, Section 8, Clauses 11-14, with the powers of the militia in Article I, Section 8, Clauses 15 and 16. "These two powers are as distinct as are the means to be employed for the exercise of them, the Army for the defense against external foes, the militia for the suppression of internal resistance." *Id.* at 3581. "By this cautious adjustment of these balances did the fathers ... provide against intervention by the standing army, if such should exist, *in the internal government of the country* ...." *Id.* (emphasis added).

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[1] Further debate continued during a special session of Congress to reconsider the appropriations bill. 6 Cong. Rec. 50 (1877). Although no amendment was passed, a number of democratic Congressmen indicated that they hoped that some limitation on the use of the military in civilian law enforcement would be forthcoming from the next regular session of Congress. *Id.* at 338 (Rep. Atkins), *id.* at 294 (Rep. Singleton); *id* at 298 (Congressman Pridemore)

Next Kimmel criticized the use of the Army in calls to posse comitatus. He argued that this power had never in fact existed, rejecting an opinion of Attorney General Cushing that he characterized as an "attempt to clothe the marshals, the lowest officers of the United States courts, with authority to use a standing army as a *posse comitatus*." *Id.* at 3582. He referred to the use of the army in suppressing labor strikes, in the execution of revenue laws, and in the "execution of the local laws" at the behest of "all sorts of people." *Id.* at 3581. Kimmel also described the use of the Army in the election of 1876 and argued that "shielded by the power of standing armies, tyrants have reconstructed the governments of States, imposed constitutions on unwilling people, obstructed the ballot by soldiers at the polls, ... [and] placed soldiers in the capitols of [the] States and excluded the representatives of the people." *Id.* at 3586. He offered the amendment "to restrain the Army so that it may not be used as a *posse comitatus* without even the color of law," *id.*, and expressed the hope that at future sessions the militia could be improved and expanded, thus "obviat[ing] [the need] for any but a very small standing Army." *Id.* These remarks indicate that Congressman's Kimmel's amendment was intended to address concerns that were wholly domestic in nature. In specifically distinguishing between internal operations, which were the province of the local police and the state militia, and external operations, which were the province of the federal military, Kimmel highlighted the domestic nature of the proposed prohibition on use of the federal forces.[2]

The version of the army appropriations bill that ultimately was passed by the House contained the following substitute, offered by Congressman Knott, for the Kimmel amendment:

> From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus* or otherwise under the pretext or for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by [a] fine not exceeding $10,000 or imprisonment not exceeding two years, or by both such fine and imprisonment.

[2] Indeed, Kimmel specifically alluded to the Indian problem, indicating that Spain and England had incited the Indians to "depredations, arson, and murder," against American citizens, and assumed the Army had a role to play in their suppression *Id* at 3584-85 *See Extraterritorial Effect*, 54 St. Johns L. Rev at 28 ("[T]he strong preference for the role of the states in law enforcement underscores the absence of an express intention—at least on the part of the sponsor of this amendment—that the Act have extraterritorial application.").

Id. at 3845. Knott echoed the concerns that had been expressed by Congressman Kimmel. *Id.* at 3846, 3849. He stated that "this amendment is designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws." *Id.* at 3849. He stated that he did not object to the use of federal troops when acting under constitutional authority to suppress insurrection or rebellion (presumably a reference to Article IV, Section 4), but simply believed that "[t]he subordination of the military to the civil power ought to be sedulously maintained." *Id.* There was essentially no debate concerning extraterritorial application of the Knott amendment,[3] and it was passed by the House as introduced. *Id.* at 3852.

In the Senate, the same concerns about use of the military as a *posse comitatus* were expressed, along with some other concerns. Senator Kernan offered an amendment for Senator Bayard that proposed to retain the Knott amendment with one important change. He suggested that the exceptions clause be amended to reach cases where the use of military force was "expressly authorized *by the Constitution* or by act of Congress." Kernan made clear that this change was to encompass the President's power under Article IV, Section 4 to use the federal military when called upon to do so by the legislature or a State governor. Kernan reiterated that the amendment was designed to address the problem of *posse comitatus*:

> It would be an entire overthrow, it seems to me, of a fundamental principle of the laws of this country, of all our traditions, to say that the Army at the instance of the law officer, through a marshal or a deputy, special or general, of election, may call a body of the Army as a *posse comitatus* and order it about the polls of an election. We all know that might be used for an entire overthrow of the rights of citizens at the polls.... Hence I think Congress should say that there shall be no right to use the Army as a *posse comita-*

[3] The only discussion that arguably touched upon foreign affairs was raised by an amendment proposed by Congressman Schleicher of Texas which read: "*Provided*, That this section [the Knott amendment] shall not apply on the Mexican border or in the execution of the neutrality law elsewhere on the national boundary line." 7 Cong. Rec 3848 (1878). Schleicher was concerned with the robbery of cattle and that the Knott amendment would end the practice of having civilian authorities accompany military scouts on border patrol to arrest Mexican rustlers. He also expressed concern that civil and military cooperation might be necessary at the Canadian border to enforce the neutrality laws, if, for instance, Russia were to go to war with England. The Schleicher amendment was defeated by voice vote. *Id.* at 3849 The intent of the amendment is not entirely clear, but at least one commentator has concluded that the proposal assumed the Knott amendment *would not* apply *outside* the borders of the United States and that it sought to establish a further exempted zone just inside the border *See Extraterritorial Effect*, 54 St Johns L. Rev at 32 ("[T]he language of the [Schleicher] proviso — 'on the national boundary line' — suggests a domestic orientation to the proviso, and an implicit understanding that the Posse Comitatus amendment had no application across the border.").

> *tus* by the peace officers of the State or the General Government unless there is some statutory or constitutional provision that authorizes it.

Id. at 4240. Senator Beck agreed and indicated that "the whole object of this section as amended is to limit the use by the marshals of the Army to cases where by law they are authorized to call for them, and not to assume that they are in any sense a posse comitatus to be called upon when there is no authority given them to call upon anything but the *posse comitatus*." *Id.* at 4241. Thus, discussion of the Act in both houses makes clear that the restriction on the use of the military as a posse comitatus was directed solely at problems of local civil law enforcement.

Debates in the Senate on other portions of the amendment likewise reveal no intent for the prohibition on use of the military *other than* as a posse comitatus to bar extraterritorial military operations to execute the laws. Nowhere was such an intent expressed in the legislative history. Moreover, the discussions on this portion of the provision demonstrate that no limitation on the President's constitutional powers was intended. Senator Windom noted that "the discussion thus far has proceeded on the assumption that it was only when the Army was used as a *posse comitatus* that [i]t was [forbidden]. But the section says 'when used as a *posse comitatus* or otherwise;' whether used in that way, or as a portion of the Army, it is forbidden." *Id.* at 4241. Senator Sargent replied that "it ought to be forbidden *unless it is according to the Constitution and the laws*." *Id.* (emphasis added). Eventually, the Senate narrowly defeated an amendment to delete the words "or otherwise" from the Act. *Id.* at 4304. Several Senators expressed the view, however, that the amendment's restriction on the use of the military to situations where "express" constitutional or statutory authority existed was an unconstitutional limitation on the President's powers as chief executive and Commander in Chief. *See id.* at 4241 (remarks of Sen. Edmunds); *id.* at 4242 (remarks of Sen. Hoar). Senator Bayard, the original sponsor of the Senate version of the amendment, defused this debate by stating he would agree to a clarifying amendment striking the word "expressly" since, in his view, the provision as proposed did not entail "a diminution of any power under the law or the Constitution." *Id.* at 4244.

After additional debates on other portions of the language, the Act was passed by both Houses with the exception for constitutional authority suggested by Senator Kernan. There was little debate on the conference reports, and the Act became law on June 18, 1878. *See* Act of June 18, 1878, ch. 264, 20 Stat. 152 (1878).

As this summary indicates, none of the Act's extensive legislative history suggests any intent to constrain the use of the military outside the territorial jurisdiction of the United States. Rather, the history makes clear that the prohibition on use of the military as a posse comitatus was aimed

at preventing the use of the military for *local* civilian law enforcement. The governing principles were the traditional American aversion to maintaining a standing army at home, the longstanding principle that civilians should control domestic governance, and a concern that the extensive use of federal military power in domestic affairs violated the sovereignty and independence of the several states. None of these concerns is implicated by the use of the military to enforce the laws of the United States abroad. Military enforcement activities on the high seas or in the jurisdiction of foreign powers cannot by definition clash with or derogate from the authority of state and local police authorities or the National Guard.[4]

Moreover, both the structure of the Act and its legislative history indicate that the phrase "or otherwise to execute the laws" was also aimed at other domestic law enforcement activities, such as the suppression of labor strikes in the East and the enforcement of the revenue laws and destruction of untaxed stills in the West.[5] The Act in essence is a statement of principle concerning the relationship of domestic civil authority to the military power; any suggestion that its restrictions were intended to apply abroad is negated by this central purpose.

Consistent with this conclusion is the absence in the Act's legislative history of any evidence of an intent to limit the Executive's freedom to act in the area of foreign affairs. To the contrary, in introducing the amendment that was to become the Posse Comitatus Act, Congressman Kimmel drew a clear distinction between the domestic and foreign powers of the federal government and indicated that the amendment dealt only with the former. 7 Cong. Rec. 3581 (1878); *see supra* pp. 324-25. Construing the Act to apply to extraterritorial law enforcement activities would raise serious questions about infringements on the President's inherent constitutional powers. *See infra* pp. 331-34. Yet there was no discussion in the legislative history concerning the effect the Act might have on the power of the President to enter into bilateral or international agreements concerning law enforcement or to use the military in executing those agreements. *See Extraterritorial Effect*, 54 St. Johns L. Rev. at 45 ("With respect to extraterritoriality, Congress, in this debate, did not exhibit concern about the use of troops in terms of the President's war powers or otherwise in furtherance of American foreign policy.").

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[4] The National Guard is the modern day form of the State militia. *See Maryland v. United States*, 381 U.S 41, 46 ("The National Guard is the modern Militia reserved to the States by Art I, § 8, cl. 15, 16 of the Constitution."), *judgment vacated and amended*, 382 U.S. 159 (1965).

[5] All the references in the debate to military law enforcement outside of the context of posse comitatus were domestic in nature. These included the use of federal troops in the election process and electoral politics. *See, e g.*, 7 Cong. Rec. 3585 (1878) (Rep Kimmel); *id.* at 3676 (Rep Hewitt); *id.* at 3677 (Rep. Mills). Concern was also voiced about the use of the military to deal with labor unrest *See id.* at 3676 (Rep Bridges); *id.* at 3683-84 (Rep. Cox). Finally, supporters of the Posse Comitatus Act decried the use of the military to enforce the revenue laws, particularly as they applied to untaxed liquor. *See id.* at 3581 (Rep. Kimmel) None of these examples suggests anything but a domestic orientation to the phrase "or otherwise to execute the laws "

Under these circumstances, it would be absurd to conclude that the drafters of the Act wished to prohibit use of the military to execute the laws abroad when, as will often be the case overseas, the military is the only effective force available to the executive branch to "take care that the laws be faithfully executed."[6] In a number of instances extraterritorial application of the Posse Comitatus Act would require the assumption that Congress wished certain criminal laws to be practically unenforceable.[7] Indeed, if the Act were automatically and unthinkingly applied to extraterritorial law enforcement situations, it could impose criminal penalties on foreign civil authorities who requested or assisted American military forces in the execution of the laws. *See Restrictions*, 7 Mil. L. Rev. at 98 (indicating that the criminal sanction would apply to civilian officials who request and receive military aid in violation of the Act). Such an absurd result should not be inferred.

C. The General Presumption Against Extraterritorial Application of Criminal Statutes Further Supports Solely Domestic Application of the Posse Comitatus Act.

Our conclusion that the Posse Comitatus Act should not be applied extraterritorially is confirmed by the general rule of statutory construction concerning the extraterritorial application of domestic legislation. In sum, that rule states:

> Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring

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[6] Numerous supporters of the Posse Comitatus Act expressed the view that it did not restrict the President's power to employ the military for domestic law enforcement when federal or state civil authorities were incapable of maintaining order. *See, e.g.*, 7 Cong. Rec. 3645 (1878) (Rep. Calkins) ("Now, it is admitted on all hands that there ought to be some reserved power or force to repress or suppress these insurrections when they take place or which are likely to take place, and which may pass beyond the control of a sheriff's *posse comitatus*."); *id.* at 4247 (Sen. Hill) ("The military puts down opposition to the execution of the law when that opposition is too great for the civil arm to suppress."); *id.* at 4243 (Sen. Merrimon) (indicating that use of the military was not proper "until [the] civil power was exhausted") Thus, even in the domestic sphere, the legislators did not intend the Act to extend to situations where only the discipline and armed strength of the military could assure execution of the laws. *See Extraterritorial Effect*, 54 St. Johns L. Rev. at 44 ("[I]f the Federal government has authority to act, and necessity requires the application of military force, then it could be used . . .")

[7] Recent legislation reflects Congress's intent that the United States be able to exercise its law enforcement powers abroad when necessary to counter international terrorism. For example, in introducing legislation (now codified at 18 U.S.C. § 2331) to criminalize murder and other acts committed against U.S. nationals abroad, Senator Specter noted that:

> In many cases, the terrorist murderer will be extradited or seized with the cooperation of the government in whose jurisdiction he or she is found. Yet, if the terrorist is hiding in a country like Lebanon, where the government, such as it is, is powerless to aid in his removal, or in Libya, where the government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial.

131 Cong. Rec. 18,870 (1985). In the hypothetical situations posed by Senator Specter, enforcement of 18 U.S.C. § 2331 likely would be a practical impossibility without extensive military involvement in the arrest and return of the offenders to the United States.

> within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute.

Restatement (Second) of Foreign Relations Law of the United States § 38 (1965). *Accord* 1 Restatement (Third) of the Foreign Relations Law of the United States § 403 cmt. g (1987).

The Supreme Court has consistently applied this principle in construing both civil and penal statutes of the United States. In *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), the Supreme Court upheld the dismissal of a complaint under the Sherman Act that alleged actions in restraint of trade wholly within the jurisdiction of Costa Rica. Despite the broad language of the Sherman Act prohibiting "[e]very contract in restraint of trade" and applying to "[e]very person who shall monopolize," the Court rejected extraterritorial application based on considerations of international sovereignty and comity. Justice Holmes' opinion for the Court indicated that these considerations "would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. All legislation is *prima facie* territorial." *Id.* at 357 (citation and internal quotation marks omitted).

The Court elaborated on the presumption that federal law applies only territorially in the context of a penal statute in *United States v. Bowman*, 260 U.S. 94 (1922). At issue in *Bowman* was the extraterritorial application of a criminal statute that was "directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military or naval service or to any department thereof, or any corporation in which the United States is a stockholder." *Id.* at 101.

The Supreme Court viewed the question of extraterritorial application as one of "statutory construction" and indicated that "[t]he necessary *locus*, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crimes under the law of nations." *Id.* at 97-98. As to purely private crimes "which affect the peace and good order of the community," exclusively territorial application is the rule, and "[i]f punishment of them is to be extended to include those committed outside the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." *Id.* at 98. But the Court indicated that a different rule would apply as to statutes that "are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents." *Id.* As to these offenses, some "can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them,"

while in other cases "to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity." *Id.*

As to the statute before it, the Court noted that it applied to false claims against any civil, military, or naval officer of the United States. Moreover, the statute had been amended in 1918 to include fraudulent claims against corporations in which the United States owned stock. Because the amendment was, in the Court's view, intended to protect the United States as sole stockholder in the Emergency Fleet Corporation, and because "that corporation was expected to engage in, and did engage in, a most extensive ocean transportation business, and its ships were seen in every great port of the world open during the war," *id.* at 102, congressional intent to provide for extraterritorial application could be inferred both from the nature of the crime and from the fact that a refusal to give such effect to the statute would have significantly undermined its purpose.

In contrast, in *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), the Court invoked the presumption against extraterritorial scope in holding that the so-called "Eight Hour Law" had only domestic application. On its face, that law broadly applied to "[e]very contract made to which the United States ... is a party" and "every laborer and mechanic employed by any contractor." The Court concluded, however, that it did not apply to a contract between the United States and a private contractor for construction work undertaken in Iraq and Iran, because it found that "concern with *domestic* labor conditions led Congress to limit the hours of work." *Id.* at 286 (emphasis added).[8]

We think it clear that in the case of the Posse Comitatus Act, there is insufficient evidence to rebut the presumption against extraterritorial application. The text of the statute itself suggests a wholly domestic orientation, and the legislative history strongly supports that view. In the words of the Supreme Court in *Bowman*, the Posse Comitatus Act proscribes conduct "which affect[s] the peace and good order of the community." 260 U.S. at 98. There is no indication that declining to give the Act extraterritorial effect wuld frustrate the purposes of the Act or "greatly to curtail the scope and usefulness of the statute and leave open a large immunity." *Id.*

[8] The Court recently reaffirmed the *Foley Bros.* approach to extraterritoriality in *Argentine Republic v Amerada Hess Shipping Corp.*, 488 U S. 428 (1989) There the Court invoked the presumption against extraterritorial application in holding that the word "waters" in an exception to the Foreign Sovereign Immunities Act, 28 U S C §§ 1602-1611, should be strictly construed to mean the territorial waters of the United States. 488 U S at 440.

D. Broadly Construing the Posse Comitatus Act to Include Actions of Military Personnel Abroad Would Raise Serious Constitutional Concerns.

Reading the Posse Comitatus Act to apply extraterritorially also would infringe on the President's inherent constitutional powers as Chief Executive and Commander-in-Chief of the armed forces both to execute the laws and to conduct foreign policy. *See* U.S. Const. art. II, § 1 (executive power vested in the President); art. II, § 2 (President is the Commander-in-Chief of the armed forces); art. II, § 3 (President must "take Care that the Laws be faithfully executed"). In The Federalist, Alexander Hamilton explained why the President's executive power would include the conduct of the nation's foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate." The Federalist No. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Thomas Jefferson expressed a similar view: "The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specifically submitted to the Senate. Exceptions are to be construed strictly ...." 5 *Writings of Thomas Jefferson* 161 (W. Ford ed. 1895).

While the domestic powers of the national government were specifically enumerated to protect the independence and domestic legislative prerogatives of the states, the individual states never possessed the foreign powers of an independent nation. These inherent powers, which are an aspect of national sovereignty, were always contained in the national government. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). Echoing the remarks of Hamilton and Jefferson quoted above, the Court in *Curtis-Wright* concluded that most of these implied powers are lodged within the executive branch. The Court referred to "the very delicate, plenary, and exclusive power of the President as the *sole organ of the federal government in the field of international relations* — a power which does not require as a basis for its exercise an act of Congress." *Id.* at 320 (emphasis added).

The convergence of the President's inherent powers under the Constitution in the area of foreign affairs and his power as Commander-in-Chief of the armed forces produce the constitutional right and duty in some instances to enforce American law outside the territorial jurisdiction of the United States.[9] Absent valid statutory constraints, the

[9] The President's duty to protect American citizens and property can arise even in the absence of a specific statute that must be executed. *See In re Neagle*, 135 U S 1, 63-67 (1890) (recognizing the President's power to protect the nation or citizens or property of the United States even where there is no specific statute to "execute")

Constitution also provides the President with the means necessary to execute the laws, including, where necessary, the use of United States military forces. *See, e.g., Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804) (Marshall, C.J.) ("It is by no means clear that the President of the United States, whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose ... have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce."); *In re Cooper*, 143 U.S. 472, 499-500 (1892) (seizure by U.S. Navy of British vessel on the high seas for violation of U.S. law); *see also* Joseph Story, 3 *Commentaries on the Constitution* 1485 (1833) ("The command and application of the public force, to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist, when they are taken away from it.").

Throughout our history, Presidents have exercised the power to call upon the military to execute and enforce the law when the civilian officers under their control have proved inadequate to the task. *See In re Debs*, 158 U.S. 564, 582, 599 (1895) (affirming executive power to use the military to prevent violent obstruction of interstate commerce); 41 Op. Att'y Gen. 313, 326 (1957) (discussing President's constitutional authority to enforce a judicial desegregation decree with military power in Little Rock, Arkansas); *see generally* Guido N. Lieber, *The Use of the Army in Aid of the Civil Power* (1898). Moreover, the executive branch has often employed the military forces abroad to protect citizens of the United States and to punish violations of American law. *See* generally Milton Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928). As one commentator puts it,

> Congress alone, of course, has the right to declare war under the Constitution, but interposition for the protection of citizens is not essentially war .... So long as the use of the army and navy of the United States for the protection of citizens resident in foreign countries does not amount to a recognized act of war, it seems to be an established fact that the President does, constitutionally, possess the power to make such use of those forces, and that Congress, except indirectly, as by disbanding the army and navy, may not prevent or render illegal his action.

Id. at 4-5.

Under these principles, construing the Posse Comitatus Act to limit the authority of the President and his designates to employ the military for law enforcement purposes outside the territorial jurisdiction of the United States would impermissibly infringe on the core constitutional responsibilities of the Executive. On foreign soil or the high seas — unlike in the domestic situation — military personnel may constitute the only means at the executive branch's command to execute the laws. Giving extraterritorial effect to the Posse Comitatus Act thus could, in many circumstances, deprive the executive branch of any effective means to fulfill this constitutional duty. Such a deep intrusion into the functions of the executive branch would present serious questions of constitutionality, *see Morrison v. Olson*, 487 U.S. 654 (1988), and it is likely that the federal courts would be "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 446 (1989). *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.").

E. The Decisions of the Federal Courts, Administrative Practice, and the Views of Commentators in the Field All Support the Conclusion that the Posse Comitatus Act Applies Only Within the Territorial Jurisdiction of the United States.

Courts and commentators generally agree that the Posse Comitatus Act does not apply extraterritorially. Several cases have addressed the issue; none has concluded that the Act so applies. In *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949), the court squarely held that the Posse Comitatus Act does not apply extraterritorially. There, an American citizen was prosecuted for treason committed in Nazi Germany during World War II. Chandler was indicted in the United States in 1943, and in 1946 he was arrested by the Army in Bavaria at the request of the Department of Justice. He was taken into military custody and flew with an Army guard to the United States where he was tried and convicted. *Id.* at 927-28.

On appeal, Chandler argued that the district court had no jurisdiction because his arrest and return to the United States by Army personnel violated the Posse Comitatus Act. *Id.* at 934. The Court of Appeals disagreed. The court noted that "the immediate objective of the [Posse Comitatus Act] was to put an end to the use of federal troops to police state elections in the ex-Confederate States where the civil power had been reestablished." *Id.* at 936. Invoking the presumption against the extraterritorial application of congressional legislation and citing *Bowman*, the court stated:

> In contrast to the criminal statute denouncing the crime of treason, this is the type of criminal statute which is properly presumed to have no extraterritorial application in the absence of statutory language indicating a contrary intent. Particularly, it would be unwarranted to assume that such a statute was intended to be applicable to occupied enemy territory, where the military power is in control and Congress has not set up a civil regime.[10]

Id. (citations omitted). The court also noted the practical impossibility of apprehending a fugitive like Chandler absent military assistance and observed that it found wholly unacceptable the conclusion "that there was no way in which a court of the United States could obtain lawful jurisdiction over Chandler unless he should choose to relinquish his asylum in Germany and voluntarily return to the United States." *Id.*

Two years after *Chandler*, the Court of Appeals for the District of Columbia Circuit was presented with an almost identical factual scenario in *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950). The court followed *Chandler* and rejected the argument that the defendant's arrest in occupied Germany by U.S. military forces violated the Posse Comitatus Act. However, it based its decision only on the narrower ground suggested by *Chandler*: that the U.S. Army was the only civil authority in Germany. *Id.* at 972-73. The *Gillars* court expressly declined to reach the general question whether the Act was extraterritorial in scope. *Id.* at 973. *Accord D'Aquino v. United States*, 192 F.2d 338, 351 (9th Cir. 1951) (based on *Chandler* and *Gillars*, court summarily rejected American citizen's claim that her arrest by military authorities and transportation to the United States for trial violated the Posse Comitatus Act), *cert. denied*, 343 U.S. 935 (1952).

More recently, decisions have raised, but not expressly decided, the question of the Act's extraterritorial application. In *United States v. Cotten*, 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973), two American civilians were indicted for defrauding the United States by passing checks in Vietnam drawn on a nonexistent account with the United States Military Exchanges. After being arrested in Vietnam by agents of the United States Naval Investigative Service and forcibly returned to the United States for trial by Air Force personnel, *id.* at 745, the defendants challenged the court's jurisdiction on the grounds that the Posse Comitatus Act had been violated and that the arresting officials' conduct was so shocking to the conscience as to violate the Due Process

[10] As the above quotation indicates, the Court of Appeals had earlier rejected Chandler's claim that the treason statute did not reach extraterritorial acts. The court noted that in defining the crime of treason in the Constitution, the Framers had discussed extraterritorial application and specifically rejected language that would have restricted treason to domestic acts. 171 F.2d at 929-31. The court also noted that the treason statute itself proscribed aid to government enemies "within the United States *or elsewhere*." *Id.* at 930 (quoting 18 U.S.C. § 2381) (emphasis added).

Clause. Relying on the so-called *Ker-Frisbie* doctrine, which provides that an illegal arrest does not divest a court of jurisdiction over the defendant's person, *see Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886), the court rejected their claims without addressing whether the Posse Comitatus Act had been violated.

United States v. Yunis, 681 F. Supp. 891 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (1991), is the only decision that is somewhat ambiguous on the extraterritorial reach of the Act and related Department of Defense regulations. That case involved a hijacker who was arrested abroad and returned to the United States by the U.S. Navy for trial. After describing other cases dealing with challenges based upon the Posse Comitatus Act, including *Chandler* and its progeny, the court rested its decision that the Act had not been violated on the ground that Navy personnel had played a "passive role[]" in the operation and did not engage in "the exercise of regulatory, proscriptive, or compulsory military power" of the kind that the Department of Defense regulations were meant to prohibit. *Id.* at 895. Although it could be argued from this basis for decision that the court assumed the regulations applied extraterritorially, in fact the court never directly addressed the issue. Moreover, it noted that *Chandler* had held that the Posse Comitatus Act "'is properly presumed to have no extraterritorial application in the absence of statutory language indicating a contrary intent.'" *Id.* at 893 (quoting *Chandler*, 171 F.2d at 936). In addition, the court observed that in the case before it, the military was "aiding law enforcement efforts of FBI agents in international waters, where no civil governmental authority existed," *id.* at 891, and indicated concern that "[b]y its very nature, the operation required the aid of military located in the area." *Id.* at 895. Under these circumstances, we do not believe that *Yunis* properly can be understood to hold that the Posse Comitatus Act applies extraterritorially.

The administrative practice of the Army further supports the view that the Posse Comitatus Act is without extraterritorial effect. On numerous occasions, the Office of the Judge Advocate General has concluded that the Posse Comitatus Act has no extraterritorial application, and that office has approved law enforcement activities overseas that likely would violate the Act if performed by military personnel in the United States. *See, e.g.*, JAGA 1957/2176, March 6, 1957 (approving the taking of a statement from a suspect in Germany by military personnel and indicating that "[t]he so-called Posse Comitatus Act need not be considered as it is without extraterritorial application"). Accord JAGA 1954/5140, June 10, 1954 (approving use of military personnel to aid New Jersey State Police in identifying a suspect in Korea); JAGA 1954/6516, July 29, 1954 (approving use of military personnel to administer lie detector test on suspect in Europe).

Commentators in the area generally agree. *See, e.g.*, *Restrictions*, 7 Mil. L. Rev. at 108 ("[I]t seems reasonably well-established that the Posse Comitatus Act imposes no restriction on employing the military services to enforce the law in foreign nations."). The most thorough scholarly

review of this topic, *Extraterritorial Effect*, one of whose authors is a former General Counsel for the Department of Defense, describes the primary purpose of the Posse Comitatus Act as "prevent[ing] the military from exercising those law enforcement responsibilities otherwise within the existing or potential capabilities of state forces and federal civilian offices." 54 St. Johns L. Rev. at 34. The article concludes that "neither the legislative history of the Act nor relevant principles of statutory construction require that the Act be given extraterritorial effect." *Id.* at 54.

Thus, we think it clear that the Posse Comitatus Act does not restrict the use of military personnel to enforce the laws outside the territorial jurisdiction of the United States. The text and history of the Act, as well as judicial, administrative, and scholarly interpretation of its provisions, all indicate that the Act was intended to deal with solely domestic concerns.

II. Legislation Subsequent to the Posse Comitatus Act

A. The 1981 Act

In 1981, Congress enacted into law a series of statutory provisions relating to military cooperation with civilian law enforcement officials. Pub. L. No. 97-86, tit. IX, § 905(a)(1), 95 Stat. 1114 (1981) (codified at 10 U.S.C. §§ 371-378) (the "1981 Act").[11] The purpose of the 1981 Act was to enact provisions, including 10 U.S.C. §§ 371, 372, and 373, to give clear authority for certain types of military assistance to civilian authorities. These provisions codified well-established exceptions to the Posse Comitatus Act for the sharing of information collected by military personnel, the sharing of military equipment and facilities, and the training of civilian law enforcement agents by military personnel. *See* H.R. Rep. No. 71, 97th Cong., lst Sess., pt. II, at 7 (1981) (These "sections clarify existing practices of cooperation between the military and civilian law enforcement authorities. Current interpretation of the Posse Comitatus Act already permits all of [this] activity.").

One provision of the 1981 Act bears particular relevance to the question of extraterritorial law enforcement by the military. Section 374, as enacted in the 1981 Act, generally permits use of Department of Defense personnel to operate and maintain equipment in connection with the enforcement of certain laws, including narcotics, tariff, and immigration laws. 10 U.S.C. § 374(a) (1982). Section 374(b) provides that generally, such military equipment may be operated by military personnel only to the extent that "the equipment is used for monitoring and communicating

[11] The provisions of the 1981 Act were substantially modified in 1988 For convenience, we cite the United States Code sections where the 1981 Act was codified as they existed prior to the 1988 amendments We discuss any effect the 1988 amendments may have on the extraterritoriality of the Posse Comitatus Act *infra* pp 340-41

the movement of air and sea traffic." *Id.* § 374(b). Section 374(c) then provides for special circumstances in which military equipment may be used outside the land area of the United States.[12]

Under ordinary principles of statutory construction, it might be argued that the express grant in section 374(c) of some authority to deploy equipment outside the United States implicitly denies authority for the military to engage in other more extensive activities. However, such an interpretation is expressly foreclosed by section 378 as enacted by the 1981 Act, which provides that the 1981 Act shall not be construed to limit the Executive's authority to use the military for civilian law enforcement efforts beyond the limitations previously imposed by the Posse Comitatus Act. *Id.* § 378. *Accord* H.R. Conf. Rep. No. 311, 97th Cong., 1st Sess. 122 (1981) (section 378 "clarifies the intent of the conferees that ... [n]othing in this chapter should be construed to expand or amend the Posse Comitatus Act"); *see also* H.R. Rep. No. 71, 97th Cong., 1st Sess., pt. II, at 12 n.3 (1981) ("Nothing in ... section [374] in any way affects the extraterritorial application, if any, of the Posse Comitatus Act."). Thus, while the 1981 Act functions as a grant of authority as well as a kind of "safe harbor" of permissible activities under the Posse Comitatus Act, it does not operate to restrict military enforcement activity beyond the limitations imposed by the Posse Comitatus Act itself. This interpretation accords with the general purpose of the 1981 Act to "clarify and reaffirm the authority of the Secretary of Defense to provide indirect assistance to civilian law enforcement officials." S. Rep. No. 58, 97th Cong., 1st Sess. 148 (1981).[13]

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[12] Section 374(c) provides in pertinent part as follows

> In an emergency circumstance, equipment operated by or with the assistance of personnel assigned under subsection (a) may be used *outside the land area of the United States (or any territory or possession of the United States)* as a base of operations by Federal law enforcement officials to facilitate the enforcement of a law listed in subsection (a) and to transport such law enforcement officials in connection with such operations, if—
>
> (A) equipment used by or with the assistance of personnel assigned under subsection (a) is not used to interdict or to interrupt the passage of vessels or aircraft; and
>
> (B) the Secretary of Defense and the Attorney General jointly determine that an emergency circumstance exists.

10 U.S.C § 374(c)(1)(A) & (B) (1982) (emphasis added)

[13] Although section 378 of the 1981 Act quite clearly indicates that "*[n]othing* in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel," at least one court seems to have been confused as to the effect of the 1981 Act In *United States v Roberts*, 779 F.2d 565 (9th Cir.), *cert denied*, 479 U S 839 (1986), the Ninth Circuit addressed whether Navy assistance to Coast Guard interdiction of a vessel carrying marijuana on the high seas "violate[d] the proscriptions of 10 U S C. §§ 371-378 " *Id.* at 567. The *Roberts* court took the position that section 378 had the effect of codifying Navy regulations as of December 1, 1981, and then asked whether these regulations had been violated *Id.* There is absolutely nothing in the text or legislative history surrounding section 378 which would suggest that it was intended to codify past executive branch regulations Moreover, such an interpretation of section 378 would seem to construe that section *itself* "to limit the authority of the executive branch," in direct conflict with its plain language. Finally, such an interpretation would have the effect of expanding the restrictions of the Posse Comitatus Act, a result expressly disclaimed by the legislative history surrounding the 1981 Act.

This same analysis applies with respect to 10 U.S.C. § 375, as enacted by the 1981 Act, which provides:

> The Secretary of Defense shall issue such regulations as may be necessary to insure that the provision of any assistance (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

10 U.S.C. § 375 (1982). Given the explicit directive in section 378 that nothing in the 1981 Act is to be construed as creating additional restrictions on the Executive's authority to use the military to enforce the laws, we believe this section also should be interpreted to require the promulgation of regulations that do no more than enforce the Posse Comitatus Act. The House Report on the provision that became section 375 supports this view. It indicates that the section was intended to "reaffirm[] the traditionally strong American antipathy towards the use of the military in the execution of civil law" as contained in the Posse Comitatus Act. H.R. Rep. No. 71, pt. II, at 10-11 (quoting 7 Cong. Rec. 4245-47 (1878) (remarks of Sen. Hill concerning the Posse Comitatus Act)). The Conference Report on section 375 is even more explicit, stating:

> Nothing in this chapter adversely affects the authority of the Attorney General to request assistance from the Department of Defense under the provisions of 21 U.S.C. 873(b). *The limitation posed by this section is only with respect to assistance authorized under any part of this chapter.*

H.R. Conf. Rep. No. 311 at 121 (emphasis added). As with section 374, therefore, we conclude that nothing in section 375 was meant to constrain preexisting executive branch authority to use the military in the enforcement of the laws.

In our view, this authority flows directly from the Constitution itself. As discussed above, the Constitution charges the President with the duty to execute the laws, and absent valid statutory constraints, it provides him with the means to see to their execution, including, where necessary, the use of military forces. *See supra* pp. 331-34. As we have concluded above, the President's constitutional power to employ the military in the execution of the laws outside the territorial jurisdiction of the United States is in no way affected by the Posse Comitatus Act. *Id.* Thus, within the terms of section 375, military enforcement of the laws outside the United States is "otherwise authorized by law."

Congress' intent that section 375 not disturb existing executive branch authority to employ the military in law enforcement activities is particularly explicit with respect to the enforcement of narcotics laws. The House Conference Report states explicitly that "[n]othing in this chapter adversely affects the authority of the Attorney General to request assistance from the Department of Defense under the provisions of 21 U.S.C. § 873(b)," which was enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1272 (1970) ("Controlled Substances Act"). Section 873(b) is presently codified in part E, subchapter I, chapter 13 of title 21, which empowers the Attorney General to call upon the military, among other federal instrumentalities, as necessary to assist him in executing the provisions of the Controlled Substances Act.[14] *See United States v. Harrington*, 681 F.2d 612, 613 n.1 (9th Cir. 1982) ("[T]he Attorney General may request the assistance of other agencies to help enforce federal drug laws."); Memorandum for Daniel Silver, General Counsel, National Security Agency ("NSA"), from John M. Harmon, Assistant Attorney General, Office of Legal Counsel at 2 (Jan. 9, 1979) (Section 873(b) is "an affirmative authorization for all federal agencies, including NSA and the Naval Security Command Group, to assist the Attorney General, or his designee, upon receipt of a legitimate and legal request for aid." (footnote omitted)).[15]

Read together, these provisions in our view provide authority in the Attorney General to call upon the military to assist him in the enforcement of the drug laws outside the territorial jurisdiction of the United States. Because the provisions of the 1981 Act do not extend extraterritorially, such aid could include direct military participation in law enforcement activities such as the apprehension of persons under indictment who are outside the territorial jurisdiction of the United States, or assistance in interdiction efforts on the high seas.

B. The 1988 Amendments

In 1988, Congress substantially modified the provisions of the 1981 Act applicable to the use of military personnel to assist in the enforcement of

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[14] Pursuant to 21 U S.C. § 965, the subchapter of title 21 that includes section 873(b) also applies to the subchapter that generally proscribes the import and export of controlled substances. Thus, the Attorney General's power to request assistance from other federal agencies extends to the enforcement of all the significant drug laws of the United States

[15] Consistent with this authority is Executive Order No 11727, 3 C FR. 785 (1971-1975), section 1 of which provides:

> The Attorney General, to the extent permitted by law, is authorized to coordinate all activities of executive branch departments and agencies which are directly related to the enforcement of the laws respecting narcotics and dangerous drugs Each department and agency of the Federal Government shall, upon request and to the extent permitted by law, assist the Attorney General in the performance of functions assigned to him pursuant to this order, and the Attorney General may, in carrying out those functions, utilize the services of any other agencies, Federal and State, as may be available and appropriate

the narcotics, immigration, and tariff laws. *See* Pub. L. No. 100-456, tit. XI, § 1104, 102 Stat. 2042 (1988) (codified at 10 U.S.C. §§ 371-380) ("1988 amendments"). The legislative history surrounding the 1988 amendments indicates that they were designed to "expand the opportunities for military assistance in a manner that is consistent with the requirements of military readiness and the historic relationship between the armed forces and civilian law enforcement activities." H.R. Conf. Rep. No. 989, 100th Cong., 2d Sess. 450 (1988). The amendments reaffirmed and broadened the military's authority to share data obtained during military missions, to lend equipment and facilities, and to train civilian law enforcement personnel. *See* 10 U.S.C. §§ 371-373.

Section 374 was substantially revised to include authorization for aerial reconnaissance by military personnel and the interception of vessels or aircraft "detected outside the land area of the United States for the purposes of communicating with such vessels and aircraft to direct such vessels and aircraft to go to a location designated by appropriate civilian officials." *Id.* § 374(b)(2)(B) & (C) (1988). Subsection 374(c), added by the 1988 Act, provides:

> The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available to any Federal, State, or local civilian law enforcement agency to operate equipment for purposes other than described in paragraph (2) only to the extent that such support does not involve direct participation by such personnel in a civilian law enforcement operation unless such participation is otherwise authorized by law.

Id. § 374(c).

As with the version of section 374 enacted by the 1981 Act, section 374(c) must be read in conjunction with the entire statutory scheme. In reenacting section 378, the 1988 amendments reiterated that no additional restrictions on executive branch authority to use the military in enforcement of the laws, beyond those contained in the Posse Comitatus Act, were intended. Since the Posse Comitatus Act does not apply extraterritorially, we conclude that there are no statutory limits on the executive branch's authority to employ the military in law enforcement missions outside the territorial jurisdiction of the United States.[16]

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[16] We note in this regard that the so-called Mansfield Amendment, 22 U.S.C § 2291(c), which prohibits any officer or employee of the United States from "directly effect[ing] any arrest in any foreign country *as part of any foreign police action*, (emphasis added) in connection with narcotics enforcement is inapplicable to the use of the military to enforce the laws of the United States. As its language suggests, the Mansfield Amendment addresses only the participation of United States employees in the internal enforcement activities of foreign countries *See United States v Green*, 671 F2d 46, 53 n 9 (1st Cir)

Continued

III. Department of Defense Regulations

The Department of Defense ("DoD") has promulgated a series of regulations, codified at 32 C.F.R. Part 213 and based on the 1981 Act, to establish uniform DoD policies and procedures with respect to support provided to Federal, State, and local civilian law enforcement efforts. 32 C.F.R. § 213.1. These regulations are somewhat ambiguous as to the restraints they place on the use of the military for overseas law enforcement operations.

As a general matter, the Department's policy is "to cooperate with civilian law enforcement officials to the maximum extent practicable." *Id.* § 213.4. Section 213.10 enumerates specific restrictions on the use of DoD personnel in civilian law enforcement activities, as well as various types of permissible direct assistance that are statutory and other well settled exceptions to the Posse Comitatus Act. Among these approved activities are "actions that are undertaken primarily for a military or foreign affairs purpose," *id.* § 213.10(a)(2)(i)(F), and "[a]ctions taken under express statutory authority to assist officials in the execution of the laws, subject to applicable limitations therein," *id.* § 213.10(a)(2)(ii)(B)(iv). In addition, section 213.10(a)(6) of the regulations provides rules complementing the requirements of section 374 of the 1981 Act, which permits the use of military equipment in certain circumstances outside the land area of the United States. *Id.* 213.10(a)(6)(iii)(C). *See supra* pp. 337-38 & n.12.

These two provisions expressly permit certain extraterritorial use of military resources for civilian law enforcement. As noted above with respect to section 374, *see supra* p. 338, the limited nature of the authorization of extraterritorial law enforcement activities in section 213.10(a)(6)(iii)(C) could be construed to exclude other more extensive extraterritorial activities. This argument might be bolstered by section 213.10(a)(3), which indicates that "[e]xcept as otherwise provided in this enclosure" the Posse Comitatus Act generally prohibits direct military assistance to law enforcement personnel. Moreover, the regulations contain no provision comparable to section 378, which provides that no additional restrictions beyond those imposed by the Posse Comitatus Act were intended. We conclude, however, that these regulations should not be read to prohibit military aid in extraterritorial law enforcement activity.

First, section 213.10(a)(6)(iii)(C) was intended to implement the 1981 Act, which quite clearly *did not* extend the prohibitions of the Posse Comitatus Act extraterritorially. While an agency may bind itself by regu-

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[16] (..continued)
("[T]he legislative history of the provision makes it clear that it was only intended to 'insure that U S personnel do not become involved in sensitive, internal law enforcement operations which could adversely affect U S. relations with that country'") (quoting S. Rep No 94-954 at 55), *cert. denied*, 457 U S. 1135 (1982). The Mansfield Amendment thus has no bearing on the use of United States military personnel to enforce the laws of the United States on the high seas or in foreign territory.

lation beyond specific statutory mandates, *Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954), it would be somewhat anomalous to conclude that the Department of Defense had done so here, particularly in light of the general policy statement in section 213.4 of the regulations to "cooperate with civilian law enforcement officials to the maximum extent practicable," and the position of the Judge Advocate General's Office on extraterritorial law enforcement activity. *See supra* p. 336.

Second, the substance of section 213.10(a)(6)(iii)(C) has been substantially undermined by the expansion of statutory authority in the 1988 amendments to section 374. Among other things, those amendments eliminated the requirement that the Attorney General and the Secretary of Defense determine that an emergency circumstance exists before military assistance may be granted. *See* 10 U.S.C. § 374(b)(2)(E).[17] We see little merit to an argument that restrictions on military assistance contained in outdated regulations must be assumed to apply extraterritorially.

In any event, we do not believe the regulations could operate to constrain the Attorney General's authority under 21 U.S.C. § 873(b) to enlist the military's assistance in the enforcement of the drug laws.[18] *See supra* p. 340. In addition, a significant constitutional question would be raised if the regulations were read to prevent the President from issuing direct instructions, based on his constitutional powers as Chief Executive and Commander-in-Chief, to the Secretary of Defense to assist civilian authorities in law enforcement activities outside the jurisdiction of the United States. *See supra* pp. 331-34. In the respects noted above, however, the regulations can be read as imposing restrictions on extraterritorial use of military forces, and numerous courts have treated the Department of Defense regulations as law binding the agency in its conduct of law enforcement activity. *See United States v. Del Prado-Montero*, 740 F.2d 113 (1st Cir.), *cert. denied*, 469 U.S. 1021 (1984); *United States v. Roberts*, 779 F.2d 565 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986); *United States v. Yunis*, 681 F. Supp. 891 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (1991).

In sum, the Department of Defense regulations contained in section 213.10(a)(6)(iii)(C) are ambiguous, at best, as to the restraints they place on the use of Department of Defense personnel to enforce the laws outside the territorial jurisdiction of the United States. Although we think the better interpretation of the regulations is to construe them consis-

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[17] Present section 374 provides that Department of Defense personnel may operate equipment for "the transportation of civilian law enforcement personnel" and for "the operation of a base of operations for civilian law enforcement personnel," outside the United States subject to "joint approval by the Secretary of Defense, the Attorney General, and the Secretary of State." 10 U.S.C. § 374(b)(2)(E). No requirement of a finding of the existence of "an emergency circumstance" is required.

[18] Indeed, the Attorney General's authority under 21 U.S.C. § 873(b) would seem to fit squarely within the exception in section 213.10(a)(2)(ii)(B)(iv) to the general prohibition on direct enforcement activities for "[a]ctions taken under express statutory authority to assist officials in the execution of the laws, subject to applicable limitations therein."

tently with the statutory provisions, until they are amended, some ambiguity will remain concerning the legality under the regulations of the use of military personnel to enforce the laws overseas.

IV. Conclusion

We conclude that the Posse Comitatus Act does not apply outside the territory of the United States. Neither the language, history, nor legislative history of the Act suggests that Congress intended the restrictions on use of the military in civilian law enforcement to apply extraterritorially. Under these circumstances, established rules of statutory construction impose a presumption that the Act be construed as having only domestic effect. Such a construction also is necessary to enable certain criminal laws to be executed and to avoid unwarranted restraints on the President's constitutional powers. Although some language in the Department of Defense regulations suggests that certain restrictions on the use of military assistance apply outside the land area of the United States, we believe the better view is to read those regulations consistently with provisions in the underlying statute stating that no limitations beyond those imposed by the Posse Comitatus Act were intended to be enacted. Until the regulations are revised to so provide, however, some uncertainty about the scope of the regulations will remain.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Scope of Procurement Priority Accorded to the Federal Prison Industries under 18 U.S.C. § 4124

The procurement priority accorded to "products" of the Federal Prison Industries under 18 U.S.C § 4124 does not include services.

November 8, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This memorandum responds to your request for our opinion whether the procurement priority accorded to "products" of the Federal Prison Industries ("FPI") under 18 U.S.C. § 4124 for sale to federal agencies includes services as well as commodities.[1] The General Services Administration ("GSA") maintains that "products" under section 4124 refers solely to commodities and not to services.[2] FPI contends that "products" includes services.[3] For the reasons set forth below, we conclude that "products" does not include services under the statute.

This dispute over the meaning of section 4124 began in 1986, when the GSA proposed to amend the Federal Acquisition Regulations ("FAR") to deny FPI priority consideration over commercial suppliers in the acquisition of services by federal agencies. 51 Fed. Reg. 21,496 (to be codified at 48 C.F.R. pt. 8) (proposed June 12, 1986). Currently, the FAR provide that FPI has a priority over commercial sources with respect to services as well as commodities. 48 C.F.R. § 8.603(a)(2). GSA proposed the change to make the regulations consistent with section 4124, on which the regulations are based. FPI challenged this proposal, arguing that the word "products" in section 4124 must be understood to

[1] Letter for Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, from Robert C. MacKichan, Jr., General Counsel, General Services Administration (Jan 4, 1989) ("GSA Letter"), attaching *GSA Position on Procurement of Services From Federal Prison Industries* ("GSA Memorandum").

[2] GSA Letter at 1-2; GSA Memorandum at 1-5

[3] Letter for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from J Michael Quinlan, Director, Federal Bureau of Prisons (June 19, 1989) ("FPI Letter"), enclosing Letter for GSA/FAR Secretariat, from Harry H. Flickinger, Acting Assistant Attorney General for Administration, Department of Justice (Oct. 16, 1986) ("JMD Letter"), Letter for General Counsel, GSA, from Eugene N Barkin, General Counsel, Bureau of Prisons (July 31, 1973)

include services and that priority over commercial sources is therefore mandated.[4]

Section 4124 requires federal agencies and institutions to purchase "such products of the industries authorized by this chapter as meet their requirements and may be available."[5] Neither section 4124 nor related sections contains a definition of "products." *See* 18 U.S.C. §§ 4121-4128. The natural meaning of the word suggests, however, that it means a commodity,[6] rather than the provision of labor that constitutes the usual meaning of the word "service."[7] This interpretation of "products" in section 4124 is confirmed by section 4122(a), which provides that FPI was created to determine what operations shall be conducted in federal penal institutions "for the production of commodities."[8] 18 U.S.C. § 4122(a); *accord id.* § 4122(b)(1) (FPI to operate prison workshops so no one private industry bears an undue burden of competition from the workshops' "products"); *id.* § 4122(b)(2) (FPI to concentrate on providing to federal agencies "only those products" that maximize inmate employment); *id.* § 4122(b)(3) (FPI to diversify its products); *id.* § 4122(b)(4) (FPI decision to introduce a new product or expand production of a product to be made by board of directors).

FPI argues that it is dangerous to impose today's "plain meaning" on the words of a statute written half a century ago.[9] Both the statute and the

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[4] FPI does not challenge the priority the FAR currently give to services provided by the blind or other severely handicapped under 41 U.S.C. § 48. *See* FPI Letter at 2 ("[W]e strongly urge that the proposed amendment to the FAR not be adopted and that the current version, establishing a priority for FPI for services *between the blind and commercial sources*, be continued.") (emphasis added); JMD Letter at 6 n.7 ("Continued priority for FPI in the provision of services would not effect [sic] the priority, over FPI, in the provision of services that exists for the Workshop for the Blind and Other Severely Handicapped (BOSH) " The GSA is thus off point with its warning that "[a] determination by the Office of Legal Counsel that 18 U.S.C. § 4124 does afford FPI priority status in Government contracting in the service area could have a severe impact on the mandatory source program for workshops for the blind and handicapped administered by the Committee for Purchase from the Blind and Other Severely Handicapped." GSA Letter at 2.

[5] Section 4124 provides in relevant part as follows

> The several Federal departments and agencies and all other Government institutions of the United States shall purchase at not to exceed current market prices, such products of the industries authorized by this chapter as meet their requirements and may be available

[6] Webster's Third New International Dictionary 1810 (1986) ("Webster's") defines "product" as "the *result* of work or thought" (emphasis added). It defines "commodity" as "an economic *good* . . a product of agriculture, mining, or sometimes manufacture *as distinguished from services.*" *Id.* at 458 (emphasis added)

We are not persuaded by FPI's argument that the word "product" necessarily includes services simply because the term "Gross National Product" has been defined to include both goods and services. That phrase is a term of art imported from a different context and, thus, cannot be dispositive of the issue

[7] Webster's defines "service" as "useful labor that *does not produce a tangible commodity* " *Id.* at 2075 (emphasis added)

[8] As originally enacted, this section referred to "articles and commodities " Act of May 27, 1930, ch. 340, § 3, 46 Stat. 391 (1930). The words "articles and" were deleted in 1948 during a recodification that was not intended to have any substantive effect. Legislative History of Title 18, United States Code at 2649 (1948).

[9] "One simply cannot apply today's precise definitions of terms, such as services, to the same words used fifty years earlier in a far looser context." JMD Letter at 4.

legislative history, however, lead us to conclude that the Congress that initially passed this statute in the 1930's understood the distinction between "products" and "commodities," on the one hand, and "services" on the other. The very chapter under consideration permits the Attorney General to make "the *services* of United States prisoners" available to federal agencies for use on public works projects, 18 U.S.C. § 4125(a), yet "services" is not mentioned in section 4124. Clearly, the Congress of that period was familiar with the word "services" and understood it to have a meaning distinct from "products."[10]

FPI argues that since federal prisoners had in fact performed services since at least the early years of this century, "products" as used in the statute should be understood to include services. FPI points out that, at various times, federal prisoners have been engaged in laundry services, tire recapping, furniture refinishing, and typewriter repair.[11] FPI argues that such services "must be presumed to have been sanctioned by that legislation" — and therefore that "products" must include "services" — "in the absence of a clear legislative mandate to the contrary."[12] We disagree. The issue before us is not whether federal prisoners may perform services; it is whether 18 U.S.C. § 4124 grants the FPI a procurement priority for such services. We think the plain meaning of that statute shows that services are not covered.

The legislative history of section 4124 confirms our conclusion. With one exception, the examples of prisoner activities discussed at the time of the statute's enactment all involved the manufacture of commodities, and that example was omitted from the version finally enacted.[13] Subsequent amend-

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[10] Our conclusion is reinforced by the language of the Robinson-Patman Price Discrimination Act passed in 1936. 15 U.S.C. § 13. This Act makes it unlawful for persons engaged in commerce "to discriminate in price between different purchasers of *commodities* of like grade and quality." *Id.* (emphasis added). Over the past half-century, courts have firmly established that the word "commodity" in this context refers to "a *product* as distinguished from a service." *Baum v. Investors Diversified Servs., Inc.*, 409 F.2d 872, 874 (7th Cir. 1969) (emphasis added), *see also May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1214-16 (9th Cir. 1980). We hesitate, therefore, to declare that Congress in the 1930's failed to grasp the distinction between commodities and services.

[11] JMD Letter at 1.

[12] *Id.* at 2.

[13] During the floor debate, reference was made to a job that would qualify as a service. 72 Cong. Rec. 2146 (1930). Fearing that the new and expanding prison industries would displace federal civilian workers, especially hundreds of employees who repaired mail bags, Representative LaGuardia offered the following amendment:

> *Provided further*, That no class of articles or commodities shall be produced for sale to or use of departments of independent establishments of the Federal Government in United States penal or correctional institutions which at present are being produced by civilian employees at the navy yards, arsenals, *mail bag repair shop*, or other Government owned and operated industrial establishments, or such articles as these Government owned and operated establishments are equipped to produce

72 Cong. Rec. at 2147 (emphasis added). He viewed this amendment as necessary because "[i]t [was] contemplated in the course of this prison reform to have the mail bag repair work conducted in jails." *Id.* (statement of Rep. LaGuardia). The final version of the statute, however, dropped the reference to mail

Continued)

ments to the statute also fail to indicate any intent to include services among priority items. In fact, subsequent congressional action in the procurement preference area indicates that Congress understood FPI's priority to apply only to goods and not services. In 1971, Congress amended the Javits-Wagner-O'Day Act of 1938, which created a procurement preference for commodities made by the blind that was subordinate to the existing priority for FPI products. 41 U.S.C. §§ 46-48c. One of the principal objectives of the 1971 amendment was to grant to the Committee on Purchase from the Blind and Other Severely Handicapped ("CPBOSH") a preference for services in *addition* to its existing preference for commodities. *See* H.R. Rep. No. 228, 92d Cong., 1st Sess. 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1079. The fact that Congress believed this amendment necessary only underscores the distinction between "commodities" and "services."

Furthermore, the 1971 Act expressly considered the relationship between the preference accorded to CPBOSH and the existing preference for FPI products. It provides a preference to "any commodity *or service*" on a list prepared by CPBOSH, subject to the availability of such "commodity *or service.*" 41 U.S.C. § 48 (emphasis added). The section goes on, however, to note that it does not apply "to the procurement of *any commodity* which is available for procurement from [FPI], and which, under *section 4124 ... is required to be procured* from such industry." *Id.* (emphasis added). The omission of any reference to services in this exception indicates that Congress did not believe that FPI was entitled under section 4124 to any preference for services.

We are not persuaded by FPI's argument that the legislative history of a 1988 amendment to the FPI statute "shows congressional awareness and approval of FPI providing services." *See* FPI Letter at 1. This history asserts that "[i]n addition to establishing UNICOR [another name for FPI] as a wholly owned Government corporation, the enabling legislation also provides that other Federal Government agencies are required to purchase from UNICOR those goods *and services* that UNICOR produces when they can do so at fair market prices." H.R. Rep. No. 864, 100th Cong., 2d Sess. 3 (1988) (emphasis added). This offhand assertion is entitled to minimal weight because the procurement preference provisions were not under consideration at the time — the purpose of the amendments was to authorize FPI to borrow funds. It is hardly probative of congressional consideration of the procurement preference issue.[14] In sum,

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[13] (. continued)
bag repair. Act of May 27, 1930, ch. 340, § 346, 46 Stat 391 (1930). We cannot infer from this failed proposal that Congress intended "products" to include "services." Indeed, the elimination of this explicit reference to a service only strengthens our conclusion that Congress did not give FPI any priority over services.

[14] That same report also lists FPI's operations, noting that it is engaged in "date [sic] and graphics including printing services to government agencies, signs, graphics products, and keyboard data entry systems." *Id.* at 4. The undisputed fact that FPI carries out such activities, however, is not material to the issue of whether it is entitled to a procurement priority for such activities.

we find nothing in the legislative history of section 4124 or related statutes that suggests FPI's interpretation of that section is correct.[15]

FPI asserts that failure to construe "products" to include services is contrary to the spirit of the statute and would undermine related provisions that require FPI to train inmates to perform skills they can use when they are released, 18 U.S.C. § 4123, and to diversify prison industrial operations, *id.* § 4122(b). Although interpreting section 4124 to reach services as well as products would no doubt enhance FPI's ability to achieve the directives of sections 4122 and 4123, we find no indication in the statute or legislative history that Congress believed a priority for services was necessary to achieve that result.[16] Where, as here, the statutory language is clear, FPI's contrary interpretation of its own enabling legislation need not be controlling. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842 (1984).

LYNDA GUILD SIMPSON
Deputy Assistant Attorney General
Office of Legal Counsel

[15] FPI also relies upon an Executive Order issued by President Roosevelt in 1934 setting up FPI This Order provided:

> The heads of the several executive departments, independent establishments and Government owned and Government controlled corporations shall cooperate with the corporation in carrying out its duties and shall purchase, at not to exceed current market prices, the *products or services* of said industries, to the extent required or permitted by law.

Exec Order No 6917, § 9 (1934) (emphasis added). This Order pointedly avoids imposing any requirement above and beyond the terms of the statute; that is the point of the phrase "to the extent required or permitted by law " Thus, since section 4124 provides only a preference for "products," the Order cannot be said to extend further. In fact, the Order's reference to "products *or* services" only confirms the inappropriateness of reading the statute's word "products" to *include* services

[16] We also disagree with FPI's assertion that our interpretation is contrary to the spirit of the statute's general goals of training prisoners and preventing them from sitting idle. *See* JMD Letter at 5. We are not persuaded that our interpretation prevents the FPI from fulfilling those goals These and other policy arguments can be presented to Congress with a request to amend section 4124.

Ethical Considerations Regarding Charitable or Political Activities of Department Spouses

Statutes and regulations impose no restrictions on the charitable or political activities of the spouses of Department of Justice officials, but officials must ensure that knowledge about their spouses' fundraising activities will not affect their impartial judgment with respect to Department business.

November 17, 1989

MEMORANDUM OPINION

The question has arisen as to the guidance that should be given to the spouses of senior Department of Justice officials who wish to engage in charitable or political activities, such as fundraising for private organizations. We have reviewed this issue carefully and have found no limitations under current statutes or Department regulations when such activities are undertaken by a private citizen married to a Department official.[1] Ethical rules do come into play indirectly, however, due to the potential repercussions of the spouse's activities upon the Department official. The constraints upon the spouse's activities are largely political rather than legal, however; they stem, in large part, from the risk that some activities of the spouse might be construed by outsiders to reflect negatively upon the Department or the official.

We discuss herein (1) the use of the spouse's name by charitable or political organizations, (2) travel reimbursement for speaking engagements, and (3) participation in fundraising activities.

A. Use of Name

No limitations apply directly to a spouse in lending his or her name to an organization. A spouse should take care to ensure that such references do not convey the appearance of an endorsement from the Department official or the Department itself. This is especially true if the Department official is one of the high level officials listed in 28 C.F.R. § 45.735-

[1] In particular, the Hatch Act does not apply to spouses of Department officers or employees.

12(d)(1) who are barred from engaging in fundraising.[2] Spouses can generally avoid such problems by identifying themselves as "Mary Jones" rather than "Mrs. James Jones" or "James Jones" rather than "James Jones, the husband of the Deputy Attorney General" and by having their name appear as one of several on any mailing.

B. Travel Reimbursement

Department regulations impose no restriction upon the acceptance of reimbursement for expenses by the spouse when travelling on personal business. Thus, the concerns that may be raised about the propriety of reimbursing a spouse when the spouse accompanies the Department official on official trips, *see* 28 C.F.R. § 45.735-14a(d), would not be implicated with respect to the travel contemplated here.

C. Fundraising

Under current law, a spouse may raise funds for a private organization, regardless of whether it is a for-profit or non-profit group. Although issues of a financial conflict of interest for the Department official might arise if the spouse were a paid fundraiser,[3] such issues do not arise where the spouse's time is donated, especially for a charitable purpose. Thus, there are no legal constraints on a spouse who fundraises, either as a volunteer for charity or as a paid fundraiser for an employer. However, a spouse may wish to consider whether activity as a fundraiser may raise some concerns for the Department official.

Fundraising, whether voluntary or paid, does require the Department official to consider whether knowledge of a spouse's work raises any concerns with a personal conflict of interest or an appearance of impropriety. This is because the Department official is under a duty to exercise impartial judgment on behalf of his client,[4] the agency that the Depart-

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[2] This regulation provides

> The Attorney General, Deputy Attorney General, Associate Attorney General, and the heads of divisions shall not make speeches or otherwise lend their names or support in a prominent fashion to a fundraising drive or a fundraising event or similar event intended for the benefit of any person.

This prohibition does not apply to a fundraising event by an organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code 28 C F.R § 45 735-12(d)(3)

[3] Unless the spouse is paid on a commission basis, the Department official would not be deemed to have a financial interest in Department matters concerning companies that donated money through the spouse to the interested organization. 18 U.S.C. § 208 Money raised for the organization employing one's spouse is not a financial interest attributable to a Department employee as long as the spouse receives a fixed salary.

[4] Department officials are generally bound by the American Bar Association Code of Professional Responsibility 28 C F R § 45 735-1(b) The ABA Code's general conflict of interest rules include a prohibition on any lawyer (except with the client's consent after full disclosure) undertaking representation

Continued

ment of Justice is representing in any particular matter. The more that the Department official knows about a spouse's work — for example, who has been approached for donations or what bonuses may be given if the spouse raises a large sum — the more likely it is that the Department official will realize that the Department's work for a client might have some impact on the fundraising activity.[5]

Thus, if a spouse discusses work with the Department official, the official will need to determine on an ongoing basis whether the knowledge gained will affect his impartial judgment with respect to Department business.[6] If they discuss the spouse's work freely, there would be no impact on the couple's personal life but some burden would be placed on the Department official's professional life. If, however, the Department official adopted a prophylactic rule of not discussing the spouse's work, there might be a significant impact on their personal life, but it would eliminate the official's professional concerns. The official would simply not know whether the spouse was trying to raise money from someone against whom the Department was contemplating, or engaged in, action. Since either course is entirely legal, the Department official is free to choose whichever of these options is best suited.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

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[4](...continued)
when the lawyer's own financial, business, property or *personal* interests may impair his or her independent judgment. DR 5-101(A). If the Department official is a member of a state bar that has adopted the Model Rules of Professional Conduct, the standard is whether he reasonably believes that his client's interests will not be "materially limited ... by the lawyer's own interests." Rule 1.7(b).

[5]The problems could arise in various ways, such as if the Department were investigating or prosecuting the organization for which the spouse works, some area (such as fundraising for the disabled) in which the organization was involved, or a donor from whom the spouse was soliciting funds A worst-case scenario would be a situation such as the Department announcing that it was not indicting a major corporation from whom the spouse of an official with prosecuting authority had just received a large donation.

[6]For example, a Department official would need to evaluate whether the fact that the spouse would receive a significant bonus if able to raise a certain sum from the defense industry would affect his impartial review of an ongoing defense procurement investigation. Or the official might need to decide whether the fact that the spouse was going to solicit funds from Company X would affect his judgment about whether to approve an investigation of that company. The likelihood of these concerns being significant is obviously speculative since they are based on facts that cannot be known in advance

Preparation of Slip Laws from Hand-Enrolled Legislation

The National Archives and Records Administration may not make any editorial changes in the content of a statute, no matter how minor, including spelling or punctuation changes.

The National Archives and Records Administration may make changes in typeface and type style, and other such changes that do not alter the content of a statute.

November 29, 1989

MEMORANDUM OPINION FOR THE ARCHIVIST OF THE UNITED STATES

This memorandum is in response to the request of your office for our opinion concerning whether the National Archives and Records Administration ("NARA") may make editorial corrections, such as spelling or punctuation changes, in preparing hand-enrolled legislation for publication as a slip law. For the reasons set forth below, we conclude that: (1) NARA may not make any editorial changes in the content of a statute, no matter how minor, including spelling or punctuation changes; but (2) NARA may make changes in typeface and type style, and other such changes that do not alter the content of a statute.

Your office has also requested advice as to how it should prepare a slip law when portions of the hand-enrolled legislation are illegible or ambiguous. As explained more fully below, we conclude that NARA has no authority to reconstruct or interpret illegible statutory text. Accordingly, we believe that the best procedure would be for NARA: (1) to typeset all unambiguous portions of the law and (2) to photograph into the slip law any illegible portions.

I. Background

After a bill has been passed by both Houses of Congress, it is "enrolled" for presentation to the President pursuant to Article I, Section 7, Clause 2 of the Constitution. Under the normal procedures, enrollment involves printing the final text of the bill, including any changes made by amendments, on parchment or other suitable paper. 1 U.S.C. §§ 106, 107. The enrollment of the bill is supervised by the Clerk of the House of Representatives or the Secretary of the Senate, depending upon the House in

which the bill originated. When the number of amendments is large, this process can be quite complicated inasmuch as each of the amendments "must be set out in the enrollment exactly as agreed to, and all punctuation must be in accord with the action taken." Edward F. Willett, Jr., Esq., Law Revision Counsel, U.S. House of Representatives, *How Our Laws Are Made*, H.R. Doc. No. 158, 99th Cong., 2d Sess. 43 (1985). In addition to assembling the text from the various amendments, the Clerk or Secretary, in enrolling a bill, proofreads the text for spelling errors and other technical mistakes. Serious technical errors that are discovered are often corrected by means of a concurrent resolution ordering the Clerk or the Secretary to make the corrections to the enrolled bill. Charles Tiefer, *Congressional Practice and Procedure: A Reference, Research, and Legislative Guide* 249 (1989); *see, e.g.*, S. Con. Res. 79, 99th Cong., 1st Sess., 99 Stat. 1962 (1985); H.R. Con. Res. 340, 98th Cong., 2d Sess., 98 Stat. 3480 (1984); S. Con. Res. 154, 98th Cong., 2d Sess., 98 Stat. 3518 (1984). The Clerk or Secretary, however, will generally correct very minor errors, such as obvious spelling mistakes, without the passage of a concurrent resolution.

Once the bill has been enrolled, it is sent to the appropriate congressional authorities for approval. In the House, enrolled bills are first sent to the Committee on House Administration. H.R. Doc. No. 158 at 43. If the Committee finds the printing to be accurate, the Chairman attaches a note to this effect and forwards the bill to the Speaker for signature. *Id.* In the Senate, the Secretary of the Senate examines the printed bill for accuracy before forwarding it for signature to the President of the Senate or the President pro tempore. Robert U. Goehlert & Fenton S. Martin, *Congress and Law-Making: Researching the Legislative Process* 38 (2d ed. 1989). After the enrolled bill has been signed by both the Speaker of the House and the President of the Senate, it is then presented to the President. If the bill is approved by the President, an exact photoprint of the enrolled bill is sent to NARA,[1] which then forwards the bill to the Public Printer for preparation of the slip law. 1 U.S.C. § 106a; 44 U.S.C. § 710. The Public Printer ("GPO") is required to print an "accurate" preliminary copy of the law, which is then sent to NARA "for revision." 44 U.S.C. § 711. NARA has interpreted this latter provision as allowing it only to correct errors made by GPO in printing the preliminary copy; NARA does not make editorial changes to the text as received from the President. After making any corrections that are necessary to ensure that the text conforms to that of the original bill signed by the President, NARA adds notations giving the public or private law number, legal citations, and other such ancillary information, and then returns the preliminary copy to GPO, which inserts these corrections and then prints the required

[1] By regulation, NARA has delegated its responsibilities for preparing slip laws to the Office of the Federal Register, which is a component of NARA. 1 C FR §§ 2.3(a), 2 5(b) (1989).

number of slip laws. 44 U.S.C. §§ 709, 711. These slip laws are "competent evidence" of the Acts of Congress "without any further proof or authentication thereof." 1 U.S.C. § 113.

The issues addressed in this memorandum arise from Congress' occasional departure from the normal process of preparing printed enrollments of bills before presenting them to the President. Until recently the printing requirement was waived only rarely. Congress waived the requirement at the end of the second session of the 54th Congress, *see* 29 Stat. app. 17 (1897), and again at the end of the second session of the 70th Congress, see H.R. Con. Res. 59, 70th Cong., 2d Sess., 45 Stat. 2398 (1929). Thereafter, Congress does not appear to have dispensed with a printed enrollment until 1982. *See* H.R. Con. Res. 436, 97th Cong., 2d Sess., 96 Stat. 2678 (1982). In the 1982 case, Congress passed a concurrent resolution waiving the printing requirement for certain bills for the remainder of the session and authorizing the enrollment of the bills in "such form as may be certified by the Committee on House Administration to be a truly enrolled joint resolution." *Id.* A similar waiver was authorized by concurrent resolution in 1984. *See* H.R. Con. Res. 375, 98th Cong., 2d Sess., 98 Stat. 3519 (1984). In recent years, Congress has tended simply to pass a new statute specifically designed to waive the normal enrollment requirements for particular statutes or for specified periods of time. *See, e.g.*, Pub. L. No. 99-463, 100 Stat. 1184 (1986); Pub. L. No. 99-188, 99 Stat. 1183 (1985).

The waiver of the normal requirement of preparing a printed enrollment of a bill before it is presented to the President has produced a number of problems in connection with the preparation of slip laws. The hand-enrolled bills are often hastily put together, include a number of mistakes, and contain handwritten portions that may be unclear or illegible. Under the ordinary procedures, these errors generally would have been caught and corrected, either by concurrent resolution or in the enrollment process, *before* the bill was presented to the President. With the hand enrollments, however, bills cannot be proofread until after they have already been approved by the President. Although the enrollment waivers made during the 1982, 1984, and 1985 sessions did not expressly provide for post-enactment enrollment, the House Enrolling Clerk did in fact supervise the typesetting of the hand-enrolled bills after enactment, using the same standards, including corrections of misspellings and other nonsubstantive errors, that are used during the normal pre-enactment enrolling process. At the time, NARA was unaware that these changes were being made, and the typeset copies of the enrolled bills, which included such changes, were processed into slip laws.

In the spring of 1986, it came to NARA's attention that the House Enrolling Clerk had been making minor editorial changes in the process of supervising the typesetting of hand-enrolled legislation. Later that year, when NARA received a typeset copy of Pub. L. No. 99-509, 100 Stat. 1874 (1986), and noted that it contained such changes, NARA requested

that the House Enrolling Clerk remove the "corrections" that had been made. The Clerk agreed to do so. On a subsequent occasion, however, the House Enrolling Clerk refused to remove the corrections, and NARA itself had the relevant portions typeset so as to conform to the hand-enrolled bill that had been presented to the President. See Pub. L. No. 99-570, 100 Stat. 3207 (1986).

On subsequent occasions when the printing requirements were waived, Congress attempted to mitigate the problems associated with hand enrollment by expressly providing that, subsequent to approval by the President, a printed enrollment of the bill would be prepared, signed by the presiding officers of both Houses, and transmitted to the President for his "certification" that the printed enrollment was a correct printing of the hand enrollment. *See, e.g.*, Pub. L. No. 100-454, § 2, 102 Stat. 1914, 1914-15 (1988); Pub. L. No. 100-203, § 8004, 101 Stat. 1330, 1330-282 to 1330-238 (1987); Pub. L. No. 100-202, § 101(n), 101 Stat. 1329, 1329-432 to 1329-433 (1987). In the process of preparing a printed enrollment, the House Enrolling Clerk was specifically authorized to make "corrections in spelling, punctuation, indentation, type face, and type size and other necessary stylistic corrections to the hand enrollment." *See, e.g.*, Pub. L. No. 100-454, § 2(a)(2), 102 Stat. 1914 (1988). In the case of each such statute, the President authorized NARA to make the determination as to whether the printed enrollments were "correct printings of the hand enrollments." *See* 53 Fed. Reg. 50,373 (1988); 53 Fed. Reg. 2816 (1988). Finally, these Acts each specifically provided that, after certification, the printed enrollment was to be used instead of the hand enrollment in order to prepare the slip law, and that the printed enrollment was to be considered for all purposes as the original enrollment.

NARA has sought our advice concerning when and to what extent any technical changes may be made to the text of a bill that has already been enacted into law. NARA confronts this question in two different contexts: (1) whether changes can be made by NARA or the House Enrolling Clerk when there is no post-enactment certification procedure; and (2) when there is such a procedure, whether NARA should, pursuant to its delegated authority, certify as "correct" post-enactment enrollments that differ in certain respects from the hand enrollment. Finally, NARA seeks advice concerning how to prepare slip laws when portions of the hand-enrolled legislation are illegible.

II. Discussion

A. Printing procedures when Congress has waived normal enrollment requirements without providing for post-enactment enrollment

When there is no statute authorizing a post-enactment certification procedure, we think that it is clear that no changes may be made to the

text of a hand-enrolled statute in the course of processing it into a slip law. The simple reason for this conclusion is that the statutory scheme regulating the printing of slip laws, as outlined above, does not allow for alterations of the text of new laws. By statute, NARA receives the originals, 1 U.S.C. § 106a, sends a copy to GPO, 44 U.S.C. § 710, and GPO is required to print an *"accurate"* preliminary copy of the law, 44 U.S.C. § 711 (emphasis added).

This preliminary copy is then further proofread by NARA, which sends the copy back to GPO with any corrections and with the appropriate ancillary information to be inserted in the margins.[2]

Furthermore, under the normal statutory scheme the House Enrolling Clerk has no role whatsoever in the printing of laws that have already been enacted. Pursuant to 1 U.S.C. § 106a, NARA receives the original copy of the statute, not from the House Enrolling Clerk, but either directly from the White House (if the bill was approved) or directly from the Speaker of the House or the President of the Senate (if the bill became law without the President's approval).[3] Accordingly, under the conventional scheme, there is no statutory authorization for a procedure whereby the House Enrolling Clerk supervises the typesetting of a bill that has already been enacted into law, makes editorial changes, and then forwards it to NARA for printing. Thus, in situations where Congress has merely waived the enrolling requirements of 1 U.S.C. §§ 106 & 107 without providing for a post-enactment enrollment procedure, NARA clearly should use only the original hand enrollments in the preparation of the slip laws.

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[2] We agree with NARA that 44 U.S.C. § 711, which states that the preliminary copy is to be sent to NARA "for revision," does not authorize NARA to make editorial changes to the text of the original copy of the statute, rather, NARA corrects only errors made by GPO in the course of printing the preliminary copy. The phrase "for revision" originated in the Act of Mar. 9, 1868, ch. 22, § 2, 15 Stat. 40, the relevant portion of which was subsequently codified, as amended, in 44 U.S.C. § 711. The 1868 Act provided that, rather than receiving copies of all new laws from the Secretary of the Senate (which was the prior practice, *see* Act of June 25, 1864, ch. 155, § 7, 13 Stat. 184, 185-86), the congressional printer would receive a "correct copy" directly from the Secretary of State (who was at that time charged with preserving the originals), and the printer would then prepare an accurate preliminary copy to be sent to the Secretary of State "for revision." The author of the 1868 Act, Senator Anthony, made clear that this procedure was designed to ensure that the printed slip laws would carefully match the originals:

> [Slip laws] have been heretofore furnished by the Secretary of the Senate and the Clerk of the House of Representatives. This bill provides that they shall be furnished hereafter from the rolls of the State Department, *so that they may be perfectly authentic and correct*. There have been some errors heretofore, necessarily, in furnishing the laws without taking them from the rolls.

Cong. Globe, 40th Cong., 2d Sess. 1126 (1868) (emphasis added). In light of this emphasis on authenticity and faithfulness to the original copy, we believe that the "for revision" language of section 711 should be construed only as permitting NARA to correct errors made by GPO in the course of preparing the preliminary copy.

[3] We recognize that, under long-accepted procedures, the photoprints for the slip law are generally made directly from the enrolled bill before it is sent to the President. This is a statutorily acceptable procedure only because the photoprints of the enrolled bill are in all respects identical to the copy presented to the President and subsequently delivered to NARA under 1 U.S.C. § 106a.

B. Printing procedures when Congress has provided for postenactment enrollment

Under the post-enactment certification procedures that have been used to date, the task of making minor editorial corrections to the hand-enrolled statutes has been assigned to the Clerk of the House of Representatives. *See* Pub. L. No. 100-454, § 2(a), 102 Stat. 1914 (1988); Pub. L. No. 100-203, § 8004(a), 101 Stat. 1330, 1330-282 (1987); Pub. L. No. 100-202, § 101(n)(1) & (2), 101 Stat. 1329, 1329-432 (1987). Under these procedures, the subsequent printed enrollment is presented to the President, not for his plenary review, but merely for his "certification" that the subsequent enrollment is a correct printing.

We believe that this procedure fails to provide the plenary right of review afforded to the President by the Presentment Clause and thus that these post-enactment certification proceedings are constitutionally defective.[4] In *INS v. Chadha*, 462 U.S. 919, 952 (1983), the Supreme Court held that every legislative act of the Congress must be presented to the President pursuant to Article I, Section 7 of the Constitution. Because the House Enrolling Clerk's actions in making editorial emendations to a law that has already been enacted is a legislative act, it must be subject to the presentment requirement of the Constitution.

There can be no doubt that drafting and amending statutory language are quintessential legislative tasks. Although many minor changes to statutes may appear too insignificant to be of practical import, we discern no principled basis for concluding that "minor" revisions of the text of statutes should be classified as anything other than a legislative activity. To conclude otherwise would be to suggest, contrary to the plain teaching of *Chadha*, that "minor" changes in the wording of statutes could be made by Congress other than through the Article I procedures. *See Chadha*, 462 U.S. at 954 n.18 ("There is no provision [in the Constitution] allowing Congress to repeal or amend laws by other than legislative means pursuant to [a]rt. I.").

Indeed, in this regard, we believe it is significant that, although codification and revision of statutes is often expressly intended not to be of any substantive significance, *see, e.g.*, S. Rep. No. 1621, 90th Cong., 2d Sess.

[4] We believe that the issue of the constitutionality of this procedure is distinct from the question of whether a court would be willing to receive the evidence necessary to permit a challenge to a statute that had been altered in the course of being printed in accordance with this procedure. *Cf. Field v Clark*, 143 U S 649, 669-72 (1892) (noting that, although "[t]here is no authority in .. the secretary of state to receive and cause to be published, as a legislative act, any bill not passed by congress," a court would nonetheless not receive evidence questioning the authenticity of a statute that was enrolled, attested to, and deposited in the public archives); *see also* Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L Rev 197, 243 (1976) ("We do not assume that a law has been constitutionally made merely because a court will not set it aside ...") We express no view as to the latter question of whether a court would be willing to receive evidence concerning, and to adjudicate a challenge to, a statute that was altered in the course of being printed.

2-3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4438, 4439-40 (enactment into positive law of title 44 of U.S. Code not intended to make any substantive changes), such revised codifications have never been considered to be conclusive evidence of the law unless they have first been enacted into positive law by Congress. *See* Pub. L. No. 80-278, 61 Stat. 633 (1947) (unenacted titles of U.S. Code are only "prima facie" evidence of the law), *codified as amended at* 1 U.S.C. § 204 (1988);[5] *cf. United States v. Welden*, 377 U.S. 95, 99 n.4 (1964) ("[A] 'change of arrangement' [in a statute] made by a codifier without the approval of Congress ... should be given no weight.").[6] In short, we believe that even a "minor" act of Congress is still an act of Congress, and a minor amendment is still an amendment.[7]

Accordingly, any attempt to alter the content of a statute by means of a procedure that does not afford the President the full review provided by the Presentment Clause would be unconstitutional. Therefore, should NARA ever again be required to determine and certify whether a subsequent printed enrollment is a correct printing of a hand-enrolled law, it should refuse to issue the certification if any change has been made to the content of the statute.

We do not believe, however, that changes in typeface, type style or the like are appropriately considered legislative acts. There is an important difference between altering the content of a law — *i.e.* changing the actual words and punctuation that make up the statute — and merely printing the statute in a different type size from that used when it was presented to the President. The former may well affect the meaning of the statute, whereas the latter will not. The Constitution is concerned with the content and composition of legislation, not with the printing standards

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[5] Because the unenacted codifications are only prima facie evidence of the law, they may not prevail over the authentic Statutes at Large in the event of a conflict between the two. *American Bank & Trust Co v. Dallas County*, 463 U.S 855, 864 n.8 (1983); *Stephan v United States*, 319 U.S. 423, 426 (1943).

[6] It appears that on only one brief occasion has Congress ever permitted a revised codification to serve as conclusive evidence of the law *See* Act of Mar 2, 1877, ch. 82, § 4, 19 Stat. 268, 269 (new edition of revised statutes would constitute "legal and conclusive evidence of the laws") In the following year, however, Congress amended this statute to omit the words "and conclusive" and to provide that the use of the new edition of the Revised Statutes "shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress." Act of Mar. 9, 1878, ch 26, 20 Stat 27 At any rate, the new edition of the Revised Statutes did *not* involve any alterations of statutory language; the revision commissioner was given no authority to makes any changes to the text of the first edition of the Revised Statutes (which had been enacted into positive law), except as authorized by formal amendments. *See* Act of Mar 2, 1877, § 2, 19 Stat. 268, 268-69 (outlining powers and duties of commissioner), *see also* Rev. Stat. at v (2d ed. 1878) ("The commissioner was not clothed with power to change the substance or to alter the language of the existing edition of the Revised Statutes, nor could he correct any errors or supply any omissions therein except as authorized by the several statutes of amendment.")

[7] The conclusion that there is no such thing as a "de minimis" change to a statute's text is further supported by examining some of the "minor" changes that have been made to statutes under the post-certification procedures that have been used to date For example, in the course of typesetting and "correcting" Pub L. No. 100-203, § 4113(a)(1)(B), the enrolling clerk changed a section reference in the statute from "(F)" to "(E)". *See* 101 Stat 1330-151 & n.52 This was itself an error; shortly thereafter Congress by statute ordered that the "(E)" be changed back to an "(F)" *See* Pub. L No 100-360, § 411(a)(3)(B)(iii), 102 Stat 683, 768 (1988).

whereby that content is reproduced for public consumption.[8] Thus, NARA is at liberty to make appropriate changes in typeface or type style of a statute.

C. Printing procedures where portions of the statute are illegible

NARA has also requested advice as to how slip laws should be prepared when portions of the hand-enrolled legislation are illegible. In light of the above discussion concerning the legal limitations on the modification or correction of statutory text, we do not believe that NARA possesses any authority to "interpret" illegible or ambiguous text. If a portion of the statute simply cannot be read, NARA has no power to reconstruct the provision in the way that strikes it as most sensible. Nor may NARA rely on the House Enrolling Clerk or congressional committees to interpret indecipherable language; such a practice could allow for congressional alteration of statutory text without following the Article I, Section 7 procedure. In short, while NARA may typeset any handwritten portions that are legible, it may not interpret and then typeset provisions that are indecipherable.

The only remaining question concerns how NARA should publish the illegible portions. In the past, NARA has simply inserted blanks and dropped a footnote indicating that the text was not legible. *See, e.g.*, Pub. L. No. 100-203, § 4051(a), 101 Stat. 1330, 1330-93 & n.32a (1987). On at least one such occasion, Congress clarified the matter by passing a statute that supplied the missing language. *See* Pub. L. No. 100-360, § 411(a)(3)(C), 102 Stat. 683, 768 (1988). In our view, however, the use of blanks does not best comply with NARA's statutory responsibilities. As noted earlier, the statutory procedure for printing emphasizes the publication of a slip law that is an "accurate" copy of the original. Where a portion of a new law cannot be typeset because it is illegible, we believe that the statutory requirements of accuracy and faithfulness to the original require that the illegible portion be photographed and reproduced on the slip law. Such a procedure would unquestionably produce a more accurate copy of the statute than would using blanks. Furthermore, such reproduction would provide an official or private party who might seek to rely on the statute at least some opportunity to attempt to interpret it. The current procedure of using blanks provides no such guidance.

III. Conclusion

To summarize: In producing slip laws from hand-enrolled legislation, NARA should make no changes to the text of statutes, but it may make

[8] In this regard, we note that any printing instructions that may be contained in the margins of a hand-enrolled statute (such as, for example, "Insert highlighted material from next page here") do not constitute part of the statutory text

changes in typeface and type style. If a particular printing is to be examined by NARA in order to determine whether it should be certified as a correct copy of the original, NARA should decline to certify if the printing contains any modifications to the content of the original. If a particular hand-enrolled statute contains illegible material, NARA should typeset the legible portions and photograph the illegible portions in producing the slip law.

WILLIAM P. BARR
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Office of Legal Counsel

Availability of the Judgment Fund for the Payment of Judgments or Settlements in Suits Brought Against the Commodity Credit Corporation Under the Federal Tort Claims Act

The Judgment Fund, the permanent appropriation established pursuant to 31 U.S.C. § 1304, is not available for the payment of judgments or settlements in suits brought against the Commodity Credit Corporation under the Federal Tort Claims Act.

December 5, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF AGRICULTURE

This memorandum responds to your office's request of February 9, 1989 ("February 9 Letter"), for the opinion of this Office concerning the availability of the permanent appropriation established pursuant to 31 U.S.C. § 1304 ("Judgment Fund") for the payment of judgments or settlements of suits under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, brought against the Commodity Credit Corporation ("CCC"), 15 U.S.C. § 714. For the reasons set forth below, we conclude that the Judgment Fund is not available for the payment of such judgments and settlements.

I. Background

This question arose from a settlement reached in the case of *First National Bank of Rochester v. United States*, in the United States District Court, District of Minnesota, Third Division, Civil No. 3-87-571. In that case, you believed that the settlement should be paid from the Judgment Fund, but the General Accounting Office opined that the Judgment Fund could not be used. *See* Letter for Mary E. Carlson, Assistant United States Attorney, from Kenneth R. Schutt, Judgment Group Manager, General Accounting Office (May 24, 1988). Although we understand that this compromise settlement was ultimately paid out of CCC funds, your office has requested that we provide an opinion on the availability of the Judgment Fund generally to the CCC for payment of judgments or settlements that arise under the FTCA.

The Automatic Payment of Judgments Act (the "Judgments Act" or "Judgment Fund statute"), ch. 748, § 1302, 70 Stat. 678, 694-95 (1956)

(codified as amended at 31 U.S.C. § 1304), creates a permanent appropriation for the payment of certain types of judgments and settlements obtained against the United States. Before passage of the permanent appropriation, most judgments against the United States required specific appropriations. *See* 66 Comp. Gen. 157, 159 (1986). Judgments obtained under the FTCA or the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, for example, required a submission to Congress for appropriation. This cumbersome process led to undue delay in payment, resulting in excess charges for interest. Congress enacted the permanent Judgment Fund to provide a simpler payment mechanism. *See* 66 Comp. Gen. at 159.

Section 1304 provides in pertinent part:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when —
>
> (1) payment is not otherwise provided for;
>
> (2) payment is certified by the Comptroller General; and
>
> (3) the judgment, award, or settlement is payable —
>
> (A) under section 2414, 2517, 2672, or 2677 of title 28;
>
> (B) under section 3723 of this title; ....

31 U.S.C. § 1304(a). Section 1304(a) thus imposes three requirements — all of which must be met — before a judgment or settlement may be paid out of the Judgment Fund. First, the payment must not be "otherwise provided for." Second, the Comptroller General must certify payment. And finally, the judgment must be payable pursuant to one of a number of specified sections in the United States Code.

The second requirement — the necessity for certification by the Comptroller General — does not appear to impose any additional substantive requirements on access to the Judgment Fund. The Comptroller General's certification follows from satisfaction of the other two requirements and completion of the necessary paperwork.[1] Thus, we need deter-

[1] The General Accounting Office itself takes this position, stating that the requirement of certification by the Comptroller General "is an essentially ministerial function and does not contemplate review of the merits of a particular judgment." General Accounting Office, *Principles of Federal Appropriations Law* 12-2 (1982) ("GAO Manual") (quoting B-129227, December 22, 1960) *See also* 22 Comp Dec. 520 (1916); 8 Comp. Gen 603, 605 (1929). In this case, however, GAO appears to have gone beyond its ministerial role by interpreting the law as it applies to the executive branch. Because we conclude that the "not otherwise provided for" requirement is not met in this case and the Judgment Fund is not available in any event, we need not address the serious constitutional questions raised by any GAO attempt to impose on the executive branch its own view of the Judgment Fund's availability. *See Bowsher v Synar*, 478 U.S 714 (1986) (Congress cannot constitutionally assign to the Comptroller General, an arm of Congress, a role in executing the laws).

mine only whether FTCA judgments or settlements against the CCC satisfy both of the two substantive requirements for Judgment Fund availability.[2]

II. The CCC

By Executive Order No. 6340 President Roosevelt established the CCC in 1933 pursuant to the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). At its inception, the CCC was incorporated in Delaware, with its office and principal place of business in Washington. Although the United States owned all the capital stock of the CCC and the members of the board of directors, selected by the President, were officers in the federal government, the CCC operated as a private corporation. *See* Exec. Order No. 6340 (1933). The original articles of incorporation expressly state that the CCC would be treated like any other corporation under the laws of the State of Delaware.[3] Under the 1935 Corporations Code in Delaware, as under current law, corporations could sue and be sued, Del. Code. ch. 65, art. 1, § 2 (1935), and the corporate entity, rather than the directors or shareholders, was liable for judgments against the corporation unless the execution of such a judgment could not be satisfied. *Id.* § 51.[4]

The underlying liability of the corporation for judgments and settlements did not change as the CCC evolved from a presidentially-created, privately-incorporated entity to a statutory corporation. Between 1933 and 1948, when the CCC was reincorporated by statute, *see* the Commodity Credit Corporation Charter Act, ch. 704, 62 Stat. 1070 (1948) (codified as amended at 15 U.S.C §§ 714-714p) ("CCC Charter Act"), Congress enacted a series of laws "to continue the Commodity Credit Corporation as an agency of the United States, to revise the basis of annual appraisal of its assets, and for other purposes." S. Rep. No. 631, 78th Cong., 2d Sess. 1 (1944).[5] These laws enabled Congress to determine the economic viability of the CCC through commercial-type audits and

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[2] Because we conclude that the FTCA actions brought against the CCC fail to meet the "not otherwise provided for" requirement, we express no opinion whether such actions meet the section 1304(a)(3) requirement of the Judgment Fund statute, which contains a specific reference to the Federal Tort Claims Act, 28 U.S C §§ 2672 & 2677.

[3] Article Third (m), Certificate of Incorporation, Commodity Credit Corporation, provides:

> (m) In general, to have and to exercise all the powers and privileges conferred by the General Corporation laws of Delaware upon corporations, and to do all and everything necessary, suitable and proper for the accomplishment of any of the purposes or for the attainment of any of the objects or for the furtherance of any of the powers herein set forth, either alone or in association with other corporations, firms, agencies or individuals, and to do every other act or thing lawfully incident or appurtenant to or growing out of or connected with any of the aforesaid objects, purposes and/or powers.

[4] These provisions of the 1935 Delaware Corporations Code were identical to those in force in 1933 through other laws. *See* 35 Del. Laws 220 (1927); 1915 Del Corporations Code 1965.

[5] *See, e.g.*, Act of Jan. 26, 1937, ch. 6, 50 Stat. 5 (1937); Act of Mar. 4, 1939, ch. 5, 53 Stat. 510 (1939); Act of July 1, 1941, ch. 270, 55 Stat. 498 (1941); Act of July 16, 1943, ch 241, 57 Stat. 566 (1943), Act of Dec 23, 1943, ch 381, 57 Stat. 643 (1943); Act of Feb. 28, 1944, ch. 71, 58 Stat. 105 (1944), Act of Apr 12, 1945, ch. 54, 59 Stat. 50 (1945), Act of June 30, 1947, ch 164, 61 Stat. 201 (1947)

appraisals. As the Senate report to one of these statutes notes, "[t]he Commodity Credit Corporation's fiscal responsibility is vested in the Corporation and not in the individual fiscal agents. In other words, the fiscal agents are responsible to the Corporation, which in turn is liable to the Federal Government for the Government's investment in the Corporation." *Id.* at 2.

In 1948, the CCC was re-established as a statutory corporation. *See* CCC Charter Act, ch. 704, 62 Stat. 1070 (1948) (codified as amended at 15 U.S.C. §§ 714-714p). The CCC was constituted as a "body corporate" which "shall be an agency and instrumentality of the United States, within the Department of Agriculture." CCC Charter Act § 2 (codified at 15 U.S.C. § 714). Section 4(c) provided that, among the general powers of the corporation, it "[m]ay sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property." *Id.* § 4(c) (codified at 15 U.S.C. § 714b(c)). Section 4(c) also provided for bench trials for suits brought against the CCC, and specified a statute of limitations for actions brought by or against the CCC. It specifically applied the FTCA to the CCC, including the 1-year statute of limitations applicable to FTCA claims. *See* S. Rep. No. 1022, 80th Cong., 2d Sess. 11 (1948); H.R. Rep. No. 1790, 80th Cong., 2d Sess. 10 (1948).

The CCC was also expressly provided with the authority to settle and pay its legal obligations. Section 4(j) granted the CCC the authority to "determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid." CCC Charter Act § 4(j) (codified at 15 U.S.C. § 714b(j)). Section 4(k) stated that the CCC "[s]hall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers." CCC Charter Act § 4(k) (codified at 15 U.S.C. § 714b(k)). The Senate Report explained that the power conferred by section 4(k)

> has been exercised by the Commodity Credit Corporation since its creation, and the power and its exercise were recognized by the Congress in the act of February 28, 1944 (15 U.S.C., 1940 ed., Supp. V, 713), in which it was provided that the Corporation should "continue" to have authority to make adjustment and settlement of its claims or the accounts of its fiscal officers.... A corporation such as the Commodity Credit Corporation, engaged in a multitude of commercial transactions, must be able expeditiously to adjust, compromise, and settle its claims in order efficiently to conduct its business.

S. Rep. No. 1022 at 12.

Moreover, just as the periodic pre-1948 evaluation and appraisal statutes reiterated the CCC's fiscal responsibility to the federal government, the 1948 statutory chartering of the CCC retained the pre-existing bases of the CCC's liability. Section 16 of the CCC Charter Act provided:

> The rights, privileges, and powers, and the duties and liabilities of Commodity Credit Corporation, a Delaware corporation, in respect to any contract, agreement, loan, account, or other obligation shall become the rights, privileges, and powers, and the duties and liabilities, respectively, of the Corporation. The enforceable claims of or against the Commodity Credit Corporation, a Delaware corporation, shall become the claims of or against, and may be enforced by or against, the Corporation.

CCC Charter Act § 16 (codified at 15 U.S.C. § 714n).

III. Analysis

The Automatic Payment of Judgments Act was not designed to shift liability to the United States Treasury from agencies that had specific and express statutory authority to pay judgments and settlements out of their own assets and revenues,[6] but rather to eliminate the need for Congress to pass specific appropriations bills for the payment of judgments.[7] The creation of the Judgment Fund therefore did not disturb the prior practice, reflected in GAO decisions, that a government corporation would be required to pay judgments and settlements on personal injury claims where it has express authority to apply its own corporate funds to discharge such debts.[8] Under the terms of the Judgments Act, a corpora-

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[6] *See* 66 Comp. Gen 157, 160 (1986) ("[I]t was never the intent of the judgment appropriation to shift the source of funds for those types of judgments which could be paid from agency funds... [T]he judgment appropriation was made available only where payment was 'not otherwise provided for' 31 U S C § 1304(a)(1). If this were not the case, agencies would be in a position to avoid certain valid obligations by using the 'back door' of the judgment appropriation, and to this extent their budget requests would present to the Congress an artificially low picture of the true cost of their activities to the taxpayer.").

[7] Congress viewed the previous method of satisfying judgment claims by specific appropriations as inequitable to judgment claimants, who were often forced to wait an unduly long time before receiving the money the Government owed them. Furthermore, the procedure resulted in unnecessary administrative expenses and interest costs to the Government. *See Hearings on Supplemental Appropriations Bill, 1957, Before Subcommittees of the House Comm on Appropriations*, 84th Cong , 2d Sess. 883-84, 888-89 (1956) *See also* 99 Cong Rec. 8793, 8794 (1953) (statements of Rep. Taber) (discussing a similar, unenacted proposal in title II of the Supplemental Appropriations Act, 1954).

[8] *See, e.g.*, 25 Comp Gen. 685 (1946) In this decision, the Comptroller General concluded that "as the Congress has recognized the corporate existence of the Virgin Islands Company and the ordinance under which it was created, any judgment obtained against the company in a suit brought for damages arising out of [a tort] .. would be payable from funds derived from the operation of the company" 25 Comp Gen. at 686-87. A later decision by the Comptroller General confirmed that even if mutually such judgments were paid by the Treasury, "it is our view that judgments of this nature should, at least ultimately, be paid from funds of the Corporation" 37 Comp. Gen 691, 695 (1958) (citing 25 Comp Gen 685 (1946)).

tion's authority to discharge its own liability means that a judgment against the corporation is "otherwise provided for" within the meaning of section 1304. Consequently, the Judgment Fund is not available to discharge the liability.

The history of the CCC confirms that Congress intended it to enjoy the authority to discharge its debts from its own funds. For the first fifteen years of its existence, the CCC operated largely in a private manner, and was responsible to the government for its liabilities. Like similar governmental corporations, it did not enjoy sovereign immunity, but was amenable to suit, including suits in tort. *See, e.g., Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939). When Congress passed the CCC Charter Act in 1948 to reincorporate the CCC, it expressly provided that the CCC would remain exposed to legal liability. *See* CCC Charter Act § 4(c) (codified at 15 U.S.C. § 714b(c)). Further, the 1948 reincorporation also provided that the CCC "[s]hall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid." CCC Charter Act § 4(j) (codified at 15 U.S.C. § 714b(j)). This language demonstrates that the CCC may determine the manner of paying its own "obligations" — *e.g.*, by sale of assets, by borrowings, or from current revenues. The next section of the statute makes explicit that the "obligations" over which the CCC has such authority include judgment claims. *See* CCC Charter Act § 4(k) (codified at 15 U.S.C. § 714b(k)) (providing the CCC with "authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation"). Since the CCC thus has the authority to apply its own funds to the payment of "any" of its judgment claims, it follows that the CCC's obligations arising from FTCA claims may be paid from corporate funds. Accordingly, payment of such FTCA judgments against the CCC is "otherwise provided for" within the meaning of 31 U.S.C. § 1304(a)(1), and the Judgment Fund is not available for that purpose.

We recognize that the CCC reincorporation statute explicitly permits FTCA suits to be brought against the CCC.[9] Because the third requirement in the Judgment Fund statute, 31 U.S.C. § 1304(a)(3)(A), and the CCC Charter Act, 15 U.S.C. § 714b(c), both refer to the FTCA, Agriculture seems to argue that FTCA judgments against the CCC are payable out of the Judgment Fund.[10] That view is erroneous. We acknowledge that the third requirement of the Judgment Fund statute is satisfied simply by virtue of the fact that the judgment or settlement at issue arises from an FTCA suit. Nothing in the statute, however, suggests that FTCA suits necessarily sat-

[9] *See* 15 U.S.C § 714b(c)

[10] In the February 9 Letter, Agriculture stated "It is equally clear that Congress did not intend to exclude the CCC from the FTCA simply because it was given the authority to settle claims Such an interpretation would read out of the CCC Charter Act the express provision that the FTCA shall apply" February 9 Letter at 5-6

isfy the separate requirement that the payment of the settlement or judgment not be "otherwise provided for." Moreover, Agriculture's argument ignores the limited purpose served by including the FTCA reference in the CCC reincorporation statute. The legislative intent behind the statutory reference to the FTCA was merely to make it plain that such suits could continue to be brought against the reincorporated CCC,[11] and to emphasize that the statute of limitations for such actions would be the same for the CCC as for other governmental entities subject to FTCA suits.[12]

Furthermore, the statutory requirement that the CCC must "determine the character of and necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid," CCC Charter Act § 4(j) (codified at 15 U.S.C. 714b(j)), would be anomalous if it gave the CCC a general responsibility for paying its legal liabilities out of its own funds, *except* where those arose under FTCA. Nothing in the language of the provision remotely suggests that the CCC would be required to defray its own liabilities on non-FTCA claims, but could look to the Judgment Fund to pay its liabilities under FTCA.

Agriculture also advances the argument that because the FTCA converts suits against government agencies and employees into suits against the United States, 28 U.S.C. § 2679(a), payment for CCC torts committed under the FTCA must be payable from general funds of the United States rather than the CCC.[13] But section 2679(a) merely creates a litigating convention which requires tort cases to be brought against the CCC in the name of the "United States" and subjects tort claims arising from CCC activities to the procedures, terms and conditions of the FTCA.[14] We do not believe that it shifts the source of funding FTCA liabilities from the CCC onto the United States Treasury.

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[11] As we noted above, even prior to the enactment of FTCA, government-owned corporations were generally held not to enjoy sovereign immunity even from tort actions, absent clear congressional indication to extend such immunity to them In the 1948 rechartering of the CCC, Congress apparently wished to allay any suspicion that the CCC, as reconstituted, would thenceforward enjoy sovereign immunity.

[12] The Senate report reveals no intention to alter the responsibility of the CCC for judgments and other liabilities The report states in pertinent part:

> The 2-year limitation upon the right to bring suit against the Corporation represents a length of time believed fair to both the plaintiff and the Corporation In this connection, it is to be noted that the Federal Tort Claims Act recently passed by the Congress (60 Stat. 842) contains a 1-year statute of limitations .. Since the Federal Tort Claims Act is designed for uniform application to all Government agencies, including corporations, the applicability of the act to the Corporation is preserved. Consequently, there would be a 1-year statute of limitations applicable to claims cognizable under that act

S. Rep. No. 1022 at 11.

[13] Thus, Agriculture maintained in its request for our opinion: "CCC funds are not legally available to satisfy FTCA judgments or settlements arising out of ... CCC programs because such judgments are as a result of suits and claims brought against the United States " February 9 Letter at 6.

[14] *See, e g., United States v. Klecan*, 859 F.2d 570 (8th Cir. 1988); *United States v Johnson*, 853 F.2d 619 (8th Cir 1988); *United States v. Bisson*, 839 F.2d 418 (8th Cir. 1988), *United States v. Batson*, 782 F 2d 1307 (5th Cir.), *cert denied*, 477 U.S. 906 (1986). This convention was, of course, followed in the litigation that gave rise to this request for an opinion, *First National Bank of Rochester v United States*

Our conclusion that the Judgment Fund is not available to the CCC accords with the longstanding interpretation of the GAO, which has taken the view that government corporations should pay judgments from their own funds rather than the Judgment Fund. GAO's conclusion is "based in part on the 'otherwise provided for' reasoning and in part on the grounds that a judgment against a Government corporation is not really the same as a judgment against the United States." GAO Manual at 12-21 (citing *Waylyn Corp. v. United States*, 231 F.2d 544 (1st Cir.), *cert. denied*, 352 U.S. 827 (1956)).[15]

IV. Conclusion

We conclude, therefore, that the Judgment Fund is unavailable for payment of judgments and settlements arising under the Federal Tort Claims Act against the Commodity Credit Corporation. The history and purposes of the Judgment Fund suggest that Congress intended payments to be made out of the permanent appropriation only when three requirements are met. In our view, the CCC may "otherwise" provide for payment of its FTCA judgments, and thus fails to meet a requirement for payment of a judgment out of the permanent appropriation.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

[15] Although the opinions of the Comptroller General, an agent of Congress, are not binding on the executive branch, we have recognized in a related context that in considering issues that "are directly pertinent to statutory restrictions on the use of appropriated funds, we believe it appropriate to accord considerable deference to decisions of the GAO." *Establishment of the President's Council for International Youth Exchange*, 6 Op. O.L.C. 541, 547 (1982).

Review of Final Order in Alien Employer Sanctions Cases

The Immigration and Naturalization Service cannot appeal to the Attorney General or seek judicial review of a final order in an alien employer sanctions case under 8 U.S.C. § 1324a.

December 5, 1989

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

Your office has requested our advice on whether the Immigration and Naturalization Service (the "Service") can seek review of a final order in an employer sanctions case under 8 U.S.C. § 1324a. *See* Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Raymond M. Momboisse, General Counsel, Immigration and Naturalization Service (June 21, 1989). For the reasons below, we conclude that the Service can neither seek judicial review of such an order nor appeal to the Attorney General.

Section 1324a(a) makes it unlawful for a "person or other entity" knowingly to hire, recruit or refer for a fee, or continue to employ an "unauthorized alien." Section 1324a(g)(1) prohibits a "person or other entity" from requiring an individual to post a bond against any liability that might arise with respect to hiring, recruiting, or referring for employment. The statute also establishes an administrative scheme for prosecuting violations of these subsections. Under section 1324a(e), a "person or entity" charged with such a violation is entitled to a hearing before an administrative law judge ("ALJ"), who may issue a cease and desist order and assess a civil penalty.[1] The ALJ's order becomes the final order of the Attorney General unless, within thirty days, the Attorney General modifies or vacates the order, in which case the Attorney General's order becomes the final order. *Id.* § 1324a(e)(7). The Attorney General has delegated his authority to review and revise an ALJ's order to the Chief Administrative Hearing Officer ("CAHO") in the Executive Office for Immigration Review, whose decision on the matter stands as the final order of the Attorney General. *See* 28 C.F.R. §§ 68.2(d); 68.52(a). Section 1324a(e)(8) provides that "[a] person or entity adversely affected by a

[1] If the person or entity does not request a hearing before an ALJ, "the Attorney General's imposition of the order shall constitute a final and unappealable order." 8 U.S.C. § 1324a(e)(3)(B).

final order ... may, within 45 days after the date the final order is issued," seek review in the appropriate court of appeals.

We think it apparent from the statutory language that the Service does not qualify as a "person or entity" that may seek judicial review of a final order under section 1324a(e)(8). Although the phrase is not expressly defined in section 1324a,[2] it is clear from the context in which it is used that "person or entity" refers to the employer being prosecuted. The phrase appears numerous times — sixteen times in subsection (e) alone — in ways that indicate that this is so.[3] *See, e.g.*, 8 U.S.C. § 1324a(a)(1) (making it unlawful for "a person or other entity to hire ... an unauthorized alien"); *id.* § 1324a(e)(3)(B) (hearing to be held "at the nearest practicable place to the place where the person or entity resides"); *id.* § 1324a(e)(4) (discussing application of sanctions to "a person or entity composed of distinct, physically separate subdivisions"). Indeed, a construction of subsection (e)(8) that would allow the Service to seek judicial review of a final order of the Attorney General would raise serious constitutional questions. Such review would interfere with the President's authority under Article II of the Constitution to supervise his subordinates and resolve disputes among them, *see Myers v. United States*, 272 U.S. 52, 135 (1926) (President "may properly supervise and guide" Executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone"), and would implicate the general rule that a lawsuit between two members of the executive branch does not give rise to a justiciable "case or controversy" under Article III. *See Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131 (1989) (discussing rule that lawsuits between two federal agencies are generally not justiciable).[4]

We also conclude that the Service cannot seek review by the Attorney General of the CAHO's order. The regulations clearly provide that the CAHO's order is the final order of the Attorney General in an employer sanctions case. 28 C.F.R. § 68.52(a)(1). Neither the statute nor the regulations provide for any further administrative review.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

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[2] Section 1101(b)(3) of title 8 defines "person" as simply "an individual or an organization."

[3] We also note that when Congress sought to refer to the Service in subsection (e), it did so explicitly. *See* 8 U.S.C. § 1324a(e)(1)(D) (directing Attorney General to establish procedures "for the designation in the Service of a unit" whose primary duty is the prosecution of cases under subsections (a) and (g)(1)).

[4] Because we conclude that the Service may not seek judicial review under section 1324a(e)(8), we do not address whether such review should be sought as a matter of policy.

Congressional Authority to Require State Courts to Use Certain Procedures in Products Liability Cases

Congress may enact legislation that requires state courts to submit the determination of the amount of punitive damage awards in products liability cases to judges rather than juries if it also enacts federal law supplying the substantive law to be applied in such cases.

Legislation that does not enact a substantive law of products liability, but simply attempts to prescribe directly the state court procedures to be followed in products liability cases arising under state law raises significant Tenth Amendment questions Given the current state of Tenth Amendment jurisprudence, however, it is unlikely that a court would invalidate such a statute.

In deciding whether to propose legislation that would impose procedural requirements on state court proceedings, the Department should give due consideration to the federalism concerns that would be raised, as required by section 5(a) of Executive Order No. 12612.

December 19, 1989

MEMORANDUM OPINION FOR THE DEPUTY DIRECTOR
OFFICE OF POLICY DEVELOPMENT

This memorandum responds to your request for our views as to whether Congress may constitutionally require the states to submit the determination of the amount of punitive damages in products liability cases to the judge rather than the jury.[1] As outlined more fully below, we believe that Congress may require the state courts to follow this procedure if Congress enacts federal law that will supply the substantive law of products liability being applied in such cases. Tenth Amendment questions may be raised if Congress does not enact any such substantive law, but merely imposes the procedural requirement; given the current state of Tenth Amendment jurisprudence, however, we think it is unlikely that a court would invalidate such a statute. Nevertheless, we believe that the Department, in deciding whether to propose such a statute, should give due consideration to the federalism concerns that would be raised.

It is well established that Congress generally may require state courts of appropriate jurisdiction to entertain causes of action arising under fed-

[1] This Office has previously advised the Office of Policy Development that the imposition of such a requirement in the federal courts would not violate the Seventh Amendment. *See* Memorandum for Stephen C Bransdorfer, Deputy Assistant Attorney General, Civil Division, from Lynda Guild Simpson, Deputy Assistant Attorney General, Office of Legal Counsel (Sept. 29, 1989).

eral law, at least where there is an analogous state-created right enforceable in state court. *See Testa v. Katt*, 330 U.S. 386 (1947); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *see generally* Charles A. Wright, *The Law of Federal Courts* § 45 (4th ed. 1983). It is also clear that federal law may properly govern certain procedural issues in state court suits concerning federal causes of action where this is necessary to secure the substantive federal right. *See Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980) (upon request of party, jury in state court suit under FELA must, as a matter of federal law, be given cautionary instruction that damages award is not taxable and that taxes are not to be considered); *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952) (state court procedural rule allowing judge to determine factual issue of fraudulent releases was inapplicable in FELA case in light of the statutory right to trial by jury which was "part and parcel" of the remedy afforded under the FELA); *Brown v. Western Ry.*, 338 U.S. 294, 298 (1949) (rejecting application, in FELA suit in state court, of Georgia rule of procedure that pleading allegations are construed "most strongly against the pleader"; the Court concluded that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws"); *Bailey v. Central Vt. Ry.*, 319 U.S. 350 (1943) (under FELA, Congress has provided for right to jury).

In light of these authorities, it seems clear that if Congress enacts a substantive federal law of products liability, it may also establish rules of procedure, binding upon the states, that are necessary to effectuate the rights granted under the substantive law.[2] In particular, *Dice* and *Bailey* suggest that the allocation of functions between judge and jury in applying federal substantive law may be settled by Congress as a matter of federal law. Accordingly, we conclude that Congress may require state courts to have judges determine the amount of punitive damages in order to effectuate the corresponding substantive rights with respect to products liability that Congress has created.

Different questions are presented where Congress does not enact a substantive law of products liability to be applied by the states, but simply attempts to prescribe directly the state court procedures to be followed in products liability cases arising under state law. Such an action raises potential constitutional questions under the Tenth Amendment,[3] since state court procedures in applying state law would appear to be an

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[2] This is true regardless of whether a state constitution provides a broader right to jury trial in civil cases than does the Seventh Amendment to the federal constitution. A constitutionally authorized federal law may preempt conflicting provisions of a state constitution. *See* U.S. Const. art. VI, cl. 2 (Laws of the United States enacted pursuant to the federal constitution "shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, *any Thing in the Constitution* or Laws of any State to the Contrary notwithstanding.") (emphasis added).

[3] The Tenth Amendment provides

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

area that is generally within a state's exclusive control. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them."); *cf. Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) ("'Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise ....'") (quoting *John v. Paullin*, 231 U.S. 583, 585 (1913)). There are no cases directly on point, and current Tenth Amendment jurisprudence cannot be said to be entirely settled. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting). Nevertheless, under existing case law, we think it is unlikely that a court would invalidate a federal statute requiring states to assign the determination of the amount of punitive damages to the judge rather than to the jury.

In *Garcia*, the Supreme Court overruled its decision in *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), which had held that Congress' power under the Commerce Clause, when construed in light of Tenth Amendment principles, does not include the power to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Garcia* expressly rejected as unworkable this "traditional governmental functions" test, and instead held that limitations on congressional power to regulate the states "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552; *see also South Carolina v. Baker*, 485 U.S. 505, 512 (1988) ("*Garcia* holds that the [Tenth Amendment] limits [on Congress' authority to regulate state activities] are structural, not substantive — *i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.").

Accordingly, under existing case law, the only apparent ground for raising a Tenth Amendment challenge to congressional regulation of state activity is to show that there were "extraordinary defects in the national political process" that frustrated the normal procedural safeguards inherent in the federal system. *Baker*, 485 U.S. at 512; *see also id.* at 513 ("Where, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated.") In *Baker*, South Carolina argued that a procedural failure had occurred because the legislation at issue had been enacted by "'an uninformed Congress relying upon incomplete information.'" *Id.* (citation omitted). The Court rejected this invitation to "second-guess the substantive basis for congressional legislation," and stated that "[i]t suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the

national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 512-13. Although it is almost impossible to apply the *Baker* standard to legislation that has not yet been enacted, we nonetheless find it difficult to imagine circumstances under which any state could successfully argue that the enactment of national legislation requiring the states to use certain procedures in products liability cases had been adopted pursuant to a process that left the state "politically isolated and powerless."

In any event, it is uncertain whether the proposed legislation would have been held to violate the Tenth Amendment even under pre-*Garcia* case law. In *FERC v. Mississippi*, 456 U.S. 742 (1982), the Court held that since Congress could have preempted the states completely in the field of utility regulation, Congress did not violate the Tenth Amendment by conditioning continued state regulation in this field on state consideration of proposed federal regulatory standards. *Id.* at 761-70.[4] Furthermore, the Court held that Congress could properly require the states to use certain notice and comment procedures when acting on the proposed federal standards. *See id.* at 771 ("If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field — and we hold today that it can — there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks.").

Because Congress could rationally conclude that state products liability suits have a substantial effect on interstate commerce, both with respect to the goods at issue and with respect to the interstate business of insurance, Congress' power under the Commerce Clause is probably sufficient to allow it completely to preempt the states in the field of products liability. *See Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981) ("A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981) (same); Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 Ohio St. L.J. 503, 507 (1987) ("Under current interpretations of the commerce clause, Congress presumably has the authority to enact a preemptive product liability reform act."); 132 Cong. Rec. 25,479-80 (1986) (reprinting report of Legislative Attorney, Congressional Research Service, on constitutionality of federal tort reform). Accordingly, *FERC v. Mississippi* suggests that Congress may choose the lesser course of allowing the states to contin-

[4] It should be noted that, to the extent that *FERC v. Mississippi* contains language offering greater Tenth Amendment protection to states than that described in *Garcia*, the Court in *Baker* stated that the continued vitality of such language was "far from clear." *Baker*, 485 U.S. at 513

ue to regulate this field, while conditioning their continued involvement on state use of certain federally prescribed procedures. We thus think it unlikely that a court would invalidate a federal statute requiring certain procedures in state law products liability cases arising in state courts.

Nevertheless, we believe that the Department, in deciding whether to recommend such legislation, should give due consideration to the federalism concerns that would be raised. *See* Exec. Order No. 12612, § 5(a), 3 C.F.R. 252, 255 (1987) ("Executive departments and agencies shall not submit to the Congress legislation that would ... [d]irectly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions.").[5]

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

[5] We do note, however, that such a proposal would not be wholly without precedent. *See* 42 U.S.C. § 9658(a) (altering state limitations period for certain tort claims brought under state law), *Ayers v. Township of Jackson*, 106 N J 557, 582, 525 A 2d 287, 300 (1987) ("CERCLA now pre-empts state statutes of limitation [under certain circumstances]")

Investigative Authority Vested in the Inspector General of the Department of Transportation

The Inspector General of the Department of Transportation has the same broad authority to investigate fraud against Department programs and operations that the investigative units transferred into the Office of Inspector General possessed when the Inspector General Act of 1978 became law.

December 19, 1989

MEMORANDUM OPINION FOR THE INSPECTOR GENERAL
DEPARTMENT OF TRANSPORTATION

This is in response to your letter of November 1, 1989, requesting the views of this Office concerning the scope of your investigative authority as Inspector General of the Department of Transportation ("DOT-IG"). You specifically asked us to consider whether you have authority under the Inspector General Act of 1978 (the "Act"), 5 U.S.C. app., to investigate allegations of fraud against DOT programs and operations by private parties who do not receive federal funds. You indicated that examples of such fraud include false statements to DOT in applications for permits or licenses and the forgery or alteration of DOT documents or of statements or signatures by DOT personnel on non-DOT documents. You have not asked for our views with respect to any specific investigation or any specific category of investigations for particular DOT programs or operations.

Subject to the caveat that this letter must not be understood as specific approval of any particular investigation or category of investigations for a particular program or operation, it is our view that, pursuant to section 9(a)(1)(K) of the Act, you possess the same broad authority to investigate fraud against DOT that the various investigative units that the Act transferred to your Office possessed at the time of the transfer. In light of this conclusion, it is unnecessary at this time to decide whether the provisions of the Act that set forth the general authority of all Inspectors General also authorize such investigations. Should you conclude that a particular investigation is not encompassed by the authority of the investigative units transferred to your Office by the Act, we would be pleased to consider the issue of your general authority.

Discussion

Section 9(a)(1)(K) of the Inspector General Act transferred to the newly created DOT-IG

> the offices of [DOT] referred to as the "Office of Investigations and Security" and the "Office of Audit" of the Department, the "Offices of Investigations and Security, Federal Aviation Administration", and "External Audit Divisions, Federal Aviation Administration", the "Investigations Division and the External Audit Division of the Office of Program Review and Investigation, Federal Highway Administration", and the "Office of Program Audits, Urban Mass Transportation Administration".

As discussed below, the Act's legislative history and DOT's immediate implementation of the Act indicate a contemporaneous understanding by Congress and DOT that the investigative authority of the DOT-IG under this provision was as broad as the authority possessed by these predecessor offices at the time the Act became law. It was also understood that this provision had the effect of transferring substantially all existing DOT investigative responsibilities to the DOT-IG.

The Senate report on the Act noted that the DOT-IG would have the responsibility for all DOT auditing and investigative work:

> The Department of Transportation has expressed its opposition to the decision to consolidate the auditing and investigating units now found in the various modal administrations of DOT into the office of [Inspector General].
>
> The committee recognizes that the various modes in DOT have unique independence growing directly from the Department of Transportation Act and the statutes creating the Federal Aviation Administration, Federal Highway Administration, and Urban Mass Transit Administration. However, the committee does not believe that the current arrangements — a proliferation of 116 audit and investigative units with audit units working for the program administrators whose programs they purport to audit — is a satisfactory arrangement. The committee believes that the effort to consolidate responsibility for auditing and investigation in an independent individual would be undermined if there was not one Inspector and Auditor General in the Transportation Department with overall accountability for all auditing and investigative work.

S. Rep. No. 1071, 95th Cong., 2d Sess. 39 (1978).

On April 27, 1979, Secretary of Transporation Brock Adams issued a memorandum providing information on the newly established Office of Inspector General for DOT. In that memorandum he stated that:

> The [Inspector General] Act identifies the audit and investigations organizations which have been transferred to the IG .... I am further authorized [by section 9(a)(2) of the Act] to transfer other functions, offices or agencies which are related to the functions of the IG. Although I do not propose transferring any other offices to the IG at this time, I do wish to make it clear that, other than the investigations programs involving United States Coast Guard Officer and Enlisted Personnel, and odometer fraud (Public Law 94-364)[,] there should be no auditor or criminal investigator personnel employed in DOT other than within the Office of Inspector General.
>
> ....
>
> ... I believe that the combining of all auditors and investigators into the IG organization will enhance the quality of audit and investigations service in this Department.

Id. at 1-2.

It is evident that Congress and DOT understood that, except for the two investigative programs mentioned in the Secretary's memorandum, all DOT investigative responsibilities that existed at the time the Inspector General Act was enacted had been transferred by the Act to the DOT-IG. DOT's investigative authority thus generally rests with the DOT-IG,[1] and the DOT-IG may investigate all matters, including fraud against DOT programs and operations, that the investigative units specified in section 9(a)(1)(K) of the Act were authorized to investigate at the time they were transferred by the Act to the Office of the DOT-IG.

Mission statements for the transferred investigative units were included in the implementation plan for the establishment of the DOT-IG, which DOT submitted to the Office of Management and Budget on January 5, 1979. The descriptions generally appear broad enough to have included investigating false statements and similar fraud against DOT programs or operations. For example, the mission statement for the Office of Investigations and Security of the Federal Aviation Administration ("FAA") indicates generally that it was the "principal staff element of FAA with

[1]As Secretary Adams recognized in his memorandum, various other DOT components may, from time to time, be assigned specific investigative authority by statute or administrative action. We have not conducted a review of such assignments.

respect to ... [i]nvestigations in support of the FAA's basic mission" (sec. 2(a)(1)). More specifically, it conducted "[p]reliminary investigation[s] of allegations of violations of ... Federal criminal statutes (bribery, fraud, graft, false statements, theft of Government property, etc., as encompassed in Title 18, U.S. Code)" (sec. 2(c)(9)), and "[t]he subjects of investigations include[d] FAA applicants and employees; contractor personnel; sponsors and grantees; airmen, air and commercial carriers, and *other individuals certificated or designated by the FAA*" (Audit and Investigative Plan, at 17) (emphasis added).

While it would appear that collectively the authority that transferred to the DOT-IG with the various investigative units was quite broad, it is beyond the scope of this letter to discuss specifically the authority of each transferred unit. If you have any such specific questions, you should raise them in the first instance with agency counsel, who have expertise regarding the relevant statutes and programs.

Conclusion

It is our view that, pursuant to section 9(a)(1)(K) of the Inspector General Act, the DOT-IG has the same broad authority to investigate allegations of fraud against DOT programs and operations that the investigative units transferred into that Office possessed at the time the Act became law. In light of this conclusion, it appears unnecessary to decide whether investigations of fraud against DOT programs and operations are also authorized by the general provisions of the Act. We would be pleased to advise you further if you believe a particular investigation is beyond the authority of the transferred units.

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Garnishment Under the Child Support Enforcement Act of Compensation Payable by the Department of Veterans Affairs

Disability or other compensation paid to a veteran by the Department of Veterans Affairs is subject to garnishment under the Child Support Enforcement Act when, in order to receive such compensation, the veteran has waived receipt of all of the military retired pay to which he or she would otherwise be entitled.

December 19, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF VETERANS AFFAIRS

This responds to your Department's letter of December 14, 1988 to the Attorney General,[1] which has been referred to us pursuant to 28 C.F.R. § 0.25(a) for reply. You have asked for our advice whether disability or other compensation paid to a veteran by the Department of Veterans Affairs ("DVA") is subject to garnishment under the Child Support Enforcement Act, 42 U.S.C. §§ 651-669, when, in order to receive such compensation, the veteran has waived receipt of all of the military retired pay to which he or she would otherwise be entitled. For the reasons that follow, we believe that disability or other compensation paid to a veteran in such circumstances is subject to garnishment.

I. Background

Many veterans who are entitled to receive DVA compensation are also entitled to military retired pay.[2] In order to receive DVA compensation, however, a veteran who is receiving retired pay must waive receipt of "so much of such person's retired or retirement pay as is equal in amount to such [DVA] pension or compensation." 38 U.S.C. § 3105; *see also id.* § 3104 (prohibiting duplication of benefits). As the Supreme Court recently observed, "waivers of retirement pay are common" among veterans

[1] Letter for the Attorney General, from Thomas K. Turnage, Administrator of Veterans Affairs (Dec 14, 1988) ("Turnage Letter").

[2] Of the "nearly 2 2 million veterans rated by the VA as having service-connected disabilities ... nearly 20 percent, some 435,000, are military retirees." Turnage Letter at 1.

who are entitled to receive DVA disability benefits, "[b]ecause disability benefits are exempt from federal, state and local taxation." *Mansell v. Mansell*, 490 U.S. 581, 583 (1989).

The DVA's general anti-garnishment statute provides in pertinent part:

> Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

38 U.S.C. § 3101(a). Thus, veterans' benefits are generally not subject to garnishment.

In 1975, Congress passed the Child Support Enforcement Act, which creates an exception to the anti-garnishment provisions of 38 U.S.C. § 3101(a) for the purpose of enforcing veterans' family support obligations. Section 659 of the Child Support Enforcement Act provides in part:

> Notwithstanding any other provision of law (including section 407 of this title), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

42 U.S.C. § 659(a).[3]

Section 662(f)(2) of the Act, however, exempts certain governmental payments to veterans from garnishment for child support, including

> any payments by the [DVA] as compensation for a service-connected disability or death, *except any compensation paid by the [DVA] to a former member of the Armed*

[3] This provision "was intended to create a limited waiver of sovereign immunity so that state courts could issue valid orders directed against agencies of the United States Government attaching funds in the possession of those agencies." *Rose v. Rose*, 481 U.S. 619, 635 (1987).

Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation ....

Id. § 662(f)(2) (emphasis added). Thus, "any compensation" paid by the DVA in cases where the recipient "is in receipt of retired or retainer pay" and has waived "a portion of his retired pay in order to receive such compensation" is subject to garnishment for the purpose of making child support or alimony payments.

The DVA is of the view that the plain language of section 662(f)(2) precludes garnishment when a veteran has waived *all* of his or her retired pay in order to receive DVA compensation. In 1983, at the DVA's request, the Office of Personnel Management ("OPM") amended its regulation interpreting 42 U.S.C. § 662(f)(2) to adopt the DVA's construction of the statute. *See* 48 Fed. Reg. 26,279 (1983).[4]

Courts have reached conflicting conclusions concerning the validity of the DVA's interpretation of 42 U.S.C. § 662(f)(2). Some courts have held that a literal construction of the statute supports the interpretation that garnishment is not available when a veteran has waived all of his or her retired pay in order to receive DVA compensation. *See, e.g., Sanchez Dieppa v. Rodriguez Pereira*, 580 F. Supp. 735 (D.P.R. 1984). Other courts have held that this construction fosters anomalous results, and is inconsistent with Congress' intent in enacting the statute. *See, e.g., United States v. Murray*, 282 S.E.2d 372 (Ga. Ct. App. 1981).

II. Discussion

In our view, 42 U.S.C. § 662(f)(2) should be interpreted as permitting garnishment of DVA compensation even when a veteran has waived *all* of his or her retired pay in order to receive such compensation. The statutory language allows this construction without strain. Moreover, Congress' purpose in permitting garnishment of DVA compensation paid in lieu of retired pay is far better served by permitting such garnishment regardless of whether the DVA compensation exceeds the retired pay entitlement.

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[4] As amended, the interpretive regulation provides:

> Any payments by the Veterans Administration as compensation for a service-connected disability or death, except any compensation paid by the Veterans Administration to a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his/her retired pay in order to receive such compensation. In this case, only that part of the Veterans Administration payment which is in lieu of the waived retired/retainer pay is subject to garnishment *Payments of disability compensation by the Veterans Administration to an individual whose entitlement to disability compensation is greater than his/her entitlement to retired pay, and who has waived all of his/her retired pay in favor of disability compensation, are not subject to garnishment or other attachment under this part*

5 C.F.R. § 581.103(c)(4)(iv) (emphasis added).

Section 662(f)(2) subjects DVA compensation to garnishment when "a former member of the Armed Forces who is in receipt of retired or retainer pay ... has waived a *portion* of his retired pay in order to receive such compensation." 42 U.S.C. § 662(f)(2) (emphasis added). In excluding disability compensation from garnishment whenever a veteran "has waived *all* of his/her retired pay in favor of disability compensation," 5 C.F.R. § 581.103(c)(4)(iv) (emphasis added), OPM's interpretive regulation tracks a common definition of the word "portion."[5] However, we do not agree that section 662(f)(2) "is sufficiently clear on its face to obviate the need for statutory construction." Turnage Letter at 5. As used in the statute, a "portion" could reasonably mean "any amount greater than zero."

The term is frequently used in this sense in other statutes. For example, 18 U.S.C. § 648, which prescribes criminal penalties for embezzlement, prohibits any "officer or other person charged by any Act of Congress with the safe-keeping of the public moneys" from "loan[ing], us[ing], or conver[ting] to his own use ... any portion of the public moneys intrusted to him for safe-keeping." Similarly, 18 U.S.C. § 653 prohibits any "disbursing officer of the United States" from, inter alia, "transfer[ring], or apply[ing], any portion of the public money intrusted to him" for "any purpose not prescribed by law." Notwithstanding the use of the word "portion," a defendant could not successfully defend a charge of embezzlement on the grounds that he embezzled all, and not part, of the public money entrusted to him.[6] Accordingly, we do not think that the use of the word "portion" in 42 U.S.C. § 662(f)(2) compels the DVA's interpretation of the statute.[7]

Because the language of the statute is not unambiguous, we turn to the legislative history for guidance. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 896 (1984); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543-44 (1940). Although that history is rather sparse, it is bereft of any indication that Congress intended to exempt veterans from their support obligations if they waive all retired pay in favor of DVA compensation. Rather, Congress' principal purpose was to prevent federal civilian and military employees from evading their support obligations by augmenting the means by which those obligations can be enforced. In

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[5] *See, e.g., Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1346 n.1 (D.C. Cir 1983) (Wald, J., dissenting) ("In usual parlance, portion means 'a: a part of a whole ... b: a limited amount or quantity.' Webster's Third New Int'l Dictionary 1768 (1976)." (ellipsis in original)).

[6] *See also* 28 U.S.C. § 994(i)(2) (directing United States Sentencing Commission to prescribe sentencing guidelines providing a substantial term of imprisonment for a defendant who "committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income").

[7] Furthermore, the language of the statute also fails to support the DVA's argument that a veteran who has waived all of his or her retired or retainer pay is no longer "in receipt of" retired or retainer pay within the meaning of section 662(f)(2). Turnage Letter at 5. The words "in receipt of retired or retainer pay" in the statute merely recite the necessary predicate for a waiver, *i.e.*, no veteran can waive his or her retired pay unless he or she is "in receipt" of such pay.

discussing the original 1975 legislation, the Senate Committee on Finance commented on the garnishment provisions as follows:

> The Committee bill would specifically provide that the wages of Federal employees, including military personnel, would be subject to garnishment in support and alimony cases. In addition, annuities and other payments under Federal programs in which entitlement is based on employment would also be subject to attachment for support and alimony payments.

S. Rep. No. 1356, 93d Cong., 2d Sess. 54 (1974).

Section 662(f)(2) was added to the Act as part of a package of clarifying amendments that were passed in 1977. The explanatory discussion of the clarifying amendments states in part:

> Although the intent of the Congress would appear to be clear from ... [the language in S. Rep. No. 1356, *supra*], questions as to the applicability of the statute to social insurance and retirement statutes have arisen. Other questions as to the kinds of remuneration which are covered by the statute ... have also been raised. To remove the possibility of confusion, the amendment adds a definition of "remuneration for employment" which covers compensation paid or payable for personal services of an individual, whether as wages, salary, commission, bonus, [or] pay .... It excludes any payment as compensation for death under any Federal program, any payment under any program established to provide "black lung" benefits, any payment by the [DVA] as pension, or any payment by the Veterans' Administration as compensation for service-connected disability or death. *Such exclusion, however, does not apply to any compensation paid by the [DVA] to a former member of the armed forces who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation.*

123 Cong. Rec. 12,913 (1977) (emphasis added).

The purpose of the 1977 amendments was thus to clarify which categories of payments were subject to garnishment and which were not, and DVA compensation received in lieu of retired pay was clearly one type of payment that Congress considered appropriate for garnishment. Although Congress used the word "portion" in describing the effect of section 662(f)(2), there is nothing to indicate that Congress attached a narrow meaning to its use in this context.

Indeed, the narrow interpretation adopted by the DVA does not rationally advance any conceivable legislative purpose that Congress had in permitting garnishment of benefits paid in lieu of retired pay.[8] Congress permitted garnishment in these circumstances because it recognized that a veteran waiving retired pay to obtain DVA compensation is merely substituting one form of income for another, and that the latter income should thus be subject to garnishment to the same extent as the former. In light of this understanding, it should not be relevant *how much* of one's claim to retired pay one waives. There is therefore simply no logical reason that a veteran who has waived 99% of his retired pay in order to receive DVA compensation should be subject to garnishment, while a veteran who has waived 100% of his retired pay should not. This is particularly so in light of the fact that, because DVA compensation is not taxed, the net after-tax income on a dollar-for-dollar basis of veterans whose DVA compensation *exceeds* their waived retired pay is actually greater than that of veterans whose DVA compensation does not exceed their waived retired pay.[9]

In reaching this conclusion, we recognize that, "[i]n analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign and not enlarge the waiver, "'beyond what the language requires.'" *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (citations omitted). However, this rule does not obviate the need to consider congressional intent when a statutory provision admits of conflicting interpretations, and Congress' intent can be reasonably discerned. *See, e.g., Berman v. Schweiker*, 713 F.2d 1290, 1301 (7th Cir. 1983) ("[W]here Congress by statute has waived sovereign immunity and has demonstrated a clear legislative intent with respect to the broad remedial purpose of the Act, ... each section of the Act must be accorded an interpretation that is consonant with the legislative purpose of the

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[8] The DVA offers no reason why Congress might have intended to exempt veterans who have waived all of their retired pay in order to receive disability benefits from the requirements of the Child Support Enforcement Act. *See* Turnage Letter at 5 ("For whatever reason, Congress intended to prohibit garnishment where retired pay is waived *in toto* . . ")

[9] Our conclusion is not in any way inconsistent with the congressional policy underlying the DVA's anti-garnishment statute, 38 U.S.C. § 3101(a). In *Rose v. Rose*, 481 U.S. 619, 630-34 (1987), the Supreme Court considered whether section 3101(a) preempted the jurisdiction of a state court to hold a veteran in contempt for failing to pay child support from his veterans' benefits. In concluding that it did not, the Court reasoned:

> Veterans's disability benefits compensate for impaired earning capacity, and are intended to "provide reasonable and adequate compensation for disabled veterans *and their families*." ... Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents

Rose v. Rose, 481 U.S. at 630-31 (citations and footnote omitted).

Since the purpose of DVA compensation is to provide for the security of both veterans and their families, the policy considerations underlying section 3101(a) would not be frustrated by construing section 662(f)(2) to permit the garnishment of DVA compensation that is received in lieu of retired pay, regardless of whether the recipients have waived all of their entitlement to retired pay in order to receive such compensation.

entire Act."). Here, consideration of the legislative history of the Act and the practical effect of the DVA's construction of section 662(f)(2) persuades us that Congress did not intend to relieve veterans of their support obligations whenever their DVA compensation exceeds their retired pay.

III. Conclusion

For the foregoing reasons, we conclude that 42 U.S.C. § 662(f)(2) should be construed to permit the garnishment of DVA compensation received in lieu of military retired pay even when a veteran has waived all of his or her retired pay in order to receive such compensation. We further recommend that 5 C.F.R. § 581.103(c)(4)(iv) be amended accordingly.

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