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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 sixteen volumes of opinions published covered the years 1977 through 1992; the present volume covers 1993. The opinions included in Volume 17 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 1993 are not included.

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

Opinions of the Office of Legal Counsel in Volume 17

Contents *Page*

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Authority of the Attorney General to Make Successive Designations of Interim United States Marshals

Under 28 U S.C. § 562, the Attorney General may make two or more successive designations of a person to serve as interim United States marshal in a judicial district where the marshal's office is vacant

After the expiration of an initial designation of a United States marshal under 28 U.S C § 562, the Attorney General may authorize a person to act as marshal under 28 U.S.C. §§ 509, 510.

January 19, 1993

MEMORANDUM OPINION FOR THE ASSISTANT TO THE ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL

This memorandum responds to your request for our opinion whether, under 28 U.S.C. § 562, the Attorney General may make two or more successive designations of a person to serve as interim United States marshal in a judicial district where the marshal's office is vacant.[1] You have also asked whether, after the expiration of an initial designation under § 562, the Attorney General may authorize a person to act as marshal under 28 U.S.C. §§ 509, 510. We conclude that § 562 permits the Attorney General to make successive interim designations, and that the Attorney General also may authorize a person to act as marshal under §§ 509 and 510.

I.

You have advised us that, in several judicial districts, deputy marshals were serving or are serving as interim marshals, pursuant to designations made under 28 U.S.C. § 562, and delegations under 28 U.S.C. § 510. The designations, under § 562, of some of these interim marshals expired thirty days after the end of the

[1] 28 U S.C § 562 provides.

(a) In the case of a vacancy in the office of a United States marshal, the Attorney General may designate a person to perform the functions of and act as marshal, except that the Attorney General may not designate to act as marshal any person who was appointed by the President to that office but with respect to such appointment the Senate has refused to give its advice and consent.

(b) A person designated by the Attorney General under subsection (a) may serve until the earliest of the following events:

(1) The entry into office of a United States marshal appointed by the President, pursuant to section 561(c)

(2) The expiration of the thirtieth day following the end of the next session of the Senate

(3) If such designee of the Attorney General is appointed by the President pursuant to section 561(c), but the Senate refuses to give its advice and consent to the appointment, the expiration of the thirtieth day following such refusal

second session of the Senate for the 102nd Congress. Other interim designations will expire thirty days after the end of the current session of the Senate.[2] Faced with the prospect that a new marshal would not have entered into office by the expiration date of some of the interim designations, the Attorney General issued orders redesignating the same deputies as interim marshals and delegating to them authority to act as marshals. If this situation recurs, the Attorney General wishes to pursue a similar course, redesignating the same deputy marshal, or another deputy marshal, to serve as interim marshal and delegating appropriate authority to that person. None of the designees has been, or will have been, appointed a marshal by the President, and refused advice and consent by the Senate.

II.

Section 562 grants the Attorney General authority, subject to specific eligibility limitations, to "designate a person to perform the functions of and act as marshal" when the office of marshal is vacant. While the marshal vacancy statute imposes limits on the authority it grants to the Attorney General, the language of the statute is compatible with a grant of authority to make successive designations.[3] The statute does not explicitly bar the Attorney General from issuing a new designation when a previous one expires.[4] We hesitate to read such a limitation into the statute. Doing so could lead to serious gaps in the United States Marshals Service's legal authority to perform its vital duties, including its "primary role and mission" of "provid[ing] for the security" of the federal courts. 28 U.S.C. § 566(a). For any number of reasons, a new marshal may not yet have taken office when an interim marshal's designation expires. The President may not have submitted a nominee to the Senate; the Senate may fail to act on the nomination, or may reject it.

If the Senate is in recess on the date an interim marshal's designation terminates without a new marshal's having taken office, the President may exercise his constitutional authority to make a recess appointment to the vacant marshal position.

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[2] We interpret the phrase "end of the next session of the Senate," in 28 U.S.C. § 562(b)(2), to have the same meaning as the nearly identical phrase in the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, that is, the adjournment *sine die* of the session of the Senate for the first session of Congress that begins after the designation was made. *See Recess Appointments*, 41 Op. Att'y Gen. 463, 469-71 (1960), *Recess Appointments Issues*, 6 Op. O.L.C. 585, 586-87 (1982). Thus, interim marshal designations made during the first session of the 102nd Congress expired thirty days after the adjournment of the Senate *sine die* for the second session of the 102nd Congress. Designations made during the second session of the 102nd Congress will terminate, under § 562(b)(2), thirty days after the adjournment of the Senate *sine die* for the first session of the 103rd Congress, probably November or December, 1993.

[3] The first rule of statutory construction is to look to the language of the statute. *See, e.g., Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990), *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978).

[4] The legislative history does not address the situation in which an interim appointment has automatically terminated without a permanent marshal's having entered into office. It says little more than that § 562 "provide[s] for the appointment of an Acting Marshal by the Attorney General" and "also assures the temporary nature of such interim appointments . . . by providing for the automatic termination of such interim appointments." 134 Cong. Rec. 32,709 (1988).

U.S. Const. art. II, § 2, cl. 3. But the Senate will not necessarily be in recess on the thirtieth day following the end of its session, or following its refusal to give advice and consent to an appointment. In such circumstances, § 562, if construed as permitting only a single exercise of the authority to designate an interim marshal, would provide no mechanism for conferring upon anyone the authority to perform the functions of a marshal in a district where the marshal's office is vacant. Such a construction would be contrary to the apparent purpose of § 562, which is to provide continuity in the performance of the marshal's functions.

While the courts have not addressed the issue of successive interim designations under the marshal vacancy statute, judicial interpretation of a statute governing interim United States attorney appointments supports our analysis of § 562. Similar to the marshal vacancy statute, the United States attorney vacancy statute authorizes the Attorney General to "appoint a United States attorney for the district in which the office . . . is vacant" to serve for 120 days, or until the President fills the office by appointment. 28 U.S.C. § 546. At least one court has found that this language permits the Attorney General to appoint as "Acting United States Attorney" a person whose 120-day interim appointment as United States Attorney for the same district had expired. *In re Grand Jury Proceedings*, 671 F. Supp. 5, 6 & n.3 (D. Mass. 1987).[5]

III.*

The Attorney General has broad authority to delegate almost "[a]ll functions of other officers of the Department of Justice and all functions of . . . employees of the Department" to "any other officer [or] employee . . . of the Department."[6] The language of these statutes supports the view that the Attorney General may delegate the authority to perform all of the functions of a United States marshal to a deputy marshal, without regard to whether that deputy marshal, or

[5] There is a difference between the two vacancy statutes that suggests that successive interim appointments by the Attorney General may be more clearly permissible under the marshal statute. Unlike § 562, § 546 explicitly provides a means for dealing with the automatic expiration of a first interim appointment: In that circumstance, "the district court . . . may appoint a United States attorney to serve until the vacancy is filled." 28 U.S.C. § 546(d). *See also* Memorandum for William P. Tyson, Director, Executive Office for United States Attorneys, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel (Nov. 13, 1986) (suggesting that the Attorney General may not make successive interim appointments pursuant to section 546); *but see In re Grand Jury Proceedings*, 673 F. Supp. 1138, 1142 n.11 (D. Mass. 1987) ("[I]t is not clear . . . that the Attorney General himself would be foreclosed from making a second interim appointment under" section 546).

* Editors Note: The Vacancies Reform Act of 1998 has called into question the conclusions reached in this section. *See* Pub. L. No. 105-277, 112 Stat. 2681-611 (1999) (to be codified at 5 U.S.C. §§ 3345-3349d).

[6] 28 U.S.C. § 509 provides, "All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except" for several functions irrelevant here.

Section 510 of title 28 provides, "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

anyone else, has been serving as an interim marshal for the district, pursuant to § 562.[7]

It is, nonetheless, possible to construe § 562 as limiting the Attorney General's broad authority under §§ 509 and 510. On that view, because § 562 grants the Attorney General more specific authority to address vacancies in United States marshals' offices, the section must have meant to set forth the full extent of the Attorney General's authority in that area. It might also be argued that such a reading of § 562 is necessary to make the section's time limits on interim marshal designations meaningful. Allowing the Attorney General to make potentially unlimited delegations of the authority to act as a marshal, such an argument might conclude, could displace the process of appointment by the President and advice and consent by the Senate.

The better view is not to read into § 562 such a limitation on the Attorney General's authority under §§ 509 and 510. Section 562 establishes procedures and criteria that the Attorney General must follow if he wishes to designate a person to serve as an interim marshal pursuant to the authority conferred by the marshal vacancy statute. One need not, and should not, assume that § 562 provides the exclusive means by which the Attorney General may delegate the authority to perform a marshal's functions, or that § 562 displaces any additional legal authority that the Attorney General otherwise would possess to address marshal vacancies.[8] Our interpretation preserves a function for § 562 without requiring that it operate so as to interfere with law enforcement, court security or the performance of other vital functions of the marshal's office.

This conclusion finds support in judicial interpretations of the Attorney General's authority to delegate under §§ 509 and 510, and construction of those statutes in conjunction with more "specific" statutes governing the Attorney General's authority to designate or appoint others to perform functions of the Department of Justice. *See, e.g., In re Subpoena of Persico*, 522 F.2d 41, 54-55 (2d Cir. 1975) (Attorney General has authority to assign others to perform prosecutorial functions "not only under 28 U.S.C. § 515 [authorizing specific designation], but also under . . . other statutes," including §§ 509 and 510); *In re Grand Jury Proceedings*, 673 F. Supp. at 1138-39, 1142 (accepting Attorney General's delegation, under § 510, of authority to act as U.S. attorney, to person whose interim appointment as U.S. attorney under § 546 had terminated); *Bruzzone v. Hampton*, 433 F. Supp. 92, 97 (S.D.N.Y. 1977) (statute authorizing marshals to remove deputy marshals did not

[7] As "officials of the [United States Marshals] Service," 28 U.S.C. §§ 564, 566(d), deputy marshals are "officer[s or] employee[s] . . . of the Department of Justice," 28 U.S.C. § 510.

[8] We do not regard the Vacancies Act, 5 U.S.C. §§ 3345-3349, as limiting the Attorney General's authority to delegate under §§ 509 and 510. Our long-standing view is that the time limits the Vacancies Act imposes on designations apply only to designations made under that act, and that §§ 509 and 510 should be construed as remedial legislation superseding the Vacancies Act. *See, e.g.*, Memorandum for Rudolph W. Giuliani, Associate Attorney General, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 30, 1982).

diminish Attorney General's power, under § 509, to "perform the functions of the Marshal" or to delegate to another officer the marshal's authority to remove deputy marshals).[9]

IV.

For the reasons set forth above, we conclude that 28 U.S.C. § 562 authorizes the Attorney General (subject to the limitations the statute explicitly imposes) to designate a deputy marshal to serve as interim marshal upon the expiration of his, or another person's, prior designation as interim marshal in a judicial district where the marshal's office is vacant. We also conclude that 28 U.S.C. §§ 509, 510 authorize the Attorney General to delegate the authority to perform the functions of a United States marshal to a deputy marshal. We recommend that Attorney General Orders designating interim United States marshals recite, in an abundance of caution, that the Attorney General acts pursuant to the authority granted by 28 U.S.C. §§ 509, 510, 562.

JOHN C. HARRISON
Deputy Assistant Attorney General
Office of Legal Counsel

[9] *See also* Memorandum for Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, from Robert B Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (May 24, 1983) (Attorney General has authority to appoint acting U S. attorneys under § 510, predecessor to § 546 vacancy statute is unnecessary). An earlier OLC opinion suggested that § 510 gave the Attorney General authority to make interim appointments to vacant U.S attorney positions, but not necessarily to vacant U.S. marshal positions. That opinion stressed that a marshal was principally "an officer of the court," that a statute authorized district courts to make interim marshal appointments, and that marshals (including interim appointees in vacant posts) had to give a personal bond to guarantee proper handling of funds Memorandum for Lawrence E Walsh, Deputy Attorney General, from Robert Kramer, Assistant Attorney General, Office of Legal Counsel at 3 (Oct 21, 1959) Those factors have changed· marshals now have substantial investigatory and law enforcement duties, 28 U.S C § 566, the current marshal vacancy statute does not give courts interim appointment power (while the U.S attorney vacancy statute now does, *see, supra* note 6), and marshals are no longer required to give personal bonds.

Authority of the Secretary of the Treasury Regarding Postal Service Bond Offering

If the Secretary of the Treasury, within the fifteen-day period following notice by the United States Postal Service of a proposed bond issue, declares his election to purchase the bonds under 39 U.S.C. § 2006(a), the Postal Service may not sell the bonds on the open market, but must instead negotiate in good faith with the Secretary to reach agreement on the terms and conditions of a sale to the Secretary

Transfer of the proceeds of any bond offering by the Postal Service to a trustee for the purpose of having the trustee make payments on outstanding Postal Service debt would be a deposit of Postal Service monies within the meaning of 39 U.S.C. § 2003(d) and, accordingly, could be done only with the approval of the Secretary of the Treasury.

January 19, 1993

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

You have requested our opinion concerning the authority of the Secretary of the Treasury under 39 U.S.C. §§ 2003(d) and 2006(a) to purchase bond issues of the Postal Service and to control the disposition of the proceeds thereof. Specifically, we were asked to address the legal issues arising from the proposed bond issue described in Postmaster General Runyon's October 7, 1992, letter to Secretary Brady. Although we understand that Treasury and the Postal Service have reached an agreement, in consequence of which the Postal Service has withdrawn this particular bond issue, we are memorializing our legal conclusions in this memorandum because of the recurring importance of these issues.

The Postal Service's plan was to issue bonds in the amount of $3 billion. The Postal Service proposed to transfer the proceeds of the bond issue to a trustee who would then purchase an equivalent amount of government securities, the interest and principal of which would be dedicated to repayment of approximately $2.6 billion of Postal Service debt held by the Federal Financing Bank ("FFB"). Under a ruling of the Financial Accounting Standards Board, this transaction would have allowed the Postal Service to remove the original FFB debt from its books, producing, the Postal Service asserted, cost savings and financial flexibility.

The Postal Service gave notice to the Secretary of the Treasury of its intent to market these bonds, as required by 39 U.S.C. § 2006(a), on October 7, 1992. On October 9, 1992, the Secretary notified Postmaster General Runyon that he was exercising his statutory option to purchase the bonds, and proposed that the Postal Service immediately enter into negotiations concerning the terms of the sale. The Secretary believed that his invocation of his right to purchase within the fifteen-day

period precluded the Postal Service from offering its bonds in the market. The Postal Service took the position that the Secretary's failure actually to purchase the bonds within the notice period permitted it to market them elsewhere.

For the reasons set forth in this memorandum, we believe that the Secretary's election to purchase the bonds within the fifteen-day period precluded the Postal Service from selling the bonds on the open market. The Secretary's election triggered an obligation of both parties to negotiate in good faith to agreement on the terms and conditions of the sale.

We further conclude that the transfer of the proceeds of any bond offering by the Postal Service to a trustee for the purpose of having the trustee make payments on outstanding Postal Service debt would have been a "deposit" of "moneys of the [Postal Service] Fund" in a place other than the Postal Service Fund within the Treasury within the meaning of 39 U.S.C. § 2003(d). Such a deposit would, under that statute, be subject to "the approval of the Secretary [of the Treasury]." *Id.* § 2003(c).

I.

The right of the Secretary of the Treasury to purchase obligations of the Postal Service arises under statute:

> At least 15 days before selling any issue of obligations under section 2005 of this title, the Postal Service shall advise the Secretary of the Treasury of the amount, proposed date of sale, maturities, terms and conditions, and expected maximum rates of interest of the proposed issue in appropriate detail and shall consult with him or his designee thereon. The Secretary may elect to purchase such obligations under such terms, including rates of interest, as he and the Postal Service may agree, but at a rate of yield no less than the prevailing yield on outstanding marketable Treasury securities of comparable maturity, as determined by the Secretary. If the Secretary does not purchase such obligations, the Postal Service may proceed to issue and sell them to a party or parties other than the Secretary upon notice to the Secretary and upon consultation as to the date of issuance, maximum rates of interest, and other terms and conditions.

39 U.S.C. § 2006(a).

Congress's dual purpose in enacting § 2006(a) was to give the Postal Service the powers necessary to run the Service on a business-like basis, while also providing some protection for the Treasury against a Postal Service debt offering that might interfere with the Treasury's marketing of its own bonds. The first policy, as stated in the report of the House Committee on Post Office and Civil Service on

the bill that ultimately became the Postal Reorganization Act, was that postal reorganization rested upon the proposition that "the management of the Postal Service should be given the powers needed to manage well and then should be held strictly responsible for the proper use of those powers." H.R. Rep. No. 91-1104, at 20 (1970) ("House Report"). Because Congress recognized that "access to capital through the sale of bonds is essential to any realistic modernization of the physical plant of the Postal Service," the reorganization bill gave the Postal Service "the power to issue its own obligations upon the security of such of its assets and revenues as it sees fit." *Id.* At the same time, Congress recognized that the Treasury might need some protection from competition from the Postal Service. As then-Under Secretary of the Treasury Paul Volcker testified before a Senate committee, the Treasury "does not want to be put in the position of the Postal Service being able to do financing independently and perhaps working at cross purposes with what the Treasury is trying to accomplish at that same time in other financing operations." 1 *Postal Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service*, 91st Cong. 311-12 (1969) ("Senate Hearings").

Section 2006(a) seeks to harmonize these concerns. The Postal Service was given the authority to determine for itself (subject, of course, to the concurrence of the market) the purposes, amounts, and terms and conditions of its borrowings, while the Treasury was provided a mechanism for coordinating Treasury and Postal Service financing. Under Secretary Volcker called this compromise an attempt to achieve "the best of both worlds . . . . The Secretary of the Treasury cannot assert substantive control over the Postal Service, but the Postal Service must coordinate its financial demands with the Treasury." Senate Hearings at 312. Similarly, the report of the House Post Office Committee explained:

> [T]he power of the Postal Service to issue its obligations is reserved to it alone. It need not seek or obtain the consent of the Secretary of the Treasury either as to the fact of the borrowing or the terms and conditions upon which it is done. There is a duty upon the Service to notify and consult with the Secretary. This, together with the right of the Secretary to purchase any or all of a proposed issue, is regarded by that Department as fully adequate protection of the interest of the United States Government as a potential competitor of the Service in the money market. At the same time, the bill guards against any inappropriate power in the Treasury to control the scale of Postal Service operations.

House Report at 21.

Although the legislative purpose behind § 2006(a) is clear, the statute itself is not. At least three readings of § 2006(a) are possible. Under the first reading, what might be called the "notice and consultation" view, the Postal Service is re-

quired to give notice to the Secretary at least fifteen days before a planned bond sale. The notice must contain certain specified information (amount, proposed sale date, maturities, etc.), but is not itself an offer to sell to the Secretary. The Secretary may purchase these bonds with the agreement of the Postal Service ("under such terms . . . as he and the Postal Service may agree"), but the Secretary is not obliged to buy, and the Postal Service is not obliged to sell. Finally, if the Secretary does not purchase the bonds, even if the failure to purchase is simply a consequence of the Postal Service's refusal to sell, the Postal Service may sell the bonds elsewhere, subject only to the requirements that it give the Secretary notice of any such sale and consult with him concerning its terms.

The second possible reading may be termed the "right of first refusal" reading. Under this interpretation, the Postal Service must give the Secretary fifteen-days advance notice of a proposed sale of obligations. The notice must, of course, contain the information specified in the statute "in appropriate detail," and constitutes an offer to the Secretary. Prior to the expiration of the fifteen days, the Secretary may exercise his option to purchase the obligations on the terms offered, or on such different terms as he and the Postal Service may have agreed. Once the Secretary exercises his option, the Postal Service is bound to sell to him under the terms of its original offer or any mutually acceptable counteroffer. Should the Secretary fail to complete the purchase within the fifteen-day period, however, the Postal Service would be free to market its bonds elsewhere, after notice to and consultation with the Secretary.

The third reading of § 2006(a) might be referred to as the "exclusive bargaining right" theory. Under this view, the Postal Service must give the Secretary notice of its proposed offering, in appropriate detail, at least fifteen days prior to the sale. The Secretary may then decide to require the Postal Service to market the securities exclusively to him. If the Secretary exercises this option within the fifteen-day period, the Postal Service must negotiate to agreement with the Secretary, and only with the Secretary, on the terms and conditions of the sale. There is no limit on the negotiation period, and although each party must act in good faith, the Secretary's exercise of his exclusive bargaining right precludes the Postal Service from negotiating with other buyers. Only if the Secretary subsequently relinquishes this right may the Postal Service offer its bonds on the market.

None of these readings is entirely free from difficulty. As an initial matter, however, we may dismiss the first interpretation, the notice and consultation model. Although this version is perhaps most easily reconciled with the wording of § 2006(a), it is totally at odds with the purpose of the provision, which is to give the Secretary a "right of first refusal." *See, e.g.*, Senate Hearings at 305 (testimony of Under Secretary Volcker); 3 *Post Office Reorganization: Hearings Before the House Comm. on Post Office and Civil Service*, 91st Cong. 1172 (1969) ("House Hearings") (colloquy between then-Under Secretary Volcker and Representative Hamilton); *see also* House Report at 21 (Secretary has "the right . . . to purchase

any or all" Postal Service obligations); Senate Hearings at 270 (testimony of Postmaster General Blount) (Treasury has right to purchase all Postal Service obligations or, at its option, to permit Postal Service to sell obligations to the public); *id.* at 305 (testimony of Under Secretary Volcker) (Secretary has an option to purchase Postal Service obligations); *Federal Financing Bank Act: Hearings Before the House Comm. on Ways and Means*, 93d Cong. 18 (1973) (testimony of then-Under Secretary Volcker). Indeed, the Postal Service itself recognizes that § 2006(a) creates some species of an option right in the Secretary of the Treasury. *See* Memorandum from Mary S. Elcanco, Vice President and General Counsel, United States Postal Service at 9 (Oct. 22, 1992) (referring to the Secretary's "right of first refusal") ("Elcanco Memo"). Thus, the first reading, requiring only notice to and consultation with the Secretary, is not a viable interpretation of § 2006(a).

Under either the second or third reading of § 2006(a), the Secretary must exercise his right (either the right of first refusal in the second reading or his exclusive bargaining right in the third) within the fifteen-day period following notice of a proposed Postal Service offering. Although the statute does not explicitly make the Secretary's right time-limited, the very notion that the Secretary has an option to be exercised suggests that there must be some point in time at which he must decide to exercise or waive his option. Moreover, if the Secretary's right were not subject to a time limit, the Secretary could by mere inaction prevent the Postal Service from obtaining *any* financing. As Under Secretary Volcker put it, however, § 2006(a) gives the Secretary the authority "to supervise the timing of the financing and the terms of any financing by the postal authority, but he can never put himself in a position where he is preventing the postal authority from obtaining what financing they think is necessary." Senate Hearings at 311. Thus, the Secretary's option, whether viewed as the right to purchase Postal Service obligations or to enjoy exclusive bargaining power, must be subject to some time limitation. The fifteen-day notice period contained in the first sentence of § 2006(a) must therefore be read as the time limit for the Secretary to exercise his option right.

Assuming that the Secretary must exercise his option right within the fifteen-day period, two questions remain. First, what is the nature of the option right? Is it a right of first refusal, i.e., the right to purchase the Postal Service's obligations on the terms contained in the original notice or as modified by agreement, or is it a right to require the Postal Service to bargain exclusively with the Secretary concerning the sale of the obligations? Put another way, can the Secretary "elect to purchase" Postal Service obligations only *after* he has reached agreement with the Postal Service on the terms and conditions of the sale (the right of first refusal theory), or can he make his election *prior* to any agreement on terms (the exclusive bargaining rights theory)?

We believe that § 2006(a) should be read as giving the Secretary the right to "elect to purchase" Postal Service obligations prior to any agreement on the terms of the sale. The statute states that the Secretary "may elect to purchase such obli-

gations under such terms, including rates of interest, as he and the Postal Service may agree." *Id.* The right of first refusal theory would interpret this phrase as if it read "may elect to purchase . . . under such terms . . . as he and the Postal Service may *have agreed*." If that had been the language of the statute, the construction would clearly indicate that the agreement on terms must precede the Secretary's election. The failure to use that construction, however, suggests that the Secretary's election may precede any agreement between the parties. We therefore read the statute to mean quite literally what it says, that the Secretary may elect to purchase upon such terms as he and the Postal Service may subsequently agree.

II.

Assuming that the Postal Service had proceeded with its proposed financing, either through a purchase by the Treasury or via open market sales, several questions concerning the Secretary's authority as it affected the proposed defeasance would still have remained. We understand that the Postal Service planned to deposit the proceeds of its financing in the Postal Service Fund of the Treasury, and then almost immediately to withdraw the funds and transfer them to a trustee. The trustee in turn would have purchased a portfolio of government securities, whose principal and interest would have been sufficient to redeem approximately $2.6 billion of Postal Service debt held by the FFB.

As outlined above, the proposed defeasance raises questions under 39 U.S.C. § 2003(c) and (d).[1] First, would the transfer of the proceeds of the Postal Service financing have been a "deposit" of funds within the meaning of § 2003(d)? If it would, then under the statute the deposit would have required the approval of the Secretary of the Treasury. Second, would the purchase of the portfolio of government securities by the trustee have been an "investment" of funds "in excess of current needs" by the Postal Service?

Turning first to the issue of whether the transfer to the trustee would have been a "deposit" within the meaning of § 2003(d), we have no hesitation in concluding that it would. To "deposit" is defined as "[t]o commit to custody, or to lay down; to place; to put; to let fall (as sediment)." Black's Law Dictionary 438 (6th ed. 1990) (citing *Jefferson County ex rel. Grauman v. Jefferson County Fiscal Court*, 117 S.W.2d 918, 924 (Ky. 1938)); *see also id.* (defining a "deposit" as "[t]he delivery of chattels by one person to another to keep for the use of the bailor"). Here,

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[1] 39 U.S.C § 2003(c) provides

> If the Postal Service determines that the moneys of the Fund are in excess of current needs, it may request the investment of such amounts as it deems advisable by the Secretary of the Treasury in obligations of, or obligations guaranteed by, the Government of the United States, and, with the approval of the Secretary, in such other obligations or securities as it deems appropriate.

39 U.S.C. § 2003(d) provides:

> With the approval of the Secretary of the Treasury, the Postal Service may deposit moneys of the Fund in any Federal Reserve bank, any depository for public funds, or in such other places and in such manner as the Postal Service and the Secretary may mutually agree.

the Postal Service would have been committing the proceeds of its financing to the custody of the trustee with instructions, contained in an irrevocable declaration of trust, to use those proceeds for the benefit of the Postal Service by paying certain Postal Service obligations as they came due. Such a transaction would have involved what appears to us to be the essential ingredient of a deposit: the holding by one person of money that belongs to another, for that other person's benefit.

The Postal Service argues that to "deposit" funds necessarily implies the right to withdraw them and that, since the Postal Service would have had no such right here, the transfer to the trustee could not be a deposit. It is true that in many, perhaps even in most, deposit situations the depositor has a right to withdraw his funds. But the right to withdraw is not therefore an inherent attribute of a "deposit." For example, a prospective purchaser of a house usually is required to put a sum of money on deposit with an escrow agent. This money, usually called "earnest money," is not withdrawable by the purchaser and, indeed, is forfeited to the seller if the purchaser does not proceed with the sale. A deposit is often required of renters of either real or personal property. This deposit is not withdrawable by the renter, but is, of course, returned to him at the conclusion of the transaction. Similarly, many utility companies require customers to post a deposit as a condition of initiating service. Once again, this deposit may not be withdrawn by the depositor, but is returned to him only upon discontinuance of his service or upon the utility's becoming satisfied of his creditworthiness. Thus, it does not appear that the ability to withdraw on demand is an essential attribute of a deposit.

The proposed transfer of funds to the trustee would clearly have been, in our opinion, a deposit of those funds within the meaning of § 2003(d). It is indisputable that § 2003(d) provides that any deposit of Postal Service funds in any place other than the Postal Service Fund of the Treasury requires the approval of the Secretary of the Treasury. We therefore conclude that the Postal Service may not have implemented this aspect of its proposed defeasance without the Secretary's approval.

If the Secretary had consented to the deposit of funds with the trustee, it still would have been necessary to determine whether the purchase of a portfolio of government securities by the trustee would be subject to the requirements of § 2003(c). That section provides that if the Postal Service desires to invest any funds "in excess of current needs" in government securities, it may request the Secretary of the Treasury to do so on its behalf. Should the Postal Service wish to invest in other than government securities, it must first obtain the approval of the Secretary.

The Postal Service argues as an initial matter that § 2003(c) would have been inapplicable here because the proceeds of its financing would not have been excess funds within the meaning of the statute. The Postal Service contends that since § 2003(c) by its terms applies only to the investment of excess funds, investment of any other funds is left to the discretion of the Postal Service.

We believe that § 2003(c) provides the only statutory authority for the investment of Postal Service funds. Certainly there is no express authority elsewhere in title 39 for the Postal Service to invest its funds. Although the broad powers granted to the Service by 39 U.S.C. § 401 might, in the absence of § 2003(c), be construed to give the Service investment authority, the specific, limited authority granted by the latter provision precludes such a reading of the former section. We believe that this situation is clearly governed by the maxim *expressio unius est exclusio alterius.* By explicitly providing for the investment of excess funds, the statute impliedly denies the Postal Service the power to invest any other moneys. Indeed, it is difficult to imagine the purpose of § 2003(c) if the general powers granted in § 401 included the power to invest; there would seem to be little reason to place special limits on the power to invest excess funds, while leaving the Postal Service free to invest funds needed for current operations in any way it chose. Both common sense and the standard principles of statutory construction suggest that the Postal Service's only source of authority to invest its funds derives from § 2003(c).

Since the Postal Service may invest only pursuant to § 2003(c), it may not invest at all, with or without the Secretary, unless the funds proposed to be invested are "moneys . . . in excess of current needs." The Postal Service argues that the proceeds of its financing would not have been funds in excess of current needs because it "intend[ed] to use the funds to effect the Defeasance (a valid business purpose)." Elcanco Memo at 18. We believe, however, that such a bootstrapping argument is not persuasive. The funds at issue would have been raised solely for the purpose of investing, through the trustee, in a portfolio of securities. If investment were considered a current need within the meaning of § 2003(c), the Postal Service could never invest *any* money, because money used for investment would be used for, and thus by definition never could be in excess of, current needs. It must therefore be the case that "current needs" excludes investment purposes. Since it is clear that the Postal Service would not have required these funds for its current operations apart from its defeasance scheme, we believe that the proceeds of this financing could be considered excess funds within the meaning of § 2003(c).

We note, however, that § 2003(c) clearly vests in the Postal Service the right to determine which funds are "in excess of current needs." We therefore conclude only that, if the Postal Service were to have requested investment of the proceeds of its proposed financing, the Secretary of the Treasury would have been legally authorized by § 2003(c) to invest such funds on its behalf. The Postal Service would have been free, however, to determine that these funds were not in excess of current needs, in which event the Postal Service would have been precluded from investing them in any manner.

The Postal Service also disputes that the purchase of securities pursuant to the defeasance scheme would have constituted an investment of funds. The Postal

Service argues that the defeasance would have been the economic "equivalent of delivering the proceeds to Treasury to prepay the FFB debt." Elcanco Memo at 19. Granted that that would have been the accounting effect of the defeasance, we do not see how that divested the purchase of the portfolio of securities of its investment character.

Investment means "an expenditure to acquire property or other assets in order to produce revenue." Black's Law Dictionary 825 (6th ed. 1990). It has also been defined judicially as "[t]he placing of capital or laying out of money in a way intended to secure income or profit from its employment." *Id.* (quoting *SEC v. Wickham*, 12 F. Supp. 245, 247 (D. Minn. 1935)) (quoting *Minnesota v. Gopher Tire & Rubber Co.*, 177 N.W. 937 (Minn. 1920)). There is no question that the Postal Service proposed to expend capital raised through its debt offering to purchase government securities in the expectation that that property would produce income in the form of dividends. That the Postal Service had an ultimate use in mind for both the principal amount of its investment and the income derived therefrom in no way changes the fact that it would have been expending its capital in the first instance for the purpose of producing income. That would have constituted an investment and thus would have brought the transaction within the scope of § 2003(c).

Although this point was not raised by the Postal Service, we note that the investment, i.e., the purchase of the securities, would not have been accomplished by the Postal Service itself, but by the trustee. It must therefore be determined whether the trustee under these circumstances would have been subject to the constraints of § 2003(c) in the same way that the Postal Service would be if it purchased the securities directly.

We believe that § 2003(c) would have applied to the trustee here. It is clear that the trustee would have exercised no discretion in this matter. He would have been required by the terms of the declaration of trust to purchase risk-free, i.e., government-issued or government-insured, securities, in amounts and with maturities and interest rates that corresponded precisely to the amounts and maturities of the Postal Service debt to be defeased. Far from exercising the independent judgment characteristic of a trustee, the trustee here would have been nothing more than the agent of the Postal Service. Since the agent could exercise no more authority than his principal possessed, we conclude that the trustee would have been subject to the provisions of § 2003(c) in the same manner that the Postal Service itself would be.

In summary, we conclude that the proposed defeasance scheme would have been fully subject to § 2003(c) and (d). The transfer of the proceeds of the Postal Service's financing to the trustee would have constituted a deposit within the meaning of § 2003(d), and therefore could have been done only with the approval of the Secretary of the Treasury. Assuming that the Secretary agreed to such a deposit, the purchase of the portfolio of securities by the trustee would have con-

stituted an investment of Postal Service moneys within the meaning of § 2003(c). That section requires that the Postal Service, or its agent, invest in government securities only through the Secretary of the Treasury. Although the Secretary could not have refused a request by the Postal Service to invest in government securities, he would have had discretion to determine which particular securities to purchase. *Postal Reorganization Act -- Investment of Excess Funds of the Postal Service*, 43 Op. Att'y. Gen. 45, 48 (1977).

TIMOTHY E. FLANIGAN
Assistant Attorney General
Office of Legal Counsel

Authority to Grant Conservation Easements Under 40 U.S.C. § 319

Federal agencies do not have authority to grant conservation easements in federal property under 40 U.S.C. § 319.

January 19, 1993

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF COMMERCE

You have requested the opinion of the Department of Justice on whether the Secretary of Commerce has authority under 40 U.S.C. § 319 to convey to the City of Boulder, Colorado, a "conservation easement" in federal property under the control of the Department of Commerce.[1] The grant of this property interest would guarantee "the perpetual preservation of open space . . . and maximum aesthetic and environmental limitations on future construction" on the site.[2] We understand that your Office has tentatively concluded that the Department of Commerce "may not possess such authority" and has notified the city attorney for Boulder of that view.[3]

Consistent with the tentative opinion of your office, we conclude that § 319 does not provide authority to grant a conservation easement. We believe that § 319 authorizes only the conveyance of property interests that were recognized by courts as valid and customary easements under the common law existing when the statute was enacted. Although the so-called scenic or conservation easement first developed as a land use device prior to enactment of § 319, it was not then recognized as a valid or customary easement in the vast majority of jurisdictions. In the absence of any indication that Congress intended § 319 to include conservation easements, we conclude that the Department of Commerce is not authorized under § 319 to convey such an easement.

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[1] Letter for Barry M. Hartman, Acting Assistant Attorney General, Environment and Natural Resources Division, from Wendell L. Willkie, II, General Counsel, Department of Commerce (Apr. 8, 1992). Mr. Hartman referred your request to us. The Environment and Natural Resources Division has reviewed this memorandum and concurs in its conclusions.

[2] *See* Memorandum for Wendell L. Willkie, II, General Counsel, Department of Commerce, from Barbara S. Fredericks, Assistant General Counsel for Administration, Department of Commerce at 1 (Apr. 6, 1992) ("Fredericks Memorandum").

[3] This issue arose out of negotiations between officials of the Department of Commerce and the City of Boulder concerning the future development of 205 acres occupied by the Department's National Institute of Standards and Technology. The Department was considering entering into a contractual agreement that would limit future construction on the site and preserve some of its open space. *See* Fredericks Memorandum at 1. The city, however, wished to become the grantee of a "conservation easement" under Colorado law. *Id.*; *see* 16A Colo. Rev. Stat. § 38-30.5-102 (1982).

Section 319 provides in part:

> Whenever a State or political subdivision or agency thereof or any person makes application for the grant of an easement in, over, or upon real property of the United States for a right-of-way or other purpose, the executive agency having control of such real property may grant to the applicant, on behalf of the United States, such easement as the head of such agency determines will not be adverse to the interests of the United States, subject to such reservations, exceptions, limitations, benefits, burdens, terms, or conditions . . . as the head of the agency deems necessary to protect the interests of the United States. Such grant may be made without consideration, or with monetary or other consideration, including any interest in real property.

40 U.S.C. § 319. Section 319 speaks of "easement[s] . . . for a right of way or other purpose," but is silent as to what "other purpose[s]" are permitted. The statute is thus arguably ambiguous as to the meaning to be given "easement": whether Congress intended that "easement" should be given its traditional, common-law meaning or be interpreted in light of continuing legal developments.

We believe, however, that Congress intended to incorporate the common-law definition of easement into the statute.[4] We reach this conclusion by employing the "traditional tools of statutory construction," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), to determine the "meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (citing 2 J. Sutherland, *Statutory Construction* § 5201 (3d Horack ed. 1943)); *see also infra* pp. 22-23 and note 14.

Section 319 was enacted in 1962. *See* Act of Oct. 23, 1962, Pub. L. No. 87-852, § 1, 76 Stat. 1129, 1129. The legislative history of § 319 demonstrates that the General Services Administration ("GSA") proposed the section to Congress because GSA had determined that the "[e]ffective and efficient administration of the real property of the United States require[d] that executive agencies have authority to grant easements." H.R. Rep. No. 87-1044, at 2 (1961); *see also* S. Rep. No. 87-1364, at 2 (1962). GSA advised that the then-existing procedures for granting easements — which for most agencies required a determination that the property rights in question were both in excess of the needs of the agency having control of the land and surplus to the needs of the federal government — were "unsatisfactory and unnecessarily cumbersome" and needed to be "simplified."

[4] Accordingly, there is on this question no statutory ambiguity to be resolved by the administering agency, and any different interpretation of § 319 would fail at "step one" of the test established by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

S. Rep. No. 87-1364, at 2; *see* 108 Cong. Rec. 1591 (1962) (remarks of Rep. McFall); H.R. Rep. No. 87-1044, at 2.[5]

Section 319 was patterned after specific easement-granting authority that was already vested in the Attorney General, the Secretaries of the military departments, and the head of the Veterans' Administration. *See* S. Rep. No. 87-1364, at 2; H.R. Rep. No. 87-1044, at 2. The earliest of those provisions gave the Attorney General power to convey "easements in and rights-of-way over" federal lands under his control, whenever "advantageous to the Government." Act of May 9, 1941, ch. 94, 55 Stat. 183 (1941) (codified at 43 U.S.C. § 931a).[6] The Attorney General sought this authority to address difficulties encountered in the development of sites for federal prisons. The Bureau of Prisons needed to restrict public access to certain local roads running through sites acquired for prisons, but some local officials would agree to such closures only if the federal government "grant[ed] an easement along the outside boundaries of the site[s] for the relocation of the roads." H.R. Rep. No. 77-393, at 1-2 (1941); *see* 87 Cong. Rec. 3257 (1941) (remarks of Rep. Sumners). The Director of the Bureau of Prisons explained that it was necessary to "be able to grant such easements promptly in order to take advantage of agreements made with State authorities. The delay which would ensue should each case have to be submitted to Congress for special authorization would jeopardize the interests of the Government." H.R. Rep. No. 77-393, at 2.

Although § 319 gives agency heads broad discretion in certain areas, we do not believe that Congress intended it to be construed to allow an agency to expand or alter the legal concept of "easement" as it was understood by Congress at the time of enactment. We have previously opined that § 319 "must be interpreted as authorizing [agencies] to grant easements only for those purposes for which easements have been traditionally permitted at common law." Memorandum for Allie B. Latimer, General Counsel, GSA, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel at 4 (June 19, 1986) ("Kmiec Memorandum"). We explained that:

> section 319 was intended to empower all agencies to grant easements over their property for any purpose for which easements

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[5] The Senate Committee on Public Works reported that § 319 would "improve the present Government procedures for granting of easements." S Rep. No 87-1364, at 3. The committee stated:

> At present these procedures are unrealistic and result in undue delay to both the Federal Government and those dealing with it Enactment of this bill will provide effective procedures in dealing with requests for easements, necessary to effective cooperation by the Federal Government in a variety of local and Federal building programs.

Id

[6] *See also* Act of Aug. 10, 1956, ch 1041, 70A Stat 1, 150-51 (1956) (codified as amended at 10 U.S.C. §§ 2668-2669) (if not "against the public interest," Secretary of a military department may grant "easements for rights-of-way over, in, and upon public lands permanently withdrawn or reserved for the use of that department" for specifically enumerated purposes, including railroad tracks, pipelines, and roads), Act of Sept. 2, 1958, Pub. L. No 85-857, § 5014, 72 Stat. 1105, 1254 (codified as amended at 38 U S.C. § 8124) (Secretary of Veterans Affairs given authority similar to Attorney General's)

> could be granted. We do not believe, however, that either the statute or the legislative history can be read . . . as authorizing agencies to grant easements *for any purpose whatsoever*, even for purposes for which easements have never been recognized. In particular, nothing suggests that Congress intended to preempt and expand the common law of easements with the enactment of section 319.

Id. at 3-4 (footnote omitted). By "the common law of easements" we meant the American law of easements prevailing at the time of enactment of § 319. *See id.* at 4 & n.6 (listing the traditional common-law easements) (citing Restatement of Property § 450 (1944) ("Restatement") and 3 Herbert T. Tiffany, *The Law of Real Property* §§ 763-775, 839 (3d ed. 1939) (cataloguing the traditional easements)).

In 1962, an easement had a particular common-law meaning that was well settled. Because § 319 contains no alternative definition of the term, firmly established canons of construction compel the conclusion that Congress adopted the "established common law meaning" of the term easement recognized by courts at the time. *Chapman v. United States*, 500 U.S. 453, 462 (1991).[7] Therefore, government agencies are not free to convey interests in federal property that go beyond the easements commonly recognized at common law in 1962.

"An easement is an interest in land in the possession of another," that, among other things, "entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists." Restatement § 450. In this case, it is helpful to distinguish between different types of traditional easements. First, an easement may be "affirmative," entitling the owner of the interest to enter upon and use the servient land (for example, a right-of-way), or "negative," enabling the easement owner to prevent the possessor of the land from doing acts upon the land that he would otherwise be privileged to do (such as obstructing the light available to the easement owner). *Id.* §§ 451-452; *see* 4 Richard R. Powell, *The Law of Real Property* § 34.02[2][c], at 34-16 to 34-17 (rev. ed. 1997). Second, a traditional easement is either "appurtenant," benefiting the owner of an adjacent parcel of land

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[7] *See also Molzof v United States*, 502 U S. 301, 306-07 (1992) (construing term "punitive damages" according to its "widely accepted common-law meaning when the [statute] was drafted and enacted" based on "cardinal rule of statutory construction" that when Congress uses a legal term of art, it "'presumably knows and adopts . . the meaning its use will convey to the judicial mind unless otherwise instructed'") (quoting *Morissette v United States*, 342 U.S 246, 263 (1952)); *Bowen v. Massachusetts*, 487 U S. 879, 896-97 (1988) (applying "the well-settled presumption that Congress understands the state of *existing* law when it legislates" to give the statutory term "money damages" the meaning "used in the common law for centuries") (emphasis added), *Edwards v. Aguillard*, 482 U S. 578, 598 (1987) ("'A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning.'") (Powell, J., concurring) (emphasis added) (quoting *Perrin v. United States*, 444 U S. 37, 42 (1979), which examined "the ordinary meaning of the term 'bribery' at the time Congress enacted the statute [in question] in 1961"); *Lukhard v Reed*, 481 U.S. 368, 386 (1987) (also quoting *Perrin* regarding the "fundamental canon of statutory construction . that, unless otherwise defined, words will be given their ordinary, contemporary, common meaning" in construing the word "income" in a statute).

(called the "dominant tenement"), or "in gross," benefiting another regardless of whether he owns or possesses other land. Restatement §§ 453-454; 4 Powell, *supra*, § 34.02[2][d], at 34-17 to 34-22.

The "conservation easement" at issue is negative and in gross. Conservation easements are negative in character because they prevent the owner of the burdened estate from developing the land, typically in any way that would alter its existing natural, open, scenic, or ecological condition. *See* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 Texas L. Rev. 433, 435 (1984); Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 Hastings L.J. 1187, 1193 (1989). Often, the benefit of the conservation easement will be in gross. *See* Restatement (Third) of Property (Servitudes) § 2.6 reporter's note, at 71 (Tentative Draft No. 1, 1989) ("Draft Restatement"). The property interest sought by the City of Boulder is expressly defined under Colorado statute as a "Conservation easement in gross." 16A Colo. Rev. Stat. § 38-30.5-102 (1982).

Traditionally, courts recognized very few types of negative easements. *See* Unif. Conservation Easement Act § 4 cmt., 12 U.L.A. 70, 76 (Supp. 1992).[8] Common law allowed only four: light, air, support of buildings, and flow of artificial streams. Dukeminier & Krier, *supra*, at 964; John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv. L. Rev. 574, 613 (1972). Prior to the enactment of § 319, American courts had added to this short list only expressly granted "easements of view," which prevent a servient landowner from obstructing the view enjoyed by the owner of a dominant tenement. *See, e.g.*, *Petersen v. Friedman*, 328 P.2d 264, 266 (Cal. Dist. Ct. App. 1958); *Northio Theatres Corp. v. 226 Main St. Hotel Corp.*, 231 S.W.2d 65, 67 (Ky. 1950); *McCarthy v. City of Minneapolis*, 281 N.W. 759, 761 (Minn. 1938); *see also* Dukeminier & Krier, *supra*, at 1003.[9] Moreover, the benefit of a traditional negative easement could not be in gross. *See* 2 *American Law of Property* § 8.12 (A. James Casner ed., 1952); *see also* Costonis, 85 Harv. L. Rev. at 613-14.[10]

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[8] Negative easements were traditionally disfavored because they restricted the free use and marketability of land. *See* Jesse Dukeminier & James E. Krier, *Property* 962 (1981), Note, 40 Hastings L.J. at 1199.

[9] Although we have not been asked to address whether the grant of an easement of view would be valid under § 319, we note that an easement of view is quite distinct from a conservation easement. In those jurisdictions where an easement of view is valid, the limits on development that it imposes are quite similar to those imposed by an easement of light or air. Surface development and development of the servient tenement's natural resources are normally not restricted at all, because construction on the servient tenement is permitted so long as it does not block the protected line of sight or view *over* the servient tenement from the dominant tenement. *See, e.g.*, *Petersen*, 328 P.2d at 265-66. The easement of view is commonly drafted as a building height limit. *Id.* In contrast to an easement of view, the so-called conservation easement at issue here would appear to prevent any development of the government land, including surface development, natural resources development, and all types of construction. Fredericks Memorandum at 1.

[10] Rather than adding to the list of negative easements, American courts (following the lead of the English common law) achieved some of the purposes that might have been served through use of negative ease-

For these and other reasons, commentators have concluded that conservation easements do not fall within the sphere of traditional easements. As one commentator has explained:

> Traditionally, the law of real covenants (enforced either as covenants-at-law or as equitable servitudes) has been seen as distinct from that of easements. Courts have viewed easements as valuable and protected property rights, while treating real covenants with suspicion and subjecting them to greater barriers against enforcement. . . .
> . . . [A]ssuming there is validity to the traditional dichotomy between real covenants and easements, conservation servitudes more closely resemble real covenants than easements and hence should not be labeled and treated as easements. Although conservation servitudes are negative restrictions, they do not resemble any of the four traditional types of negative easements. Like real covenants, conservation servitudes are "promises respecting the use of land."

Korngold, 63 Texas L. Rev. at 436-37 (footnotes omitted); *see also* Note, *Open Space Procurement Under Colorado's Scenic Easement Law*, 60 U. Colo. L. Rev. 383, 395 (1989) ("Conservation easements, often held in gross by remote charitable organizations, might receive little judicial protection under a common law that traditionally disfavors such restrictions on land use.").

Although the use of "scenic" or "conservation" servitudes to achieve open space or other land preservation goals first developed prior to the enactment of § 319,[11] those innovative forms of servitudes had not gained wide acceptance in the courts by 1962, and certainly such interests were not considered "easements" in the traditional sense. *See, e.g.*, Jan Z. Krasnowiecki & James C.N. Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. Pa. L. Rev. 179, 194 (1961) ("[T]he type of interest needed to accomplish open-space preservation is so unlike any easement and so like most restrictive covenants that one can expect the courts to treat them as covenants."). Under the common law, these interests, if recognized as property interests at all, would most likely have been classified as servitudes or real covenants rather than negative easements. *See* Costonis, 85 Harv. L. Rev. at

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ments by expanding the recognition of a different property interest, the "equitable servitude," which is a promise respecting the use of land (similar to a real covenant) that is equitably enforceable. *See* Dukeminier & Krier, *supra*, at 964, 966-67, 1003

[11] *See* William A. Whyte, *Securing Open Space for Urban America: Conservation Easements* 11-14 (Urban Land Inst. Bull No 36, 1959) In the 1950s and before, governments, including the federal government, occasionally used their powers of eminent domain to acquire scenic "easements" in property adjoining parklands or highways. *See id.*, *see also* 4 Powell, *supra*, § 34.11[3], at 34-60 to 34-61. The first "Scenic Easement Deed Act," enabling local governments to accept grants of scenic easements, was passed in California in 1959 *See* Thomas S. Barrett & Putnam Livermore, *The Conservation Easement in California* 11 (1983)

614-15 ("Characterizing a preservation restriction as an equitable servitude offers a more promising route [to recognition] than either [as a negative easement or real covenant]. Equitable servitudes are not restricted to four specific types of negative easements. . . . No privity of estate other than that provided by the agreement need exist."); *see also* 4 Powell, *supra*, § 34.11[3] at 34-158 ("*Tulk v. Moxhay*, [2. Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848)] the case generally considered as establishing the doctrine of equitable servitudes, really involved [what is now being referred to as] a scenic easement.").

Indeed, it was because of the reluctance of courts to recognize this new form of property interest that many states in the 1970s and 1980s adopted conservation easement statutes, including the Colorado statute that would govern the conveyance sought by the City of Boulder.[12]

Although recent developments in the American law of property tend to blur the distinctions between negative easements and other forms of servitudes such as restrictive covenants and equitable servitudes, *see* Draft Restatement, at xxv-xxvi, and suggest that benefits in gross may someday be freely permitted for all servitudes, *see id.* § 2.6 & cmt. d, the traditional distinctions were still much in force in 1962. Accordingly, we conclude that by authorizing agencies in § 319 to convey only "easement[s]," Congress did not intend to permit an agency to encumber federal property with a nontraditional form of restrictive equitable servitude like a "conservation easement."[13]

As we stated earlier, the Supreme Court has instructed that we construe arguably ambiguous terms "to contain that permissible meaning which fits most logically

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[12] *See* 1976 Colo Sess Laws 750, § 1 (codified at 16A Colo. Rev. Stat § 38-30.5-101 (1982)) ("The general assembly finds and declares that it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary."), *see also* Unif. Conservation Easement Act § 4(3), 12 U L.A. 70, 76 (Supp 1992) (providing that a conservation easement will be valid under the uniform act even though "it is not of a character that has been recognized traditionally at common law"), *supra*, note 8.

[13] Our conclusion would be the same even if we disregarded the "fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning," *Perrin v. United States*, 444 U S 37, 42 (1979), and assumed that Congress intended the meaning of the term "easement" in § 319 to evolve with the common law The use of the word "easement" in the term "conservation easement," a term that does not occur in § 319, is of slight legal significance The relevant question in our analysis is whether the eventual recognition and enforcement of conservation easements — in states where they are recognized and enforced — were an outgrowth of the traditional law of easements or whether conservation easements developed independently of the common law doctrine

We have already explained that a conservation easement is closer to a restrictive equitable servitude than any type of common law easement. Even more important, however, conservation easements have come to be recognized in a body of statutory law that developed independently of the common law of easements. Thus, even if Congress intended for the meaning of the term "easement" in § 319 to evolve with the common law (and expressed such intent in the statute), there is still ample reason to conclude that a so-called "conservation easement" is not a development of the common law of easements This conclusion further supports our view that a conservation easement cannot properly be interpreted as an easement within the meaning of § 319

and comfortably into the body of both previously and subsequently enacted law."[14] As the Court explained in *United Sav. Ass'n*:

> [V]iewed in the isolated context of [a particular section of a statute], the phrase [at issue] could reasonably be given the meaning petitioner asserts. Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

484 U.S. at 371 (citations omitted). We therefore examine congressional intent as it is expressed in other statutes governing the management and disposal of excess federal property, *see* 40 U.S.C. §§ 483, 484, 488, 490, as well as in the other subsections of 40 U.S.C. § 319. That examination provides further support for our conclusion that Congress did not intend § 319 to apply to the type of conservation easements at issue here.

With few exceptions, the management and disposal of federal government property remains a matter entrusted to the Administrator of GSA by the Federal Property and Administration Services Act of 1949, ch. 288, 63 Stat. 377 (1949) (codified as amended in scattered sections of Titles 40, 41, 44 & 50 of the United States Code). The purpose of the statute is to provide for the efficient operation of federal government property, buildings and works. 40 U.S.C. §§ 471, 483. With respect to an agency's surplus property, the Administrator must follow certain procedures in the disposal or transfer of such property to maximize the benefit to the federal government as a whole. 40 U.S.C. §§ 483-490. Under these procedures, property must be reallocated within the federal government if possible prior to being transferred or conveyed to private parties. 40 U.S.C. § 483(a)(1). The Administrator also has nearly exclusive control over the leasing of federal government property. 40 U.S.C. § 490(a)(13). Absent independent authority, no agency may lease or otherwise encumber federal government property without GSA approval.[15]

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[14] *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991); *see also Patterson v. Shumate*, 504 U.S. 753, 758, 762-63 (1992) (explaining that an ambiguous statutory term should be considered "together with the rest" of the statute); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (in discerning the meaning of a statute, "the court must look to . . . the language and design of the statute as a whole"), *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (instructing that ambiguous phrases should be examined in the context of "the remainder of the statutory scheme"); *cf. Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting) ("Our highest responsibility in the field of statutory construction is to read the laws in a consistent way . . .")

[15] *Id.*, *see also* Reorg. Plan No. 18 of 1950, *reprinted in* 15 Fed. Reg. 3177 (1950) ("All functions with respect to acquiring space in buildings by lease, and all functions with respect to assigning and reassigning space in buildings for use by agencies . . . are hereby transferred from the respective agencies in which such functions are now vested to the Administrator of General Services").

In sum, the statutory scheme of 40 U.S.C. §§ 483-490 entrusts to the Administrator of GSA authority over the use and disposition of surplus federal property, and the transfer of substantial control over such property to private parties is disfavored. Although § 319, as proposed by GSA, is an exception to the scheme outlined in 40 U.S.C. §§ 483-490, there is no reason to believe that GSA proposed or that Congress intended to undercut or repeal by implication large portions of the more general scheme.[16] Section 319 was intended only as a limited exception to the existing law to expedite relatively limited types of grants. *See* Kmiec Memorandum at 3-4.[17] According to its principal sponsor in the House of Representatives, § 319 was proposed by GSA as "a simplified way" to grant easements over federal land without going through the "unnecessarily cumbersome" requirement of having the land declared surplus to the needs of the United States. 108 Cong. Rec. 1591 (statement of Rep. McFall). It was not intended to displace any other law. *Id.*

It is true that § 319 is broader than the authority specifically given to the Secretaries of the military departments, *see* 10 U.S.C. §§ 2668-2669, because the latter is limited to the granting of easements for specifically enumerated rights-of-way, such as pipelines and roadways, whereas § 319 allows the conveyance of an easement for a right-of-way "or other purpose." 40 U.S.C. § 319. *See* H.R. Rep. No. 87-1044, at 2; S. Rep. No. 87-1364, at 2.[18] However, this shows only that Congress intended § 319 to authorize agencies to grant *easements* for purposes other than rights-of-way; it does not suggest that Congress intended to confer granting authority for interests other than easements (as the term was understood in 1962).[19]

Consistent with this interpretation, the only example of an easement specified in § 319 is a right-of-way over federal property. In fact, in a brief exchange between the principal floor sponsor in the House, Representative McFall, and Representa-

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[16] Subsection 319c expressly provides that the authority to convey such easements created in § 319 is not conferred with respect to the vast majority of federal land *See* 40 U S C. § 319c (excluding the public lands, including the national forests, fish and wildlife preserves, and certain other land under the control of the Secretary of the Interior as well as certain Indian trust property from the definition of "real property of the United States" as used in § 319)

[17] The Senate Committee on Public Works stated that "easements might be desired for power transmission lines, pipelines, water lines, roads, and other public utilities or public service facilities, which serve a highly useful purpose, and that if the head of the executive agency determines that such easement is not adverse to the interests of the United States, it should be granted " S Rep No 87-1364, at 3

[18] *See also* Letter for Sam Rayburn, Speaker of the House of Representatives, from John L. Moore, Administrator of GSA (June 12, 1961), *reprinted in* H R. Rep. No 87-1044, at 4 *and* Sen Rep No 87-1364, at 5 The letter explained the draft bill submitted by GSA

> Rather than limit the grant of such easements to enumerated purposes, as is done in 10 U.S C 2668 and 2669, it is felt advisable to permit the head of the executive agency having control of property to grant the easement for such purpose as he deems advisable so long as the interests of the United States will not be adversely affected.

[19] In addition to rights-of-way, other rights recognized as easements when § 319 was enacted include watercourses, percolating waters, spring waters, grants of water power, artificial watercourses, surface waters and drains, support of land and buildings, party walls, partition fences, pews, light and air, and burial rights. *See* 3 Tiffany, *supra*, at §§ 763-775

tive Gross on whether the original bill should be placed on the unanimous consent calender, Representative McFall stated that he thought the bill was "confined to the granting of an easement *for right-of-way purposes*." 108 Cong. Rec. 1591 (emphasis added). When asked to provide examples of the types of easements that could be conferred pursuant to the bill, Representative McFall only offered the example of a right-of-way over federal property and specifically rejected other interpretations of the bill. *Id.* Satisfied by Representative McFall's assurances that § 319 would not change existing laws governing the use and disposal of federal property except to allow the grant of relatively limited types of easements, Representative Gross withdrew his reservation to allow the bill to be placed on the unanimous consent calender. *Id.*[20]

Compared to easements that confer rights-of-way, it is obvious that the scope of private control over federal property made possible by the grant of a conservation "easement" would be much more extensive. We have previously opined that an agreement referred to as an "easement" that amounts in substance to a lease of federal property is beyond the scope of § 319. *See* Kmiec Memorandum at 5-9. We explained that traditional easements are characterized by the "'requirement that the easement involve only a *limited* use or enjoyment of the servient tenement.'" *Id.* at 5 (quoting 4 Powell, *supra*, § 34.02[1], at 34-10 (rev. ed. 1997)); *see also* Restatement § 471, cmts. d and e. For this reason, we concluded that the purported easement at issue in the Kmiec Memorandum was not valid. Kmiec Memorandum at 9.

The type of conservation easement discussed in your request and the types of conservation easements authorized under the Colorado statute do not appear to be limited in scope or constrained by definition. The Colorado statute enforces the seemingly unlimited "right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area or air space above the land or water . . . appropriate to the retaining or maintaining of such land, water, or airspace . . . in a natural, scenic, or open condition." 16A Colo. Rev. Stat. § 38-30.5-102 (1982).

Thus, the scope of restrictions that may be placed on the agency's use of its land under the Colorado conservation easement statute are limited only by the imagination of the drafters of the granting instrument, § 38-30.5-103(4), and the requirement that such use restrictions be "appropriate" to the preservation of land in "a natural, scenic, or open condition," § 38-30.5-102. Moreover, the Colorado statute expressly provides that the remedies available for a breach of a conservation easement are not limited by traditional remedies at law or equity, but also include damages for "the loss of scenic, aesthetic, and environmental values." § 38-30.5-108(3). It is clear that many types of leases would involve fewer limitations on an

[20] Although the text of § 319 plainly authorizes the grant of an easement for a right-of-way or "other purpose," the exchange between Representatives Gross and McFall is evidence that at least some members of Congress thought such other purposes were rather limited.

agency's use of its surplus land than some types of conservation easements.[21] In short, we do not believe that the type of conservation easement authorized by Colorado law is the type of limited easement that is covered by § 319.

Finally, we have reconsidered the legislative history of § 319, and conclude that the purposes underlying the enactment of § 319 seem to have significantly less force in the context of open space preservation. As discussed above, the principal purpose behind § 319 was to promote the "effective administration" of federal property by allowing agencies to respond quickly to the demands of local interests that may present a relatively minor impediment to the completion of a federal land development project. Where, on the other hand, the local interest wishes to secure the perpetual preservation of federal land by *preventing* further development, and the agency is willing to accommodate such a desire, there would ordinarily be little need for a quick conveyance of a conservation easement by the agency. If the agency determines that such preservation is consistent with the interests of the United States, the agency may follow existing procedures for the disposal of excess property, *see* 40 U.S.C. §§ 483, 484, 488, 490, or may seek special legislative approval from Congress for such a conveyance.

DOUGLAS R. COX
Principal Deputy
Assistant Attorney General
Office of Legal Counsel

[21] There are obviously many differences between a lease and a conservation easement, particularly with regard to the possessory interests involved, but there might be little difference with respect to the non-owner's degree of control over the federal agency's use of the land that is subject to the lease or conservation easement. We adhere to the view that Congress did not intend in the passage of § 319 to create a distinction between GSA's authority to direct and supervise leases on federal property and its authority to supervise conveyances referred to as easements that amount to a significant relinquishment of federal control over such property.

Applicability of the Civil Service Provisions of Title 5 of the United States Code to the United States Enrichment Corporation

The United States Enrichment Corporation is exempt from the civil service provisions of title 5 of the United States Code

June 22, 1993

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
UNITED STATES ENRICHMENT CORPORATION

You have requested our opinion on whether the United States Enrichment Corporation ("USEC") is subject to the civil service provisions of title 5 of the United States Code. We have concluded that, under the statute establishing USEC, title IX of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 2923 (codified at 42 U.S.C. §§ 2297-2297e-7) ("the Act"), USEC is exempt from the civil service provisions of title 5.

I.

Before USEC was established, the Department of Energy ("DOE") produced enriched uranium for use as fuel for commercial nuclear power plants. Congress decided that the DOE program was inefficient; the problems included increasing international competition, declining global market share, and billions of dollars in unrecovered costs of production. In response to these problems, Congress decided to transfer the DOE program to a government corporation that could eventually be sold to the private sector, in order to ensure that the program would be operated in a more business-like fashion. *See, e.g.*, H.R. Rep. No. 102-474, pt. VIII, at 75-76 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2293-94; *see also* 42 U.S.C. § 2297a(1), (7) (identifying purposes of USEC, including "[t]o operate as a business enterprise on a profitable and efficient basis" and "[t]o conduct the business as a self-financing corporation and eliminate the need for Federal Government appropriations or [most] sources of Federal financing").

The rules regulating USEC's employees are set forth in 42 U.S.C. § 2297b-4. This provision authorizes the Board of Directors of USEC to "appoint such officers and employees as are necessary for the transaction of its business." 42 U.S.C. § 2297b-4(a). In addition, 42 U.S.C. § 2297b-4(b) provides:

> The Board shall, without regard to section 5301 of title 5, fix the compensation of all officers and employees of the Corporation, define their duties, and provide a system of organization to fix respon-

> sibility and promote efficiency. Any officer or employee of the Corporation may be removed in the discretion of the Board.

By granting the Board broad discretion to make decisions regarding hiring and employment, including decisions on wage rates and removal of employees, these provisions suggest a congressional intent to exempt USEC from the civil service laws regulating such decisions, including the statutory pay system embodied in 5 U.S.C. §§ 5301-5392.

We recognize that, arguably, the use in § 2297b-4(b) of the phrase "without regard to section 5301 of title 5" reveals an intent not to exempt USEC from any provisions of title 5 other than § 5301. However, under the traditional rules of statutory construction, this is not a plausible interpretation of the Act, and the Act should be read as fully exempting USEC from the civil service laws, including title 5's provisions regarding pay rates.

II.

A.

In interpreting the Act we "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), and we must interpret the specific statutory language identified above in the context of the "remainder of the statutory scheme," *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

Section 5301 of title 5 establishes general policy criteria for setting pay rates for federal employees under the General Schedule; the specific rules regulating federal pay rates and systems, in turn, are set forth in the subsequent sections of chapter 53 of title 5. Accordingly, construing the Act to exempt USEC from § 5301 but not the implementing provisions of chapter 53 would create an anomaly: the Board would be authorized to make employment decisions without complying with the basic policy provision of chapter 53, but would have to comply with the specific statutory and regulatory provisions intended to effectuate that policy. It would not make sense to interpret the Act as containing this contradiction, especially because all the other relevant evidence shows that Congress intended to exempt USEC from all of title 5's civil service provisions.[1]

When 42 U.S.C. § 2297b-4(b) is read in the context of the other employee provisions in § 2297b-4 and the rest of the Act as a whole, it becomes even clearer that USEC is exempt from the civil service provisions of title 5, including all the

[1] This reasoning is sufficient to defeat the *expressio unius est exclusio alterius* maxim on which the argument for a contrary interpretation would be based. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47 25 (5th ed 1992) (*expressio unius* maxim should not be applied if its application would result in a contradiction or would not serve the purpose for which the statute was enacted)

rules regarding pay in chapter 53. First, the other provisions in 42 U.S.C. § 2297b-4 demonstrate that Congress authorized USEC to make employment-related decisions without regard to the civil service laws. For example, subsection 2297b-4(c) provides that USEC is to follow certain *general principles* set forth in title 5 governing personnel matters, but also expressly exempts USEC from the *specific requirements* of title 5 in making these decisions:

> **Applicable criteria.** The Board shall ensure that the personnel function and organization is consistent with the principles of section 2301(b) of title 5, relating to merit system principles. Officers and employees shall be appointed, promoted, and assigned on the basis of merit and fitness, and other personnel actions shall be consistent with the principles of fairness and due process *but without regard to those provisions of title 5 governing appointments and other personnel actions in the competitive service.*

42 U.S.C. § 2297b-4(c) (emphasis added).

Furthermore, 42 U.S.C. § 2297b-4 contains certain provisions relating to the rights of employees transferred to USEC from DOE and other government positions. These provisions indicate that Congress contemplated that USEC employees would not be protected by the civil service laws. For example,

> [c]ompensation, benefits, and other terms and conditions of employment in effect immediately prior to the transition date, whether provided by statute or by rules of the Department or the executive branch, shall continue to apply to officers and employees who transfer to the Corporation from other Federal employment *until changed by the Board.*

42 U.S.C. § 2297b-4(d) (emphasis added). This provision reflects Congress's assumption that USEC would be free to set the terms and conditions of employment for its employees, because if USEC were bound by civil service statutes Congress would not have needed to guarantee transferred employees their existing employment terms and conditions. Furthermore, the protection is merely temporary, for it lasts only "until changed by the Board." Thus, Congress provided that USEC would be authorized to change the terms and conditions of employment for transferred government employees without regard to civil service laws. The natural inference from this authorization is that Congress assumed it had given USEC the same authority with respect to new hires and other non-governmental employees.

In addition, the part of the Act that governs the benefits of transferees and detailees reflects Congress's assumption that USEC would retain discretion to set

pension and other benefits without regard to the statutory civil service benefit requirements. That provision states:

> At the request of the Board and subject to the approval of the Secretary, an employee of the [DOE] may be transferred or detailed as provided for in section 2297b-14 of this title, to the Corporation without any loss in accrued benefits or standing within the Civil Service System. For those employees who accept transfer to the Corporation, it shall be their option as to whether to have any accrued retirement benefits transferred to *a retirement system established by the Corporation* or to retain their coverage under either the Civil Service Retirement System or the Federal Employees' Retirement System, as applicable, in lieu of coverage by the Corporation's retirement system. For those employees electing to remain with one of the Federal retirement systems, the Corporation shall withhold pay and make such payments as are required under the Federal retirement system. For those [DOE] employees detailed, the [DOE] shall offer those employees a position of like grade, compensation, and proximity to their official duty station after their services are no longer required by the Corporation.

42 U.S.C. § 2297b-4(e)(4) (emphasis added). If Congress had intended that USEC would generally be subject to the civil service laws, it would not have been necessary for the Act to state that employees transferred or detailed from government jobs to USEC would retain "accrued benefits [and] standing within the Civil Service System." Furthermore, subsection 2297b-4(e)(4) constitutes congressional authorization for USEC to establish its own retirement system in lieu of one of the two retirement systems established in title 5.[2]

Finally, 42 U.S.C. § 2297b-4(e)(3) states that USEC is subject to the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169. This provision also reflects Congress's intent to treat USEC more like a private employer than a government employer for purposes of employment guidelines. Government agencies and departments subject generally to the civil service system of title 5 are not covered by the NLRA; instead, these government entities are subject to the Labor-Management and Employee Relations subpart of title 5. *See* 5 U.S.C. §§ 7101-7135.

Thus, when read together, the employee provisions of the Act require the conclusion that the Act exempts USEC from all of title 5's pay provisions. This interpretation is also consistent with the general purposes of USEC's enabling statute as a whole. As discussed above, Congress established USEC so that it could

[2] *See* 5 U.S.C. §§ 8331-8351 (Civil Service Retirement System), *id.* §§ 8401-8479 (Federal Employees' Retirement System)

implement the uranium enrichment program in a more efficient and competitive manner. USEC was created in order to "operate as a business enterprise on a profitable and efficient basis," 42 U.S.C. § 2297a(1); *see id.* § 2297a(7) (citing as one purpose of USEC, to "conduct the business as a self-financing corporation and eliminate the need for Federal Government appropriations or sources of Federal financing"),[3] and accordingly was authorized to have "all the powers of a private corporation incorporated under the District of Columbia Business Corporation Act," *id.* § 2297b-2(1). The flexibility to make employment decisions without regard to the civil service laws, and particularly to attract highly qualified business executives without regard to federal salary caps, constitutes the sort of competitive advantage that USEC needs to carry out the purpose of the Act.

Our conclusion is also supported by the fact that Congress contemplated that USEC would start out as a government corporation but would eventually be privatized without further action by Congress. Under 42 U.S.C. § 2297d(a), USEC is required to "prepare a strategic plan for transferring ownership of the Corporation to private investors" within two years after the date DOE's uranium enrichment program is transferred to USEC. The privatization plan must be transmitted to the President and Congress, *id.* § 2297d(d); USEC is authorized to implement the plan without additional legislation, so long as the President approves the plan and USEC notifies Congress of its intent to implement the plan and then waits 60 days, *id.* § 2297d-1. Thus, if the Act were interpreted to subject USEC to title 5's civil service provisions and USEC is then privatized, USEC as a private corporation would be covered by the civil service laws. This would produce a very odd result, and one that contradicts the purpose of the Act — namely, to enable USEC to take advantage of the added flexibility a private corporation has to compete in international markets.

B.

The sparse legislative history of the Act supports the above analysis, because it shows that Congress rejected the Senate's language, which would have subjected USEC to most of the civil service laws. The original Senate and House versions of

[3] *See also* H.R. Rep. No. 102-474, pt. II, at 77, *reprinted in* 1992 U.S.C.C.A.N. at 2084 ("A Government corporation, with a clearly defined mission to operate as a commercial enterprise on a profitable and efficient basis, will provide the enrichment program with the businesslike structure and flexibility that is crucial to the survival of the program"), H.R. Rep. No. 102-474, pt. VIII, at 76, *reprinted in* 1992 U.S.C.C.A.N. at 2294 ("This proposal [establishing USEC] addresses the current problems of the DOE program through the establishment of a Government Corporation which eventually could be sold to the private sector. However, it is critical that the new Government Corporation operate according to certain principles in order to be successful. The first principle is that the Government Corporation must be *treated like a private corporation to the fullest extent practicable*. In order for the Government Corporation to become attractive to private investors, it will have to be competitive in the marketplace. This will require freedom from bureaucratic behavior and weaning from special government favoritism.") (emphasis added).

the Act treated USEC's employees quite differently. Section 1504 of S. 2166, 102d Cong. (1992), the bill first passed by the Senate,[4] provided:

> (a) Officers and employees of the Corporation shall be officers and employees of the United States.
>
> (b) The Administrator [of USEC] shall appoint all officers, employees and agents of the Corporation as are deemed necessary to effect the provisions of this title without regard to any administratively imposed limits on personnel, and any such officer, employee or agent shall only be subject to the supervision of the Administrator. The Administrator shall fix all compensation *in accordance with the comparable pay provisions of section 5301 of title 5, United States Code, with compensation levels not to exceed Executive Level II, as defined in section 5313 of title 5, United States Code*: Provided, That the Administrator may, upon recommendation by the Secretary and the Corporate Board . . . and approval by the President, appoint up to ten officers whose compensation shall not exceed an amount which is 20 per centum less than the compensation received by the Administrator, but not less than Executive Level II.

(Emphasis added.) The Senate bill also provided that USEC employees were to be included in one of the two federal civil service retirement systems, S. 2166, § 1504(c), and it explicitly subjected USEC employees to federal laws restricting employee conduct such as the Hatch Act, *id.* § 1504(e). As explained in the committee report accompanying S. 210, 102d Cong. (1991), a bill with identical employee provisions introduced the previous year, the Senate bill would have "subject[ed] USEC employees to all civil service laws except as otherwise provided" in the bill. S. Rep. No. 102-63, at 29 (1991) (discussing effect of § 1504(a)).

Thus, the Senate bill would have explicitly subjected USEC to the compensation provisions of title 5, including the pay cap provision. By contrast, the bill first passed by the House of Representatives, H.R. 776, 102d Cong. (1992), specifically provided that the "[o]fficers and employees of the Corporation *shall not* be officers and employees of the United States." *Id.* § 1305(a) (emphasis added). This language would have unambiguously exempted USEC from all civil service laws.[5]

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[4] *See* 138 Cong Rec. 2567 (1992)

[5] The only other employee-related provisions in the bill protected the existing rights of employees at facilities performing functions vested in USEC and subjected USEC to the NLRA. H.R 776, § 1305(b). Similar provisions were incorporated into the legislation ultimately enacted into law. *See* 42 U.S.C. § 2297b-4(e)(1)-(3).

H.R. 776 was passed by the House on May 27, 1992 and sent on to the Senate. 138 Cong. Rec. at 12,725. The Senate amended H.R. 776 and replaced the House language regarding USEC employees with the language contained in its own bill, S. 2166 (quoted above); the Senate passed the amended bill on July 30, 1992. 138 Cong. Rec. at 20,430.

No legislative history explains the differences between the House and Senate versions of the employee provisions and the language produced by the House-Senate conference and enacted into law. However, a comparison of the House and Senate bills makes clear that the provisions agreed upon effected a compromise under which USEC was exempted from all of the civil service laws relating to employee pay and benefits, but was required to implement "merit system principles" and apply fairness and due process in carrying out personnel actions under 42 U.S.C. § 2297b-4(c).[6] Thus, unlike the Senate version, the Act specifically exempts USEC from 5 U.S.C. § 5301 and authorizes it to fix the compensation of employees, take personnel actions without regard to the relevant title 5 rules, and establish its own pension plan. Furthermore, the Act provides that the "[b]oard shall appoint such officers and employees as are necessary for the transaction of its business," 42 U.S.C. § 2297b-4(a), in contrast to the original Senate version of the bill, which provided that officers and employees would be officers and employees of the United States.

III.

Based on the foregoing analysis of the Act and its legislative history, we have concluded that USEC is exempt from the civil service provisions of title 5 of the United States Code.

DANIEL L. KOFFSKY
Acting Assistant Attorney General
Office of Legal Counsel

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[6] *See* Letter for Honorable James B. King, Director, Office of Personnel Management, from J. Bennett Johnston, Chairman, Senate Committee on Energy and Natural Resources (May 6, 1993) (explaining the Senator's view of the legislative history, based on informal sources that did not become part of the official recorded legislative history) We merely note that this letter supports the theory explaining the change in the bill's language, because the letter is a post-enactment interpretation by one Member of Congress, we do not rely on it in any way for our interpretation. *See, e.g., Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part); *Tataranowicz v Sullivan*, 959 F.2d 268, 278 n.6 (D.C. Cir 1992), *cert denied*, 506 U.S. 1048 (1993), *Multnomah Legal Servs Workers Union v. Legal Servs. Corp.*, 936 F.2d 1547, 1555 (9th Cir 1991).

Construction of § 406 of the Federal Employees Pay Comparability Act of 1990

Section 406 of the Federal Employees Pay Comparability Act of 1990 does not extend the authority to make bonus payments to employees at the New York Field Division of the Federal Bureau of Investigation pursuant to section 601 of the Intelligence Authorization Act for fiscal years 1989 and 1990 beyond the expiration date of the demonstration project established by section 601.

August 23, 1993

MEMORANDUM OPINION FOR THE
ASSISTANT DIRECTOR, LEGAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

This memorandum responds to your request for our opinion whether § 406 of the Federal Employees Pay Comparability Act of 1990 ("FEPCA"), 104 Stat. 1427, 1467,[1] preserves extraordinary benefits payable under § 601 of the Intelligence Authorization Act, Fiscal Year 1989, Pub. L. No. 100-453, 102 Stat. 1904, 1911 (1988), as amended by the Intelligence Authorization Act, Fiscal Year 1990, Pub. L. No. 101-193, § 601, 103 Stat. 1701, 1710 (1989), even after expiration of § 601's payment authority. We conclude that § 406 does not preserve the § 601 benefits beyond the expiration of the latter provision.

Section 601 establishes a demonstration project that attempts to improve recruitment and retention at the New York Field Division ("NYFD") of the Federal Bureau of Investigation ("FBI") by increasing pay. *See* H.R. Rep. No. 100-591(I), at 11-12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2469, 2479-80. Pursuant to § 601, any FBI employee transferred to the NYFD receives a lump sum payment of up to $20,000, conditioned upon the employee's agreement to serve at least three years in that office. § 601(a)(1). In addition, all employees in the NYFD receive periodic bonus payments of between 20 and 25% of their basic pay for the period covered by the bonus. § 601(a)(2). Section 601(b) provides that these benefits will terminate after five years. We understand from you that the program will end on September 30, 1993.

FEPCA institutes a system of pay adjustments for general schedule employees throughout the Federal government, including locality pay to accommodate the higher cost of living in certain areas. Under FEPCA, special agents in the NYFD currently receive a 16% increase over base pay to account for New York's higher cost of living. Similarly, support staff who receive pay under the general schedule

[1] FEPCA was enacted as § 529 of the Treasury, Postal Service and General Government Appropriations Act, 1991, Pub L. No. 101-509, 104 Stat. 1389 (1990). All references to provisions of FEPCA in this memorandum will cite the internal section numbers and corresponding pages in the statutes at large.

receive an 8% increase. Support staff who receive pay under the federal wage system do not receive any increase. *See* FEPCA §§ 101, 404, 104 Stat. at 1429-30, 1466; Exec. Order No. 12786, Schedule 9, *reprinted in* 5 U.S.C. § 5332 note (Supp. III 1991).

Thus, § 601 and FEPCA each provide extra pay for NYFD employees (except for wage employees who receive benefits under § 601 but not FEPCA). FEPCA's § 406, however, instructs the Office of Personnel Management ("OPM") to coordinate the two programs to ensure that their payments are not cumulated:

> Notwithstanding [§ 601], as amended, the Office of Personnel Management shall reduce the rate of periodic payments under such section as the provisions of this Act [FEPCA] are implemented: *Provided*, That no such reduction results in a reduction of the total pay for any employee of the New York Field Division of the Federal Bureau of Investigation. Notwithstanding [§ 601], the Office of Personnel Management may make such periodic payments inapplicable to employees newly appointed to, or transferred to, the New York Field Division on or after January 1, 1992.

The main clause in the first sentence of § 406 clearly does not authorize a continuation of § 601 pay beyond the life of the demonstration project. On the contrary, it expressly directs OPM to *reduce* § 601 payments to NYFD employees as FEPCA is implemented. The second sentence of § 406 also contemplates the curtailing of § 601; it instructs that employees hired after January 1, 1992, need not receive any § 601 benefits.

Notwithstanding this general thrust of § 406, it has been suggested that the proviso in the first sentence might be intended as independent authority to "grandfather" current NYFD employees with continued extra pay at the § 601 level. The suggestion is that the proviso forbids any reduction in the total pay of NYFD employees as a result of a reduction in § 601 benefits. Since the termination of § 601 benefits will cause a decrease in the pay of NYFD employees (because FEPCA's benefits are lower and also do not extend to wage employees), it is urged that the proviso would prevent any reduction in pay by authorizing continued pay at the § 601 level.

This suggestion misconstrues the purpose of the proviso. As indicated above, the main clause of § 406 directs OPM to reduce § 601 payments in response to FEPCA. That clause, however, does not specify by how much the payments are to be reduced. It is the proviso that limits OPM's discretion in this regard. The proviso precludes any reduction of § 601 benefits that "results in a reduction of the total pay for any employee of the [NYFD]." In effect, this means that OPM may not reduce § 601 benefits by more than one dollar for every dollar introduced under FEPCA; if it did, an employee's total pay would be reduced, in violation of the

proviso. Thus, for each reduction in § 601 payments implemented pursuant to the main clause of § 406, the proviso caps the reduction at the amount of FEPCA dollars that the employee receives, which prevents any net loss of pay.

It must be understood that the proviso's protection applies only with respect to OPM's reduction of § 601 benefits *pursuant to § 406*. This much is established by the phrase, "no such reduction," which unmistakably links the proviso's operation with the preceding clause. *See also* 2A Norman J. Singer, *Sutherland Statutory Construction* §§ 47.08-.09 (5th ed. 1992) (in general, a proviso should be strictly construed to relate to the enactment of which it is part). In this case, the reduction of pay will occur as a result of the winding down of § 601's internal clock, and not pursuant to § 406. Thus, the proviso will not be triggered. Accordingly, § 406 cannot be said to authorize continued extra pay at the § 601 rate.[2]

WALTER DELLINGER
Acting Assistant Attorney General
Office of Legal Counsel

[2] We can find no references in the legislative history of FEPCA (nor were any presented to us) to suggest that § 406 was intended to continue § 601 benefits beyond their natural span.

Applicability of 18 U.S.C. § 207(c) to the Briefing and Arguing of Cases in Which the Department of Justice Represents a Party

Section 207(c) of title 18 forbids a former senior employee of the Department of Justice, for one year after his or her service ends, from signing a brief or making an oral argument in a case where the Department represents one of the parties

August 27, 1993

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF GOVERNMENT ETHICS

This memorandum responds to your request for our opinion whether 18 U.S.C. § 207(c) prohibits former high-level Department of Justice officials, within one year after their service in the Department ends, from filing briefs or making oral arguments on behalf of parties other than the United States in cases where the Department represents one of the parties. We conclude that the statute forbids these activities.

I.

Section 207(c) of title 18 prohibits a senior employee, for one year after termination of service, from knowingly making a communication to or appearance before his former department in connection with a matter on which he seeks official action.[1] This Office construed an earlier, similar version of § 207(c) as prohibiting former officials from signing briefs or delivering oral arguments in cases where the Department of Justice represents the United States. *See, e.g.*, Memorandum for a United States Attorney, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Former U.S. Attorneys — 18 U.S.C. 207(c)* (Oct. 22, 1980); Letter for a Former Official, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel at 3 (Sept. 20, 1985) ("Tarr Memo"); Letter for an Independent Counsel, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 5-6 (Apr. 29, 1987) ("Cooper I Memo"); Letter for an Independent Counsel from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 6 (Aug. 28, 1987) ("Cooper II Memo"). The Office of Government Ethics ("OGE") reached the same conclusion. *See The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, 1979-1988*, at 57 (1989) (Informal Advisory Letter No. 80 x 66,

[1] Section 207(d) contains an additional restriction that applies to the most senior officials in the executive branch: such officials may not contact senior officials in other departments and agencies. Our reasoning applies to both § 207(c) and § 207(d).

Aug. 1, 1980) ("OGE Letter No. 80"); *id.* at 283 (Informal Advisory Letter No. 82 x 13, Aug. 31, 1982); *Supplements to the Informal Advisory Letters and Memoranda and Formal Opinions of the Office of Government Ethics*, 62-63 (Informal Advisory Letter 89 x 20, Dec. 21, 1989).

Notwithstanding these prior positions, a memorandum to our files dated January 14, 1993 ("January 1993 Memorandum"), memorialized advice that § 207(c) does not preclude former senior officials from briefing and arguing cases in which the Department is or represents a party. Your recent letter about the January 1993 Memorandum argued that § 207(c) prohibits such advocacy, and that the amendments to § 207, which were passed in 1989, broadened, rather than narrowed, its scope. Letter for Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, from Stephen D. Potts, Director, Office of Government Ethics (June 4, 1993). The question we now face is whether we should revert to our original interpretation of § 207(c) or should adopt the reasoning of the January 1993 Memorandum.

II.

As first enacted in the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1865 — and before the passage of the 1989 amendments, Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1717-18 — § 207(c) of title 18 prohibited a senior government employee (as defined in 18 U.S.C. § 207(d)) from making any oral or written communication to his former agency within one year of the termination of his employment, with the intent to influence the agency in connection with a particular matter in which the agency was interested.[2]

As we interpreted this version of § 207(c), it prohibited covered former officials of the Department of Justice from filing briefs or making oral arguments in cases where the Department represented a party. For example, as we stated in a 1987 letter:

> The no-contact rule of section 207(c) prohibits persons to whom it applies from making any oral or written communication with their former agency on behalf of anyone other than the United States, in connection with any matter pending in their former department, or in which their former agency has a direct and substantial interest. The Department of Justice has historically construed the section to preclude covered former Department of Justice officials from sign-

[2] The main elements of this version of § 207(c) were that a senior employee was prohibited from, (1) within one year of the termination of his employment, (2) "with the intent to influence," (3) "mak[ing] any oral or written communication" (4) to his former department or agency (5) "in connection with any judicial, rulemaking, or other proceeding . or other particular matter" (6) "which is pending before such department or agency or in which such department or agency has a direct and substantial interest." 18 U.S.C. § 207(c) (1988).

> ing briefs or delivering oral argument in court cases where the Department of Justice is representing the United States. We have not construed it to preclude aiding and assisting in a "behind the scenes" fashion in such cases.

Cooper II Memo at 6; *accord* Cooper I Memo at 5-6 (containing identical language).

OGE also adopted this position. In a letter dated August 1, 1980, it squarely addressed whether 18 U.S.C. § 207(c) prohibited a former official from representing a private client in a suit against his former department within one year after he left that department. OGE concluded that such representation would have the "unavoidable intent of attempting to influence and to persuade the defendant in the lawsuit," and thus concluded that it would violate § 207(c). OGE Letter No. 80 at 57-58; *see also* 5 C.F.R. § 2637 (1993) (OGE guidelines prohibiting such representation).[3] Thus, this interpretation of § 207(c) was both longstanding and uniform in this Office and in OGE.[4]

III.

The January 1993 Memorandum points to three possible reasons for reading the present version of § 207(c) as not prohibiting a former official of this Department from filing a brief or making an oral argument in a case where the Department represents a party. First, § 207(a), which forbids communications or appearances as to certain matters on which former officials worked or which were under their official responsibility, specifically mentions communications to or appearances before courts, but § 207(c) refers only to contacts with agencies. Therefore, according to the January 1993 Memorandum, Congress did not intend § 207(c) to reach the filing of briefs or the making of oral arguments in court cases, even if the former of-

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[3] Moreover, in the only judicial opinion that addressed this issue, the court noted that § 207(c) "prevents the plaintiff [a former United States Attorney] . . from involving [himself] in any matters opposed by the Department of Justice for a period of one year." *Sullivan v Director, Office of Personnel Management*, No. 81 C 3810 (N.D Ill. Jan. 7, 1982), *vacated as moot sub nom Devine v. Sullivan*, 456 U.S. 986 (1982)

[4] The January 1993 Memorandum suggests that two letters from this Office modified our interpretation of § 207(c), *id* at 4 n.8, but neither letter bears that construction In the first, we concluded that a former official was prohibited from representing a client by 18 U S C § 207(b)(1) which applied to matters that had been pending under the former official's responsibility. Letter for a Former Official, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (Apr. 17, 1981) We reserved comment on whether § 207(c) would have forbidden such an official from appearing in court if he avoided contact with Department personnel *Id.* at 2 n.*. Because this statement was irrelevant to our conclusion and simply reserved the question, it does not constitute a modification of this Office's interpretation of § 207(c) The second letter cited in the January 1993 Memorandum is inapposite because it involved a former official's representation in a case in which the Department was not a party but could potentially have participated as an amicus curiae Letter for a Former Official, from J Michael Luttig, Assistant Attorney General, Office of Legal Counsel (Oct. 24, 1990). We concluded that such representation would be permissible, but our reasoning included the crucial distinction that amici do not participate as parties and, under the rules of the court involved, the parties' briefs were not served on amici. *Id* at 2.

ficial's agency was served with the brief or was present for the argument. *Id.* at 9-10. Second, the amendments to § 207(c) in 1989 removed a previous reference to communications to agencies in connection with judicial proceedings. From this change, the January 1993 Memorandum inferred that the scope of the section had been narrowed. *Id.* at 11. Third, the January 1993 Memorandum argued that an attorney who files a brief or delivers an oral argument makes a communication to the court, not to any agency that is or represents a party to the case, *id.* at 3-7, and seeks the official action of the court but not of such an agency. *Id.* at 7-8.

A.

As the January 1993 Memorandum points out, § 207(a) specifically mentions communications to or appearances before courts and § 207(c) does not. But the argument that § 207(c) therefore does not reach a former official's filing briefs or making oral arguments in a court case where his former agency represents a party, if valid, would have applied equally to the version of § 207 enacted in 1978. Like the version of § 207 now in effect, the law enacted in 1978 mentioned communications to courts in § 207(a) but not in § 207(c). Nevertheless, the settled interpretation of the 1978 version of § 207(c) was that it barred filing briefs or making oral arguments in court cases where the former official's agency was involved.

Congress's decision in 1989 to reenact § 207 with this same structure buttressed the previous interpretations of § 207(c). In fact, an earlier proposal to amend § 207 assumed that it extended to litigation. The proposal contained a specific exemption to allow former officials to represent clients in litigation against their agencies before the courts. S. 237, the "Integrity in Post Employment Act," would have retained in its essentials the structure of § 207(c) (before the 1989 amendments), except that it would have excluded from its prohibitions "an attorney appearing in a judicial proceeding before a court of the United States." S. Rep. No. 100-101, at 20 (1987). The Senate Report on the section containing the exemption tated that

> [t]his section permits an attorney, who would otherwise be forbidden by section 207(c) from making advocacy contacts in the Federal Government, to represent a client in a judicial proceeding before a court of the United States. In the absence of this provision, attorneys who take a high level Government position . . . could forfeit their only livelihood for the proscribed period after leaving Government service . . . . This section ensures that individuals in this position would not be able to make any advocacy contacts to any executive or legislative body, but could return to the courtroom on judicial business on behalf of a client.

Id. at 29. As these materials reveal, § 207(c) prohibited lawyers from representing clients in judicial proceedings, which would encompass filing briefs and making oral arguments. Congress did not pass the proposed exemption but instead eventually reenacted § 207 with the same structure (in relevant respects) as before. Congress thus left in place the existing prohibition against filing briefs and making oral arguments in court cases.

Furthermore, when Congress amended and reenacted § 207, the administrative interpretation that § 207(c) covered filing briefs or making arguments in court cases was a matter of public knowledge. OGE's 1980 opinion so holding had been published in 1987 in the *Ethics in Government Reporter.* We had set out our identical position in letters supplied to the Special Division of the District of Columbia Circuit that appoints Independent Counsel. By reenacting § 207 with a structure that was, in the relevant respect, identical to that of the earlier version, Congress can reasonably be seen as adopting this administrative construction. *Cf. Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554, 561 (1991) (""'Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.'"") (quoting *United States v. Correll*, 389 U.S. 299, 305-06 (1967) (quoting *Helvering v. Winmill*, 305 U.S. 79, 83 (1938))).

B.

As a result of the 1989 amendments, the present version of § 207(c) prohibits a senior employee from, (1) within one year of the termination of his employment, (2) "with the intent to influence," (3) "knowingly mak[ing] . . . any communication to or appearance before" (4) his former department or agency (5) "in connection with any matter" (6) "on which such person seeks official action by any officer or employee of such department or agency." 18 U.S.C. § 207(c)(1).

According to the January 1993 Memorandum's second argument for its new interpretation of § 207(c), the provision does not cover appearances before a court in which a former official's agency is litigating because the 1989 amendments removed language under which § 207(c) covered communications to an agency "in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter" and replaced it with the phrase "in connection with any matter." *Id.* at 11. The removal of the language modifying the word "matter," however, shows that the coverage of the provision was *broadened*, not narrowed. Congress made the section applicable to "*any* matter," not just those matters specifically listed "or other particular matter[s]." The term "particular matter" had been construed as narrower than the word "matter."

In regulations issued in 1980, OGE had interpreted the "particular matter" language of § 207(c) as excluding certain kinds of matters:

> [Section 207(c)] does not encompass every kind of matter, but only a particular one similar to those cited in the statutory language, *i.e.*, any judicial or other proceeding, application, request for a ruling or determination, contract, claim, controversy, investigation, charge, accusation, or arrest. . . . Not included are broad technical areas and policy issues and conceptual work done before a program has become particularized into one or more specific projects.

5 C.F.R. § 2637.204(d) (1993); *see also id.* § 2635.402(b)(3) (stating that "particular matter" excludes certain kinds of matters). Thus, the regulation indicated that "particular matter" has a narrower meaning than "matter." In light of the natural meaning of the words and the published OGE interpretation of "particular matter," the elimination of the reference to "judicial . . . proceeding[s]" and "other particular matter[s]" does not support the new, narrower interpretation of § 207(c).

C.

The January 1993 Memorandum also relied on two other phrases in § 207(c). The "communications" covered by § 207(c) must be "*to* . . . any officer or employee of the department or agency" in which the former official served. *Id.* (emphasis added). The January 1993 Memorandum argues that a brief is not directed "to" the Department but to the court. As with the structure of § 207, however, this language does not reflect any change from the 1978 version of the statute. The version of § 207(c) in effect before 1989 also required a communication "to" an officer or employee of the department or agency (or the department or agency itself). The settled interpretation of that language was that it covered briefs and arguments in a court case.

Moreover, the January 1993 Memorandum's interpretation of "communication to" does not comport with the realities of litigation. Briefs and oral arguments are directed not only to the court but also to the opponent, as part of a dialogue between the parties. The January 1993 Memorandum acknowledges that § 207(c) probably prohibits some forms of this dialogue — for example, "[a] colloquy between counsel in the courtroom." *Id.* at 13. But such statements are, like briefs and oral arguments, technically addressed to the court. The January 1993 Memorandum thus concedes that statements technically addressed to the court are also statements to opposing counsel, and this concession undercuts the conclusion of the January 1993 Memorandum. Written briefs and oral arguments, while more formal than some oral statements in court, are still elements of an exchange between counsel.

The 1989 amendments did add, as an element of the offense under § 207(c), that the former official must "seek official action" from his former department or agency. Whatever the effect of this change in other contexts, however, we do not believe that the new language alters the result here.

The reasoning of the prior opinions of this Office and OGE answers the question whether a former official who files a brief or makes an oral argument "seeks official action" from an agency that is or represents a party to the case. The prior opinions conclude that an attorney who takes such action is trying to influence the activities of the agency involved. As OGE stated in its 1980 letter, briefs and oral argument "have the additional unavoidable intent of attempting to influence and to persuade the defendant in the lawsuit. The role of the plaintiff's lawyer is in large part to have the defendant [Department] change its position as a result of what plaintiff argues in court." OGE Letter No. 80 at 57-58;[5] *see* Tarr Memo at 3 (noting OGE's reasoning in concluding that a former official cannot brief or argue cases within one year of termination). Under this reasoning, an attorney filing a brief or making an oral argument "seeks official action" from the officers and employees of an agency or department that is or represents a party to the case.[6]

The representation of the United States in litigation is an official act of the attorney who works on the case. An essential part of this official act is the presentation of the government's arguments, both orally and in written briefs. Although a former official's briefs and arguments are formally addressed to the court, rules of procedure provide each party with an opportunity to rebut the other's arguments and require that briefs be served on counsel for each party. *See, e.g.*, Sup. Ct. R. 25 (time for filing briefs); *id.* 29 (service of briefs); *id.* 28 (structure of oral argument); Fed. R. App. P. 31 (time for filing briefs and service of briefs); *id.* 34 (oral argument). The provision of a period during which an adverse party can formulate arguments constitutes a recognition — and expectation — that the parties respond to their opponents' arguments. A litigator's briefs and arguments seek to persuade the opponent that his view of the case is erroneous or, at the least, seek to frame the dispute and win concessions about the issues and principles that should lead to a

[5] OGE's informal Advisory Opinion 80 x 6 gave two different grounds for concluding that a former official could not undertake the representation there: first, that a communication directed to the court was also necessarily an attempt to persuade the adverse party (the official's former agency), *id*., and second, that on the facts of the case the former official would be likely to interact with officials of his former agency *Id.* at 58. The first ground is sufficient to decide the issue here. As is noted above, however, a brief or oral argument also involves an interaction between counsel

[6] The January 1993 Memorandum suggests that, with respect to the "official action" requirement, there is no basis for distinguishing briefs from advocacy pieces in newspapers or correspondence to the Department on firm letterhead, if the former official's name appears on that letterhead. *Id* at 6 & n 11 Briefs can be distinguished from these other forms of communication, however, because the latter are not nearly so focused and directed as communications in a court case. Briefs are sent from the litigating counsel to named attorneys in the Department and thus constitute a communication between litigating *attorneys*, whereas the other forms of communication either are not from a specific attorney (e.g , inclusion of a name on letterhead) or are not to a specific Department attorney (e g , advocacy pieces in newspapers). Furthermore, most advocacy pieces are written on behalf of the author, and § 207(c)(1) penalizes only communications "on behalf of any other person "

decision by the court. Moreover, in multi-party cases in which the Department appears, a party's briefs or arguments may be aimed, in part, at enlisting the United States' support for at least some of that party's positions, as against the other parties. Thus, briefing and oral argument, by their nature, not only request action by the court but also "seek official action" by the Department, in the form of modifications to or abandonment of arguments or claims. The 1989 amendments' reference to such "official action," therefore, does not affect the applicability of § 207(c) to briefing and oral argument.

Finally, the legislative history of the 1989 amendments does not indicate any intent to narrow the application of § 207(c), by the addition of the "seeks official action" language or otherwise, in situations where a former official submits a brief or makes an argument to a court. In fact, the only intent expressed — and the apparent impetus for the amendments to § 207(c) — was Congress's rejection of the conclusion reached by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Nofziger*, 878 F.2d 442, *cert. denied*, 493 U.S. 1003 (1989), that an element of the offense was that the defendant knew of all the facts making his conduct illegal.[7] There is no suggestion in the legislative history that Congress intended to narrow the scope of § 207(c).[8]

IV.

Thus, before this year, this Office interpreted § 207(c) to prohibit former senior officials from briefing and arguing cases in which the Department is or represents a party. OGE, too, consistently held this view. There is no persuasive evidence that Congress intended that the amendments to § 207(c) would produce a different result. Moreover, application of § 207(c) to the briefing and arguing of cases comports with the language and history of the statute.[9]

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[7] Senator Levin emphasized this concern, stating that

> [i]n the recently decided case involving former Presidential aide Lyn Nofziger, the court of appeals held that under the current law, the word "knowing" modified all the elements of the offense including the provision that the particular matter was pending before the subject department or agency or that the agency had a direct and substantial interest in the particular matter. That judicial interpretation does not reflect congressional intent. We correct that misinterpretation in this bill by including a knowing standard only for the act of making the communication with the intent to influence and state that the offense is committed if the former employee seeks official action by an agency or department employee. There is no requirement, here, that the former employee know that the particular matter on which he or she is lobbying was a matter of interest or was pending before the subject agency or department. Thus, we are able to set the record straight on this matter.

135 Cong. Rec. 29,668 (1989).

[8] *See id.* (Section-by-section analysis describing new version of § 207(c) as "similar to current law" and failing to indicate any changes in scope of § 207(c).)

[9] The January 1993 Memorandum suggested that the rule of lenity is relevant because § 207 is a penal statute. *Id.* at 12. Even assuming that the rule would otherwise be pertinent, it applies only if "after a court has '"seize[d] every thing from which aid can be derived"' it is still 'left with an ambiguous statute.'" *Chapman v. United States*, 500 U.S. 453, 463 (1991) (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805))); *see Moskal v. United States*,

All of these factors militate against the new interpretation set forth in the January 1993 Memorandum. Accordingly, we conclude that the January 1993 Memorandum was in error and instead return to the interpretation of § 207(c) that this Office took before that memorandum was written.

DANIEL L. KOFFSKY
Acting Deputy Assistant Attorney General
Office of Legal Counsel

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498 U S 103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute ") (quoting *Bifulco v United States*, 447 U S 381, 387 (1980)) The rule of lenity could not apply here because the language and history of § 207(c) show that it prohibits former officials from briefing and arguing cases against the United States, and no ambiguity remains.

Ethics Issues Related to the Federal Technology Transfer Act of 1986

A government employee-inventor who assigns his rights in an invention to the United States and accepts the government's payment of amounts tied to the resulting royalties, as provided in the Federal Technology Transfer Act of 1986, may continue to work on the invention without violating the statute against taking part in matters in which he has a financial interest, 18 U.S.C. § 208, or the statute forbidding supplementation of federal salaries, 18 U.S.C. § 209

Under 18 U.S.C § 208, a government employee-inventor may not take official action with respect to an agreement for development of his invention entered into by the United States and a company with which the employee has contracted to exploit the invention abroad.

September 13, 1993

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF GOVERNMENT ETHICS

You have asked us to advise whether we agree with a September 27, 1988, letter from the Office of Government Ethics ("OGE") to the Department of Commerce ("1988 OGE letter") and to review a draft OGE letter to the Special Counsel for Ethics at the Department of Health and Human Services ("draft OGE letter"). Both letters address issues involving the relationship between federal conflict-of-interest laws and the Federal Technology Transfer Act of 1986 ("FTTA"), as amended, 15 U.S.C. §§ 3701-3717. We believe that the 1988 OGE letter was correct in concluding that payments to a government employee under FTTA section 7 do not violate 18 U.S.C. § 208 or 18 U.S.C. § 209(a). We also agree with the conclusion of the draft OGE letter that, on the specific facts stated there, § 208 bars an employee from working in his official capacity on an invention for which the employee holds a foreign patent, and for which the employee has contracted for foreign commercialization with the same company that is under contract with the federal government to develop the invention.

I.

Congress enacted the FTTA in 1986 as part of a continuing effort to encourage technology transfers from federal research laboratories to private industry. The FTTA amended the Stevenson-Wydler Technology Innovation Act of 1980, Pub. L. No. 96-480, 94 Stat. 2311, which created incentives for federal agencies and employees to work with private industry in commercializing new technologies developed in federal laboratories.[1] To this end, section 7 of the FTTA requires a

[1] *See, e.g.*, 132 Cong. Rec. 20,388 (1986) (statement of Sen. Gorton) ("The FTTA is designed to improve the transfer of technology out of the Federal laboratories and into the marketplace. . . . It improves the

government agency to "pay at least 15 percent of the royalties or other income the agency receives on account of any invention to the inventor . . . if the inventor . . . assigned his or her rights in the invention to the United States." 15 U.S.C. § 3710c(a)(1)(A)(i). Once section 7 payments are made to an employee-inventor, the individual generally will continue to work on the development and improvement of the invention, including its commercialization as part of federal research and development efforts. These efforts may include a cooperative research and development agreement ("CRADA"). CRADAs are cooperative agreements with universities or other entities in the private sector and are aimed at refining an invention and transferring it to the marketplace. They are specifically authorized under section 2 of the FTTA.[2]

At the same time, federal ethics laws generally prohibit government employees from personally participating in matters where they have a "financial interest." Under 18 U.S.C. § 208:

> Except as permitted by subsection (b) hereof [concerning waivers and other exclusions], whoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he . . . has a financial interest — Shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 208(a).[3] If amounts paid to government employees under FTTA section 7 constitute a "financial interest" in the invention, then the employee-inventor probably would be forbidden to continue working on the project while receiving section 7 payments.

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incentives for Federal scientists to put in the time and effort to explore the commercial possibilities of their inventions by requiring agencies to share at least 15 percent of the royalties received from patents with the inventor.")

[2] Section 2 provides in relevant part:

> Each Federal agency may permit the director of any of its Government-operated Federal laboratories, and, to the extent provided in an agency-approved joint work statement, the director of any of its Government-owned, contractor-operated laboratories —
>
> (1) to enter into cooperative research and development agreements on behalf of such agency . and
>
> (2) to negotiate licensing agreements . . for inventions made or other intellectual property developed at the laboratory and other inventions or other intellectual property that may be voluntarily assigned to the Government

15 U.S.C § 3710a(a).

[3] Section 216 provides both civil and criminal penalties for violations of § 208. 18 U S C. § 216

In 1988, OGE resolved this apparent conflict by concluding that amounts paid to federal employees under section 7 constitute compensation from the government and that such compensation does not constitute "a financial interest" under § 208. While the 1988 opinion was not reviewed by this Office at that time, it is consistent with views we expressed in an earlier opinion. In 1980, this Office concluded that § 208(a) does not cover a situation "in which the only financial interest in the [particular matter] is that which federal employees have in their government position and salary, as to which no outside financial interest is implicated." *See* Memorandum for Thomas Martin, Deputy Assistant Attorney General, Civil Division, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: 18 U.S.C. § 208 and Pending Salary Adjustment Litigation* at 3 (Jan. 24, 1980) ("1980 Opinion").[4]

The question whether the term "financial interest" as used in § 208 covers compensation received by a government employee in connection with his government employment has never been conclusively settled.[5] As in any task of statutory construction, we begin with the text, *see, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981) ("In determining the scope of a statute, we look first to its language."), and are bound by the "fundamental canon" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Section 208 does not define the term "financial interest." It could be interpreted to refer to any number of potential monetary or other personal interests of a covered person, including an individual's federal compensation.

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[4] In 1985 and again in 1987, we admittedly questioned the correctness of the 1980 Opinion in light of the "plain language" of § 208(a) *See* Memorandum for Richard K. Willard, Assistant Attorney General, Civil Division, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re 18 U.S.C § 208 and Participation of Departmental Attorneys in Debt Ceiling Litigation* at 2 n 1 (Dec. 6, 1985); Memorandum for the Solicitor of the Interior, from Samuel A. Alito, Jr , Deputy Assistant Attorney General, Office of Legal Counsel, *Re Scope of the Term "Particular Matter" Under 18 U.S.C 208* at 9 n 13 (Jan. 12, 1987) Notwithstanding those opinions, we adhere to our 1980 Opinion.

[5] The only case arguably on point is *United States v. Lund*, 853 F.2d 242 (4th Cir. 1988) In that case, the court applied § 208 to interests arising from a federal employee's government salary. The facts of that case, however, are unique. The defendant was a federal manager who married a subordinate and kept their marriage secret. The defendant continued to supervise his wife and, over time, granted her higher pay, promoted her over another applicant, and recommended her for a government-funded graduate school program

This conduct was found to violate § 208. The specific issue before the Court, however, was whether § 208(a) was "applicable to conflicts of interest in intra-agency personnel matters." *Id.* at 243. Based upon the statute's plain language, the Court concluded that § 208(a) was applicable to such conflicts, rejecting the argument that the statute's "reach is limited to conflicts of interest in matters involving outside suppliers of goods and services to the government." *Id.* at 244.

The implication of the *Lund* court's decision was that a federal employee's spouse's employment contract represented a § 208 "financial interest," even if that contract was with the federal government. The Court did not, however, directly address the issue whether the covered employee's own federal employment contract could constitute a "financial interest" giving rise to a prohibited conflict. Moreover, it is significant that the arrangement was kept secret As will be discussed *infra*, Congress appears to have been principally concerned with financial interests that would not be known to the agency involved In any case, it is unclear whether *Lund* could be extended beyond its very peculiar facts.

It is also true, however, that in "ascertaining the plain meaning of [a] statute, the court must look to . . . the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).[6] In this regard, the provisions of § 208(b) may illuminate the meaning of subsection (a). Section 208(b) provides that:

> Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee.

18 U.S.C. § 208(b).

The creation of a procedure whereby employees may obtain exceptions from the prohibitions of subsection (a) upon disclosure of their financial interest indicates that Congress was not referring to "financial interests" that need no disclosure, such as the compensation a federal employee receives from the government. This rationale led to our original determination that the compensation received by federal employees was not a "financial interest" within the meaning of § 208(a). As noted in the 1980 Opinion, the full disclosure requirements of § 208(b) "suggest that the interest of concern is one that, without such disclosure, would not be ordinarily known to the appointing official. Otherwise, there would appear to be no logical or practical reason for requiring 'full disclosure' by the federal employee." 1980 Opinion at 2.

This interpretation of § 208 is supported by its legislative history. Section 208 was enacted in its present form in 1962. Before its enactment, 18 U.S.C. § 434 forbade federal employees from acting for the United States in the transaction of business with any business entity in which they were "directly or indirectly interested in the pecuniary profits or contracts." 18 U.S.C. § 434 (1958). In 1962 § 434 was replaced by § 208, which was intended to broaden the scope of its prohibitions — in particular to cover financial interests held by the spouse, children and partners of covered persons. However, as noted in our 1980 Opinion, it is doubtful that Congress meant to "sweep within § 208's ambit every conceivable financial interest of whatever type." 1980 Opinion at 3. For example, the Senate Report on the bill that became § 208 explained that:

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[6] *See also Richards v United States*, 369 U S. 1 (1962), *Federal Power Comm'n v Panhandle Eastern Pipe Line Co*, 337 U S 498 (1949)

> The disqualification of the subsection embraces any participation on behalf of the Government in a matter in which the employee *has an outside financial interest*, even though his participation does not involve the transaction of business.

Id. (citing S. Rep. No. 87-2213, at 13 (1962)) (emphasis added). Thus, § 208 was enacted to extend the reach of federal conflict-of-interest prohibitions to cover the "outside" financial interests of a covered employee — those interests outside of the individual's federal employment contract that would not necessarily be evident to the employee's superiors. Examples would include personal investments or the financial interests of an employee's family or business partners. There is little evidence that Congress meant also to encompass the employee's interest in his own federal compensation.

Indeed, if "financial interest" is interpreted to include compensation received from the federal government, the section could lead to absurd results. If an employee's federal salary were characterized as a "financial interest" under § 208(a), any action taken with the intent to increase that salary — enthusiastically and conscientiously performing his or her duties in the hope of promotion for example — might be forbidden by that section. Or an employee who must decide claims brought against the United States — a Social Security hearing officer for example — might well violate § 208 whenever he or she decides in favor of the federal government. An employee might be said to have a conflicting "financial interest" in protecting the federal treasury, from which his or her own livelihood is drawn, and § 208(a) expressly reaches the financial interests of the government employee's employer. There appears to be no principled distinction that would exclude such actions or determinations made by an officer or employee from § 208's reach, if federal compensation is considered a "financial interest." Such an interpretation of the statute would subject federal employees to possible prosecution under § 208 for the vigilant performance of their duties.

In addition, we note that Congress enacted the FTTA against the background of the conflict-of-interest laws, including § 208. It is well settled that statutes must be construed as consistent if possible, and that an earlier statute should not be read broadly when the result would be to circumvent a later enactment. *See Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989). In this connection, we note that the Supreme Court has declined to interpret federal conflict-of-interest laws broadly when the effect would be to forbid activity specifically authorized by Congress in a later enactment. *See United States v. Chemical Found., Inc.*, 272 U.S. 1, 17-19 (1926) (predecessor statute of § 208 does not cover transactions authorized under later measure passed to deal with wartime conditions).[7] We believe that § 208 can and should be interpreted as consistent with the provisions of the FTTA.

Payments made to employees under FTTA section 7 are federal compensation, indistinguishable for these purposes from salary, benefits, and other payments such as performance awards. The 1988 OGE letter concluded that royalty payments made under section 7 should be viewed as "additional compensation for Federal service," noting that the United States retains ownership rights in the invention under FTTA section 7 and that the inventor receives his or her share in the royalty payments from the United States, not directly from the outside licensee. This conclusion finds additional support in section 7, which provides that employees can receive payments in excess of $100,000 under this program *only* with the approval of the President under the provisions regarding presidential cash awards — 5 U.S.C. § 4504. 15 U.S.C. § 3710c(a)(3).

Therefore, we conclude that compensation received by an employee under FTTA section 7 does not constitute a "financial interest" under § 208. Such employees may receive payments under section 7 and continue to work on the development and commercialization of their inventions.[8]

II.

In addition, we agree with the 1988 OGE letter's conclusion that FTTA section 7 payments are not prohibited supplementations of salary under 18 U.S.C. § 209(a). Section 209(a) prohibits federal employees from receiving any supplementation of salary in consideration of the performance of their official duties "from any source other than the Government of the United States." Since an employee receives section 7 payments from the federal agency holding the rights to the invention, the payments are not subject to § 209(a)'s prohibition.

III.

The draft OGE letter concerns section 8 of the FTTA. Under that section, when an agency having the right to ownership of an invention

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[7] *See also Busic v United States*, 446 U.S 398, 406 (1980) (more specific statute given precedence over more general one, regardless of sequence of enactment).

We acknowledge that the Senate report on the FTTA stated that the provisions of the bill "ma[d]e no changes in the conflict of interest laws affecting Federal employees or former Federal employees " S Rep No. 99-283, at 10 (1986) This statement, however, could indicate that the Congress that passed the FTTA may well have believed that § 208 did not reach any forms of compensation by the government

[8] Given this conclusion, it follows that an employee entitled, or potentially entitled, to payments under section 7 also may work on an invention pursuant to a CRADA, without violating § 208 It would be entirely arbitrary to conclude that an employee could work on an invention potentially leading to such payments before, but not after, a CRADA is signed by the federal laboratory that employs him. He would have the same interest in the potential payments, and the substance of his research would likely be the same, both before and after his laboratory entered into the CRADA. Furthermore, the FTTA expressly contemplates that employees, in at least some circumstances, will continue to work on their inventions under CRADAs. · 15 U.S C. § 3710a(b)(5) Application of § 208 would mean that, absent a waiver, employees could *never* do such work under CRADAs, because successful work would enable the employees to receive larger payments under section 7. There is no indication that Congress intended such a result

> does not intend to file for a patent application or otherwise to promote commercialization of such invention, the agency shall allow the inventor, if the inventor is a Government employee or former employee who made the invention during the course of employment with the Government, to retain title to the invention [subject to reservation of a nonexclusive, license for the Government].

15 U.S.C. § 3710d(a). Under this provision and implementing regulations, an agency may determine to prosecute a patent application in the United States, but not abroad, leaving foreign rights to the employee-inventor. 37 C.F.R. § 101.8 (1993).

The draft OGE letter addresses a case in which the federal government, while choosing to commercialize an invention in this country, has permitted the inventors to retain foreign patent rights. Specifically, three federal employee-inventors share the rights to obtain certain foreign patents. The United States owns the domestic patent. These individuals have obtained some foreign patent rights and have entered a licensing agreement with a private firm, granting it the right to exploit the inventions overseas in exchange for royalties. Draft OGE letter, at 2-3. At the same time, the agency employing the three inventors has awarded an exclusive license to develop and exploit the inventions domestically to the same licensee. Moreover, the agency intends to enter a CRADA with the licensee under which that firm would handle the clinical trials necessary to test and evaluate the invention for the marketplace. "Thus, the private firm has an exclusive license for both the Government's domestic patent rights and the employee-inventors' foreign patent rights, plus a research and development agreement with the Government to develop and test the product." *Id.* at 4. Two of the three employee-inventors will be directly involved, as part of their official duties, with work related to the invention through the CRADA. It is, in fact, "typical for the inventor and the Government to enter into licensing agreements with the same firm" and "it is often in the Government's best interest to allow inventors who hold foreign rights to continue to develop their work." *Id.* at 4.

OGE has concluded that the employee-inventors have a § 208 "financial interest" in their inventions "because they own the foreign patent rights from which they receive royalties," and that they cannot, therefore, "officially act on any matter involving the private firm to which they assigned their patent rights. This prohibition would include work by the employee-inventors on the research and development agreement with the private firm." *Id.* at 5. In distinguishing these interests from the interest of an employee-inventor in section 7 royalty payments, OGE notes that here the inventors, not the United States, own the patent rights and that they consequently are "placed into a direct relationship with the party paying royalty fees." *Id.* Moreover, OGE points out that the licensing agreement itself constitutes a § 208 "financial interest."

We agree with OGE that the employee-inventors are prohibited by § 208(a) from taking official action involving the CRADA between the United States and their licensee. The license agreement between the employee-inventors and the government's contractor appears to constitute a "financial interest" under § 208(a). Accordingly, the employee may not participate "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise," in the performance or administration of the CRADA. We do not, however, believe it necessary to determine whether the inventor-employees' interest in foreign patent rights constitutes a "financial interest" that in itself would prohibit them from otherwise continuing the government's research into this invention. While the employee-inventors' section 8 ownership interest in the foreign patent rights to the invention is distinguished from their royalty rights under section 7, both interests constitute an integral part of the FTTA incentive program created by Congress. Both arguably may be characterized as "compensation" to the employee, and there seems little reason to distinguish between the two interests — both of which will be known to the individuals' supervisors. It is unnecessary to resolve this broader question, and we decline to do so.[9]

WALTER DELLINGER
Acting Assistant Attorney General
Office of Legal Counsel

[9] There does, however, appear to be a clear distinction between owning the patent rights themselves, and an interest in a licensing agreement under which those rights are exploited. This would be analogous to an employee who receives section 7 royalty payments, and who invests those sums in the shares of a business corporation. Such an employee would be forbidden by § 208(a) to participate in a CRADA with that corporation involving the employee's invention. This is true not because the royalties, or patent rights under section 8 are a "financial interest," but because the employee's investment, or licensing agreement, is such an interest.

General Services Administration Printing Operations

The Joint Committee on Printing lacks the authority to alter the General Services Administration's printing operations because the only basis for that authority is an invalid legislative veto provision contained in 44 U.S.C. § 501.

Section 207 of Public Law Number 102-392 requires executive branch entities (other than the Central Intelligence Agency, the Defense Intelligence Agency, and the National Security Agency) to procure printing related to the publication of government publications by or through the Government Printing Office.

September 13, 1993

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This memorandum responds to your request for our opinion on certain restrictions that the Joint Committee on Printing ("JCP") has attempted to place on the printing operations of the General Services Administration ("GSA"). In particular, you have asked us whether the JCP has the authority to restrict GSA's printing functions, and whether recent legislation has any effect on GSA's authority to engage in printing. We conclude that the JCP does not have the authority to alter GSA's printing operations, but that section 207 of Public Law Number 102-392, 106 Stat. 1703, 1719 (1992) (codified as a note to 44 U.S.C. § 501) mandates procurement of printing for executive branch agencies by or through the Government Printing Office ("GPO").

I

Section 501 of title 44 provides that all executive, congressional, and judicial printing must be done at the GPO, except for printing in field plants operated by executive departments or independent offices "if approved by the Joint Committee on Printing." This Office issued an opinion in 1984 determining that the requirement of approval by the JCP constitutes an unconstitutional legislative veto, because it purports to empower a single committee of Congress to take legislative action without meeting the Constitution's requirements of bicameral passage and presentment to the President. Memorandum for William H. Taft, IV, Deputy Secretary of Defense, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Effect of INS v. Chadha on 44 U.S.C. § 501, "Public Printing and Documents"* (Mar. 2, 1984); *see INS v. Chadha*, 462 U.S. 919 (1983) (holding legislative veto unconstitutional for failure to comply with constitutional require-

ments of bicameralism and presentment). The opinion concluded that the provision allowing field printing is severable from the invalid approval mechanism and that the remainder of the statute, permitting field printing, remains effective.

Section 501 of title 44 is the only statute that purports to give the JCP direct authority over government field printing operations. Congress has not amended 44 U.S.C. § 501, nor has it passed any other legislation granting the JCP new authority over printing. Thus, the JCP lacks the authority to alter executive agencies' printing operations; its only asserted authority to do so is contained in an invalid approval mechanism.

The JCP has, on a number of occasions, asserted its authority to alter GSA's printing operations. In particular, it has stated that it "modified the charters of all GSA printing plants" by means of a letter sent to GSA on March 16, 1989. *See* Letter for Richard G. Austin, Administrator, General Services Administration, from the Honorable Charlie Rose, Chairman, and Senator Wendell H. Ford, Vice Chairman, Joint Committee on Printing, at 1 (Jan. 15, 1993). The March 16, 1989, letter apparently relied on the JCP's purported authority under 44 U.S.C. § 501 in stating, "please advise your [GSA's] field printing and duplicating organizations to restrict their activities to providing services to Federal agencies within their immediate building complexes." Letter for Richard G. Austin, Acting Administrator, General Services Administration, from Senator Wendell H. Ford, Acting Chairman, Joint Committee on Printing (Mar. 16, 1989). Because the JCP lacks the authority to restrict GSA's printing operations, its attempt in 1989 to alter GSA's field printing operations, as well as all other attempts by the JCP to modify unilaterally the printing operations of executive agencies, are invalid.

II

Although Congress has not passed legislation granting the JCP direct authority over executive agencies' printing operations, it has passed legislation that requires executive branch agencies to procure printing through the GPO. Paragraph (a)(1) of section 207 of Public Law Number 102-392 provides as follows:

> None of the funds appropriated for any fiscal year may be obligated or expended by any entity of the executive branch for the procurement of any printing related to the production of Government publications (including printed forms), unless such procurement is by or through the Government Printing Office.

The scope of section 207(a)(1) is quite broad: it applies to any appropriated funds expended by any executive branch entity, which would encompass virtually all

spending by all executive branch agencies.[1] *Cf.* 5 U.S.C. app. § 8E (Inspector General Act of 1978) (defining the term "Federal entity"). Thus, section 207(a)(1) mandates that all executive agencies procure all of their printing related to the production of government publications by or through the GPO.[2]

There are, however, three limitations on this provision. Section 207(a)(2) exempts from the strictures outlined above:

> (A) individual printing orders costing not more than $1,000, if the work is not of a continuing or repetitive nature, and, as certified by the Public Printer, cannot be provided more economically through the Government Printing Office, (B) printing for the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency, [and] (C) printing from other sources that is specifically authorized by law.

The first two exemptions place clear, but narrow, limits on the scope of section 207. Only the third exemption could potentially exempt GSA entirely from the restrictions of section 207(a)(1). The sole remaining question, then, is whether GSA may be exempted pursuant to section 207(a)(2)(C), which exempts "printing from other sources that is specifically authorized by law."

III

You have identified two possible statutory bases for the proposition that GSA's printing operations are specifically authorized by law. The first is 40 U.S.C. § 481(a)(3), which authorizes the Administrator of GSA to "procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities." The second is 40 U.S.C. § 293, which provides in relevant part that, "[f]or the establishment of a working capital fund there is appropriated $50,000, without fiscal year limitation, for the payment of salaries and other expenses necessary to the operation of a central blue-printing, photostating, and duplicating service."

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[1] Previous versions of the note to 44 U.S.C. § 501 (where section 207 is codified) contain similar restrictions on printing procured by entities of the executive branch. *See, e.g.*, 44 U.S.C. § 501 note (Supp. II 1990) (Legislative Branch Appropriations Act, 1991, Pub. L. No. 101-520, § 206, 104 Stat. 2254, 2274 (1990)). These prior versions had a significantly narrower scope, however, as they applied only to the procurement of printing "from commercial sources." *See id.*

[2] Section 207 does not violate the separation of powers by delegating executive authority to the GPO. *See Applicability of Post-Employment Restrictions on Dealing with Government to Former Employees of the Government Printing Office*, 9 Op. O.L.C. 55 (1985) (concluding that the GPO is a unit of the legislative branch for purposes of post-employment restrictions). It does not give the GPO the authority to refuse to print any materials, but rather merely requires that printing be procured "by or through" the GPO. Moreover, because 44 U.S.C. § 1101 provides that "[t]he Public Printer shall execute such printing and binding for the President as he may order and make requisition for," the executive branch retains its ability to ensure that materials are printed.

Section 481(a)(3) of title 40 does not constitute specific authorization to print. The provision does not mention printing or any printing-related services. This omission is particularly striking in light of the reference in a companion provision, § 481(a)(1), to other aspects of "procurement and supply of personal property and nonpersonal services," such as "contracting, inspection, [and] storage." The specific reference in § 481 to such functions can be contrasted with the omission of any reference to printing. Moreover, there are no references to printing in the legislative history of 40 U.S.C. § 481. Thus printing is authorized by this provision only as one of the many services that GSA provides. Such broad authorization to engage in certain categories of services is, by definition, general. There is no basis for suggesting, therefore, that this provision satisfies the requirement that the printing be "specifically authorized by law."

Section 293 is a somewhat closer case, because it does mention "blue-printing, photostating, and duplicating," which could be construed to include most, and perhaps all, of GSA's printing operations. The problem with this section is that, although it specifically mentions these printing operations, it does not specifically authorize them.

Section 293 was originally enacted as a section of an appropriations act that was passed in 1945, Independent Offices Appropriation Act, 1946, Pub. L. No. 79-49, § 101, 59 Stat. 106, 115 (1945), and has not been substantively amended since then. This section of the appropriations act authorized the creation and maintenance of a fund to pay salaries and other expenses; that is, it merely appropriated funds. The operative effect of the current version, similarly, is to authorize the use of certain money to fund ongoing operations. The structure of § 293 is that it appropriates $50,000 for the payment of salaries and expenses necessary to the operation of printing services. The phrase "necessary to the operation of a central blue-printing, photostating, and duplicating service" indicates that the printing service — and any authorization for it — exists irrespective of the appropriation in § 293. The reference to printing merely clarifies the purposes for which the funds shall be used. Thus, § 293 clearly contemplates that GSA[3] will operate "a central blue-printing, photostating, and duplicating service," but it does not, by its terms, authorize such a service. The language of the section reveals that its operative effect is to authorize the use of funds to pay for certain functions, not to authorize those functions *per se*.

Arguably, the establishment of a fund to pay for printing also constitutes an implied authorization to print. Such implicit authorization, however, does not appear to meet the requirement that the printing be "specifically authorized by law." "Specifically" is defined as "[w]ith exactness and precision; in a definite manner," Webster's New International Dictionary 2415 (unabridged 2d ed. 1957), and

[3] The original version of 40 U S C § 293 appropriated funds for blue-printing, photostating and duplicating by the Federal Works Agency Section 103 of the Federal Property and Administrative Services Act of 1949, Pub. L No 81-152, 63 Stat 377, 380, transferred all functions of the Federal Works Agency to GSA

"specific" means "[e]xplicitly set forth; definite." American Heritage Dictionary 1730 (3d ed. 1992). In this case, the authorization to print is not explicitly set forth or presented in a definite manner. At most, it is indirectly entailed in the explicit authorization to appropriate funds. The absence of an express authorization to print defeats any argument that GSA's printing operations were "specifically authorized by law." Thus, in 40 U.S.C. § 293 there is a specific reference to printing, and there may be an implied authorization to print, but there is no specific authorization to print.

The legislative history of 40 U.S.C. § 293 does not affect this analysis of its language, because such history reveals nothing with respect to Congress's intent (or lack thereof) specifically to authorize printing. We are left, then, with the words of the statute. The most natural reading of them is that they specifically authorize the creation of a fund to pay certain expenses, and that they may contain an implied authorization of the printing that helps to create those expenses, but that they do not specifically authorize printing, because the implication of authorization does not rise to the level of specificity that section 207 requires.

IV

We conclude that the JCP lacks the authority to alter GSA's printing operations, because the only basis for that authority is an invalid legislative veto contained in 44 U.S.C. § 501. We also conclude that section 207 requires executive branch entities (other than the Central Intelligence Agency, the Defense Intelligence Agency, and the National Security Agency) to procure printing related to the publication of government publications by or through the GPO. GSA is exempted from this requirement only with respect to certain individual printing orders costing $1,000 or less.

WALTER DELLINGER
Acting Assistant Attorney General
Office of Legal Counsel

Disclosure of Grand Jury Matters to the President and Other Officials

The Attorney General may disclose grand jury material covered by Rule 6(e) of the Federal Rules of Criminal Procedure to the President and members of the National Security Council where such disclosure is for the purpose of assisting the Attorney General in her enforcement of federal criminal law. Although under those circumstances such disclosure may be made without prior judicial approval, the names of those receiving the grand jury material must be submitted to the court that impaneled the grand jury in question

There are also circumstances where the President's constitutional responsibilities may provide justification for the Attorney General to disclose grand jury matters to the President independent of the provisions of Rule 6(e). Such circumstances might arise, for example, where the Attorney General learns through grand jury proceedings of a grave threat of terrorism, implicating the President's responsibilities under Article II of the Constitution.

September 21, 1993

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to your request for our legal opinion on the question of whether, and under what circumstances or conditions, the Attorney General may disclose grand jury material covered by Rule 6(e) of the Federal Rules of Criminal Procedure in briefings presented to the President and other members of the National Security Council ("NSC").

We conclude that the Attorney General may disclose Rule 6(e) materials to the President or to other NSC members where such disclosure is for the purpose of assisting the Attorney General in her enforcement of federal criminal law. Disclosures satisfying this "criminal law enforcement purpose" standard may be made without prior court approval or a showing of particularized need, but the names of those who received the information must be supplied to the district court that empaneled the grand jury. Fed. R. Crim. P. 6(e)(3)(A), (B). Subject to obtaining prior court approval based on a showing of particularized need, the Attorney General may also make such disclosures "[for] uses related fairly directly to some identifiable litigation, pending or anticipated." *United States v. Baggot*, 463 U.S. 476, 480 (1983); *see also* Fed. R. Crim. P. 6(e)(3)(C)(i). These court-approved disclosures may be made for the purpose of gaining assistance in *civil* as well as criminal litigation. We do not believe that any of the 6(e) exceptions would apply to disclosures made to the President or NSC officials for general policymaking purposes, as opposed to obtaining the assistance of those officials for law enforcement purposes.

We also believe, however, that the President's ultimate responsibility to supervise the executive branch, and in particular his duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, may sometimes provide a constitutional justification for the Attorney General to disclose grand jury matters to the President *independent* of the Rule 6(e) exceptions. Disclosures of this nature would be supported by basic separation of powers principles where, for instance, the President has a special need for such information in order to exercise necessary supervision over the Attorney General's law enforcement functions in matters of unusual national significance. Inasmuch as the courts have not directly addressed the extent of the President's Article II power in this particular context, any disclosures of grand jury material made on the basis of that power alone should be undertaken with caution. Judicial sanction for such disclosures might be obtained by invoking the court's inherent supervisory authority to approve disclosures of grand jury materials not otherwise covered by one of the Rule 6(e) exceptions in appropriate circumstances.

I. *Disclosures under Rule 6(e)*

Rule 6(e)(2) of the Federal Rules of Criminal Procedure establishes a "General Rule of Secrecy" providing that certain persons, including attorneys for the Government[1], "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules." *See United States v. John Doe, Inc. I*, 481 U.S. 102, 107 (1987). Under this rule, no attorney for the Department of Justice may disclose "matters occurring before the grand jury" to any other person, unless one of the rule's enumerated exceptions applies. The specified exceptions are set forth under subparagraph (3) of Rule 6(e) and may be summarized as follows:

(1) Disclosure to an attorney for the government for use in the performance of that attorney's duties. (Exception (A)(i));

(2) Disclosure to such government personnel as are deemed necessary to assist an attorney for the government in the performance of his duty to enforce federal criminal law. (Exception (A)(ii));

(3) Disclosure directed by a court preliminary to or in connection with a judicial proceeding. (Exception (C)(i));

(4) Disclosure at the request of a defendant and approved by a court "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." (Exception (C)(ii));

(5) Disclosures made by an attorney for the government to another federal grand jury. (Exception (C)(iii)); and

(6) Disclosures to state or local law enforcement officials permitted by the court at the request of any attorney for the government for purposes of aiding prosecu-

[1] For purposes of Rule 6(e), the Attorney General is an "attorney for the government." Fed R Crim P. 54(c); *see United States v Bates*, 627 F.2d 349, 351 (D C. Cir. 1980).

tion of violations of state or local law that may be brought forth before the grand jury. (Exception (C)(iv)).

A. *Subsection (A): Self-executing Exceptions*

Rule 6(e)(3)(A) sets forth the exceptions to nondisclosure of grand jury matters which may be exercised without prior judicial approval or a showing of particularized need. It provides as follows:

> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to —
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government *to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.*

Id. (emphasis added).

The (A)(i) exception clearly would not apply to disclosures to the President or members of the NSC.[2] However, the (A)(ii) "government personnel" exception could apply to such disclosures in circumstances where they are made for the purpose of obtaining the assistance of the President or NSC members in enforcing federal criminal law.

Although the (A)(ii) exception was primarily designed to allow disclosures to lesser-ranking officials or agents assisting a prosecutor in a particular case, there is no persuasive reason why the Attorney General cannot make such disclosures to the President or to other senior Administration officials (who do constitute "government personnel") for purposes of obtaining their assistance in carrying out federal criminal law enforcement responsibilities. One plausible example of such a situation might be the grand jury investigating the terrorist attack on the World Trade Center. In such a case, it is possible that the Attorney General's direction and supervision of the case could be facilitated by discussing developments (including developments brought forth before the grand jury) with the President and NSC members such as the Secretary of State. However, disclosure of such

[2] Although the President and some members of the NSC are attorneys, they are not "attorneys for the government" in the sense in which that term is used in Rule 6(e)

grand jury materials could not be made under the (A)(ii) exception for mere purposes of general policymaking.

While we find no case authority specifically addressing (A)(ii) disclosures to the President or senior government officials at the Cabinet level, we believe the language of the subsection, its legislative history, and judicial opinions interpreting it are compatible with such disclosures under the limitations noted.

The text of the (A)(ii) exception on its face allows for disclosures to the President or to NSC officials in circumstances where the Attorney General (in her capacity as "an attorney for the government") deems such disclosures necessary to obtain the assistance of such officials in the performance of her duties to enforce federal criminal law. In this regard, there is no persuasive reason why the term "government personnel" as used in subparagraph (A)(ii) should be narrowly construed to exclude the President or Cabinet-level officials.

The (A)(ii) "government personnel" exception was enacted in 1977. Act of July 30, 1977, Pub. L. No. 95-78, § 2(a), 91 Stat. 319, 319. The Senate Report on the 1977 amendment explained its origins and purpose as follows:

> The Rule as redrafted is designed to accommodate the belief . . . that Federal prosecutors should be able, without the time-consuming requirement of prior judicial interposition, to make such disclosures of grand jury information *to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement.*

S. Rep. No. 95-354, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 527, 531 ("1977 Senate Report") (emphasis added). The Report's use of the permissive phrase "as they deem necessary" strongly supports the view that Congress intended federal prosecutors to have broad leeway in deciding what government personnel should have access to grand jury materials for purposes of facilitating enforcement functions.

Assessing this legislative history of the (A)(ii) exception in *In re Perlin*, 589 F.2d 260 (7th Cir. 1978), the Seventh Circuit stated:

> [T]he history of the amendments of rule 6(e) . . . clearly indicates the continuing Congressional support for inter-agency cooperation and the active participation of agency personnel, including agency attorneys, in grand jury proceedings.

Id. at 267.

The Supreme Court's opinion in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), provides further insight regarding the intended scope of the (A)(ii) exception. *Sells* held that attorneys in the Civil Division of the Department

of Justice could not obtain automatic direct disclosure of grand jury materials from Department prosecutors under the (A)*(i)* exception where the purpose of the disclosure was for use in civil suits as opposed to criminal law enforcement. Under those circumstances, the Court held that the Civil Division attorneys must instead apply for court-approved disclosure under the (C)(i) exception applicable to matters related to both civil and criminal judicial proceedings. In the course of its opinion, however, the Court emphasized the sharp distinction between the automatic subsection (A) exceptions applicable to *criminal* law enforcement and the more restrictive, court-approved subsection (C) exceptions applicable in the civil context. Referring to materials in the 1977 Senate Report, quoted above, the Court said that they

> reflect[] the distinction the Senate Committee had in mind: "*Federal prosecutors" are given a free hand concerning use of grand jury materials, at least pursuant to their "duties relating to criminal law enforcement*"; but disclosure of "grand jury-developed evidence for civil law enforcement purposes" requires a (C)(i) court order.

Id. at 441-42 (emphasis added).

Other opinions also suggest a relatively expansive interpretation of the "government personnel" exemption. In *United States v. Cook*, 794 F.2d 561 (10th Cir.), *cert. denied*, 479 U.S. 889 (1986), the court upheld applicability of the (A)(ii) exception to disclosures to two state police officers who were deputized as Special Deputy U.S. Marshals to assist in an investigation of illegal drug activities. The court stressed that the officers "were needed to aid in the investigation and that the disclosures were necessary to effective aid" and held that they should be "included within even the most restrictive definition" of the government personnel exemption. *Id.* at 565; *see also United States v. Kilpatrick*, 821 F.2d 1456, 1471 (10th Cir. 1987), *aff'd sub nom. Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) ("Federal employees assisting the prosecutor in the investigation and prosecution of federal criminal violations are permitted access to grand jury materials without prior court permission. However, such support personnel may not use the material except for purposes of assisting Government attorneys to enforce federal criminal laws."); *United States v. Claiborne*, 765 F.2d 784, 795 (9th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986) (holding that (A)(ii) authorizes disclosure to federal officials who assist the prosecution in collecting evidence for a case).

These cases demonstrate that the category of "government personnel" to whom disclosures may be made should not be narrowly construed. We therefore see no reason to conclude that the President and other officials of the NSC could not qualify as "government personnel" for purposes of this exemption. Rather, the key factor in determining the applicability of this exemption to disclosures of the kind

proposed is the extent to which the disclosure is limited to the purpose of obtaining the assistance of the President and other officials in the Attorney General's *criminal* law enforcement activities. *See Sells*, 463 U.S. at 442. If disclosures are confined to that purpose, they should qualify for coverage under the (A)(ii) exception.

If the Attorney General does rely upon the (A)(ii) exception to disclose grand jury material without prior court approval in this context, a list naming all the officials to whom such disclosures are made must be submitted to the district court that empaneled the grand jury. Fed. R. Crim. P. 6(e)(3)(B). While the rule does not explicitly require submission of the list of names *before* the disclosure is made, it has been held that submission of the names should ordinarily be made prior to disclosure of the materials. *United States v. Hogan*, 489 F. Supp. 1035, 1038 (W.D. Wash. 1980) (citing the 1977 Senate Report at 8, where it was stated, "[a]lthough not expressly required by the rule, the Committee contemplates that the names of such personnel will generally be furnished to the court before disclosure is made to them"). We believe that, when practicable, the list of names should be submitted prior to the disclosures.

B. *Subsection (B): Exceptions Requiring Court Approval*

Subsection 6(e)(3)(C) of the rule sets forth four additional exceptions from its general ban on disclosure of grand jury materials. The only one of these exceptions relevant to the question posed is the (C)(i) exception, which provides:

> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
>
> > (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

This exception has been narrowly interpreted by the Supreme Court. In *United States v. Baggot*, 463 U.S. at 480, the Court held that the (C)(i) exception did not provide a basis for disclosing grand jury material to agents of the Internal Revenue Service ("IRS") for purposes of conducting an audit to determine the erstwhile grand jury target's civil tax liability. The Court first noted that disclosure under (C)(i) can only be justified where there is a "particularized need" for access to the materials and where that need is related to a judicial proceeding. The Court then elaborated upon the latter prerequisite:

> It reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy. Rather, the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or

> anticipated . . . . If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted.

Id.

The *Baggot* Court's restrictive interpretation confines the (C)(i) exception to disclosures that are closely and directly related to some identifiable litigation. However, to the extent that disclosures of the kind described by the Attorney General could satisfy that standard, there is no apparent reason why this exception would not extend to such disclosures. The primary practical value of the (C)(i) exception in this context is that it permits disclosures that are related to *civil* judicial proceedings as well as criminal.

Prior judicial approval for (C)(i) disclosures must be obtained by filing a petition with the district court where the grand jury convened. Fed. R. Crim. P. 6(e)(3)(D). When the government is the petitioner, ex parte hearings are authorized. *Id.* If the court approves the petition, the court specifies the manner, time, and conditions of the disclosure. *Id.* 6(e)(3)(C).

II. *Disclosures to President under Article II*

Apart from the enumerated exceptions from Rule 6(e)'s prohibition against disclosure of grand jury material, we believe that the Attorney General's disclosures of such materials to the President could in some circumstances be authorized on broader constitutional grounds. As the repository of all executive power in the national government, the President is charged with the duty to "take Care that the Laws be faithfully executed." U.S. Const., art. II, §§ 1, 3. Accordingly, there may be circumstances in which his constitutional responsibilities entitle the President to obtain disclosure of grand jury information that has already been made available to the Attorney General, even where that disclosure might not be specifically authorized by one of the exceptions under Rule 6(e).

In a brief memorandum prepared to provide responses to Watergate-related press inquiries in 1973, this Office opined that it "is not altogether clear" whether the President may obtain access to the transcript of a federal grand jury investigation.[3] The memorandum first advised that the restrictive language of Rule 6(e) "seemingly precludes the disclosure of [matters occurring before the grand jury] to the President because he is not a member of the group specifically authorized to obtain this information." *Id.* at 1. This aspect of the memorandum may be attributed to the fact that the (A)(ii) exception for "government personnel" had not yet been incorporated in the rule at the time the opinion was written. However, the

[3] Memorandum for Horace Webb, Acting Director, Public Information Office, from Robert G. Dixon, Assistant Attorney General, Office of Legal Counsel, *Re. Questions from the Press on the Watergate Investigation* (Apr. 30, 1973)

memorandum went on to state, "it can be argued that the President by virtue of his responsibility in administering the executive branch is authorized to obtain the transcripts of testimony before a grand jury." *Id.* Stressing that all executive power is vested in the President, and his particular obligation to take care that the laws be faithfully executed, U.S. Const. art. II, §§ 1, 3, the memorandum stated:

> [T]hat power which is vested in the Attorney General to supervise all litigation empowers the President to supervise the litigation and to perform any functions incidental thereto because the power of the Attorney General is a residue of the more general power vested in the President by the Constitution. *See also* 7 Op. A.G. 453 (1855) (the heads of all Departments are subject to the direction of the President).

Id. at 2. The memorandum added that its opinion on this question was "purely hypothetical" because the President had ordered that no transcripts of testimony before the Watergate grand jury were to be sent to the White House. *Id.*

A memorandum opinion prepared for the President by Attorney General Griffin Bell in 1977 provides additional pertinent insight regarding the President's constitutional authority in working with the Attorney General. *Proposals Regarding an Independent Attorney General*, 1 Op. O.L.C. 75 (1977). That opinion expressed "serious doubts" as to the constitutionality of certain proposed legislation providing that the Attorney General should be appointed for a definite term and removable from office only for cause or malfeasance. The opinion placed great stress on the President's constitutional responsibility as Chief Executive to supervise the law enforcement functions of the Attorney General, stating:

> Indeed, the President must be held accountable for the actions of the executive branch; to accomplish this he must be free to establish policy and define priorities. Because laws are not self-executing, their enforcement obviously cannot be separated from policy considerations. The Constitution contemplates that the Attorney General should be subject to policy direction from the President. As stated by the Supreme Court: "The Attorney General is . . . the hand of the President in taking care that the laws of the United States . . . be faithfully executed." *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922). Removing the Attorney General from the President's control would make him unaccountable to the President, who is constitutionally responsible for his actions.

Id. at 76; *see also Myers v. United States*, 272 U.S. 52, 133 (1926) (stressing that "[e]ach head of a department is and must be the President's *alter ego* in the matters of that department where the President is required by law to exercise authority").

The foregoing Attorney General's opinion focused on the President's supervisory authority over the Attorney General in the context of the removal power. The constitutional principles it invoked are nevertheless pertinent to the President's ability to obtain information needed to discharge his responsibilities relative to the Attorney General's functions and to "take care that the laws are faithfully executed." In some circumstances, we believe that the President's Article II responsibilities in this area may independently justify the Attorney General's disclosure to him of pertinent grand jury information. A prime example of such circumstances might be a grand jury investigation of major international terrorist activity in the United States, involving a threat to domestic peace and national security. In such a case, the President should be able to share grand jury information legitimately possessed by the Attorney General in order to aid the President's handling of the overall law enforcement crisis. Similarly, presidential access to such grand jury information would also appear justified under the removal power, *see Myers*, in a case where, for example, the integrity or loyalty of a presidential appointee holding an important and sensitive post was implicated in the grand jury investigation.

Although we find no opinions directly addressing this issue, several cases suggest that the constitutional duties of the respective branches may provide independent support for their access to grand jury information. In *Matter of Grand Jury Subpoena of Rochon*, 873 F.2d 170, 174 (7th Cir. 1989), the court observed as follows in reversing a district court order disqualifying the Attorney General from participating in a grand jury investigation on alleged conflict of interest grounds:

> [A] federal district court order prohibiting the Attorney General of the United States from participating in a grand jury investigation is no small matter, even if the investigation could continue in his absence. Since initiating a criminal case by presenting evidence before the grand jury is "'an executive function within the exclusive prerogative of the Attorney General,'" *United States v. Chanen*, 549 F.2d 1306, 1312-13 (9th Cir.) (quoting *In re Persico*, 522 F.2d 41, 54-55 (2d Cir. 1975)), *cert. denied*, 434 U.S. 825, 98 S. Ct. 72, 54 L.Ed.2d 83 (1977), such an order raises sharp separation-of-powers concerns. As the Ninth Circuit has stated, although the "'grand jury is subject to a supervisory power in the courts, aimed at preventing abuses of its processes or authority,'" *id.* at 1313 (quoting 1 Wright, Federal Practice and Procedure § 101, at p. 151 (1969)), "the separation-of-powers principle imposes significant limits on it."

Id. (quoting *United States v. Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985)).

Two lower court decisions of note have upheld *congressional* access to grand jury materials in aid of that branch's constitutional power of impeachment. In *Grand Jury Proceedings of Grand Jury No. 81-1*, 669 F. Supp. 1072, 1074-75 (S.D. Fla.), *aff'd*, 833 F.2d 1438 (11th Cir. 1987), the court held that the House Judiciary Committee was entitled to receive the record of grand jury proceedings in furtherance of its impeachment investigation of Judge Alcee Hastings. Although the committee's access to the materials was separately justified on the basis of Fed. R. Crim. P. 6(e)(3)(C)(i), the court held that the disclosure was also justified on the basis of, inter alia, the Impeachment Clause. U.S. Const. art. I, § 2; *see also In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219 (D.D.C.), *mandamus denied sub nom. Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (district court's decision granting the Watergate grand jury's request that its report on the matters it investigated be submitted to the House Judiciary Committee, upheld by court of appeals in denying mandamus relief).

These decisions should be read with some caution because the disclosures of the grand jury materials at issue were directly related to impeachment proceedings — which have been viewed as within the coverage of the Rule 6(e)(3)(C)(i) exception — and were undertaken only after obtaining prior judicial approval. Nonetheless, they demonstrate the courts' willingness to recognize an independent constitutional basis for disclosures of grand jury information outside the provisions of Rule 6(e). Thus, if congressional access to grand jury materials may be independently justified on the basis of its Article I power, it would be anomalous to contend that presidential access to such materials could not be justified on the basis of the President's Article II powers.

In the absence of judicial precedent on this point, however, any disclosure of grand jury matter to the President on this basis should be cautiously undertaken and reserved for matters of clear executive prerogative in areas where the Rule 6(e)(3)(A)(ii) exception could not be used. Because such disclosures would be based on the President's inherent constitutional powers rather than Rule 6(e), the rule's various procedural requirements would not be applicable. Nonetheless, the risk of constitutional confrontation could be minimized by seeking the approval of the district court that impaneled the grand jury, invoking the court's inherent authority to disclose grand jury materials for reasons other than those specified in Rule 6(e).

A federal court's "inherent" power to authorize disclosure of grand jury matters outside the parameters of Rule 6(e) was recognized by the Eleventh Circuit in *In re Petition*, 735 F.2d 1261, 1268 (11th Cir.), *cert. denied*, 469 U.S. 884 (1984). At issue was whether the Judicial Council of the Eleventh Circuit could have access to records of a federal grand jury in connection with the Council's investigation of Judge Alcee Hastings under the Judicial Councils Reform and Disability Act, 28 U.S.C. § 372. The court recognized that none of the Rule 6(e) exceptions applied

to the request, although it noted that the investigation in question was "very similar" to the "judicial proceedings" covered by the Rule 6(e)(3)(C)(i) exception. Nonetheless, the Eleventh Circuit affirmed the district court's holding that Rule 6(e) did not preclude it "from fashioning an alternate method for disclosure under its general supervisory authority over grand jury proceedings and records." 735 F.2d at 1267-68.[4] As the court explained the inherent power doctrine:

> [I]t has been authoritatively said that [Rule 6(e)] is not the true source of the district court's power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court.

Id. at 1268. After citing examples of how the courts have influenced the development of Rule 6(e) through the exercise of their "inherent power" over grand jury materials, the court stated:

> These examples from the history of Rule 6(e) indicate that the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts in conformance with the rule's general rule of secrecy.

Id. at 1269. The court concluded that "it is certain that a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in the rule," *id.* at 1268, but it stressed that the courts can only order disclosure outside the rule in "exceptional circumstances consonant with the rule's policy and spirit." *Id.* at 1269.

Although the Eleventh Circuit's "inherent power" doctrine has not been widely cited by the courts in published opinions, it does provide one recognized framework for seeking judicial approval of disclosures of grand jury material to the President based on constitutional authority rather than on Rule 6(e).

WALTER DELLINGER
Acting Assistant Attorney General
Office of Legal Counsel

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[4] The Eleventh Circuit's holding on this issue has been criticized in one district court decision In *Matter of Electronic Surveillance*, 596 F. Supp. 991, 1001 (E D Mich 1984), the court asserted that the "Eleventh Circuit's reliance on the inherent powers doctrine is suspect." In support of this position, the district court contended that the Supreme Court's decision in *United States v. Baggot* 463 U S. 476 (1983) had implicitly rejected extra-Rule 6(e) disclosures because the trial court in *Baggot* had found that disclosure was authorized under the inherent powers doctrine, but the Supreme Court had held against disclosure because the standards of Rule 6(e)(3)(C)(1) had not been satisfied. We do not read the *Baggot* decision as taking any position, one way or the other, on the inherent powers doctrine because, as the Court noted, certiorari there was limited to the narrow question of whether an IRS civil tax audit is "preliminar[y] to or in connection with a judicial proceeding" under the (C)(i) exception *Id* at 478 (alteration in original)

Reimbursement for Costs of Attending Certain Banquets

Employees in the United States Attorneys offices may properly be reimbursed for the costs of attending retirement banquets for state law enforcement officials under appropriate circumstances. However, reimbursement for attendance at such functions should be limited to circumstances where the nature of the ceremonial event in question provides good reason to believe that the employee's attendance advances the authorized functions or programs of the office

September 23, 1993

MEMORANDUM OPINION FOR THE DIRECTOR
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

You have asked for our opinion whether employees in the United States Attorneys offices may be reimbursed for the cost of attending retirement banquets for state officials. Your inquiry focuses on the Opinion of the Comptroller General in *Richard W. Held*, B-249249, 1992 WL 387431 (C.G. Dec. 17, 1992), which concluded that the cost of an FBI official's attending such a banquet is properly reimbursable. We believe that the Comptroller General's holding was correct and would be applicable to an employee of a United States Attorney's Office attending the same kind of event under like circumstances. However, we caution that application of the *Held* ruling should be carefully limited to closely similar factual circumstances, where the nature of the ceremonial event in question provides good reason to believe that the official or employee's attendance advances the office's authorized functions.

I. THE *HELD* OPINION

In the *Held* ruling, the Comptroller General concluded that a FBI Special Agent in Charge could properly be reimbursed for the cost ($35) of attending a retirement banquet for the Police Chief of Fremont, California. The opinion noted that the FBI had "a long-standing tradition to recognize state and local police officials' contributions to the FBI's public service mission" and that the Special Agent, who was invited to the function in his capacity as head of the FBI's San Francisco Office, "would be expected to participate in such ceremonies." *Id.* 1992 WL 387431, at *1. At the banquet, the Special Agent presented the retiring Police Chief with a plaque provided by the FBI and a personal letter from the FBI Director.

The Comptroller General ruled that reimbursement for the cost of attendance was proper even though the banquet took place within the limits of the Special Agent's official station area and Federal Travel Regulations generally do not authorize reimbursement for employee meal or lodging expenses incurred within

those area limits. 41 C.F.R. §§ 301-7.5(a), 301-8.1(d) (1992). In support of this ruling, the Comptroller General relied upon a number of his prior opinions which have upheld reimbursement for meals within the station area where such meals are necessitated by attendance at certain "meetings" for which expenses are reimbursable under 5 U.S.C. § 4110. *E.g.*, *Internal Revenue Service - Meal Costs*, 68 Comp. Gen. 348 (1989); *Gerald Goldberg*, B-198471, 1980 WL 16668 (C.G. May 1, 1980). Applying § 4110's standards to the FBI Special Agent's attendance at the banquet in question, the Comptroller General concluded:

> [I]t is clear that his attendance was in furtherance of the functions or activities for which the agency's appropriations are made, and we have no objection to reimbursing Mr. Held the $35 cost of the banquet.

Held, 1992 WL 387431, at *2.

II. ANALYSIS

A. *Applicability of 5 U.S.C. § 4110*

5 U.S.C. § 4110 provides:

> Appropriations available to an agency for travel expenses are available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.

The applicability of this section to attendance at banquets honoring state and local law enforcement officials first depends upon whether such banquets can properly be considered as "meetings." The term "meeting" is a very broad one. For example, *Webster's Third New International Dictionary* (1986) defines it to include "a gathering for business, social, or other purposes." *Id.* at 1404. Interpreted in this ordinary sense, the term "meeting" appears broad enough to encompass retirement banquets and similar ceremonial functions.

An argument for a narrower interpretation might be based upon the fact that § 4110 was enacted as part of the Government Employees Training Act, Pub. L. No. 85-507, § 19(b), 72 Stat. 327, 336 (1958), and is located in chapter 41, entitled "Training," of title 5, United States Code. Since the sections surrounding it are primarily concerned with "training" activities for government employees, it might be argued that the term "meeting" as used in § 4110 refers only to meetings at

which some kind of "training" occurs. However, two fundamental considerations militate against that narrowing interpretation.[1]

First, the text of the section limits the broad term "meetings" only to the extent that they must be concerned with, or supportive of, agency functions or activities for which the agency's appropriations are made; language requiring that covered meetings must specifically be concerned with "training" could easily and naturally have been included (as in the sections surrounding § 4110), but was not. Second, the legislative history does not provide any clear evidence that, contrary to the plain wording of the section, the term "meeting" was intended to be limited to meetings concerned with training.[2]

In addition to qualifying as "meetings," banquets of the kind described in *Held* must also satisfy the functional-relationship criteria of § 4110. It is reasonable to conclude that banquets honoring law enforcement personnel will generally be "concerned with the functions or activities" covered by FBI or U.S. Attorney appropriations, since they are likely to include speeches and discussions concerning law enforcement. We also believe that attendance by federal law enforcement agency personnel at such banquets would generally "contribute to improved conduct, supervision, or management" of functions encompassed by their agency's appropriations. Attendance by suitable federal representatives at such events is likely to promote the exchange of information and ideas about the interaction of federal and state law enforcement offices and thus to help cultivate and maintain good working relationships between federal officials, on the one hand, and state and local law enforcement agencies and their personnel on the other. Such good relationships advance the broad law enforcement functions of the FBI and the U.S. Attorneys' offices.[3]

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[1] This Office has previously opined that 5 U.S.C. § 4110 is not limited to meetings attended or conducted for training purposes. Memorandum for Edwin M. Zimmerman, Assistant Attorney General, Antitrust Division, from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel, *Re: Authority of Federal Agencies to Become Members of Private Organizations* (Nov. 14, 1968).

[2] H.R. Rep. No. 85-1951, at 26 (1958), *reprinted in* 1958 U.S.C.C.A.N. 2909, 2931-32. The section-by-section analysis in the House Report describes the section of the Government Employees Training Act (§ 19(b)) that was codified as 5 U.S.C. § 4110 as follows:

> Section 19(b) provides that, on and after the date of enactment of the bill, any appropriation available to any department (as defined in and to the extent covered by the bill) for travel expenses also shall be available for expenses of attendance at meetings, if these meetings are concerned with the functions or activities for which the appropriation is made or will contribute to improved conduct, supervision, or management of those functions or activities.

Id.

[3] The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), broadly provides appropriations for, inter alia, "expenses necessary for the legal activities of the Department of Justice," *id.* at 1831, and for "necessary expenses of the Office of the United States Attorneys," *id.* at 1832.

B. *Legitimacy of the Expense*

Having determined that ceremonial banquets of the kind described may constitute "meetings" covered under 5 U.S.C. § 4110, we must decide whether the cost of attending the banquet (which we assume will normally be in the form of a single charge for the entire event, with no lesser or separate charge for the "meal") is properly reimbursable.

The Comptroller General's opinion states that the test for determining whether an employee may be reimbursed for the cost of such a banquet is "whether the meal was an incidental part of the event or the event was incidental to the meal." *Held*, 1992 WL 387431, at *2. Under this test, the availability of reimbursement depends upon whether the meal is found to be merely "incidental" to what might be called the main event. While that test may be appropriate when applied to "working lunches" or meals taken during the course of a conference or training event, we consider it inapposite when applied to ceremonial banquets. A banquet *is* a meal, albeit a ceremonial and elaborate one, and it is therefore not readily understandable how it can be concluded that "the meal is clearly incidental to the [banquet]." *Id.*

In the case of an official ceremonial banquet, we believe that the question whether the meal is "incidental to the event" is subsumed by the broader question whether the particular banquet qualifies as a "meeting" that is legitimately related to the agency's functions under 5 U.S.C. § 4110. In the case of a banquet for which a single cost of attendance is paid, the event is inseparable from the meal. We therefore believe that determinations whether such events are eligible for reimbursement should focus upon the legitimacy of their relationship to the functions of the attendee's agency rather than abstract consideration of whether a meal may be "incidental" to a banquet.

In the *Held* ruling, there was strong reason to believe that the Special Agent's attendance at the banquet would help to foster or maintain good working relationships with the local law enforcement community. *Id.* Therefore, the costs of attendance were properly reimbursable. We believe that an employee of a United States Attorney's office could properly be reimbursed for attending a similar banquet under like circumstances, since we see no fundamental difference between the FBI's need to maintain good working relationships and exchange information about official duties with state and local law enforcement agencies and the comparable need of United States Attorneys' offices.

C. *Limitations*

While we agree that the cost of attending the banquet described in the *Held* ruling was properly reimbursable, we would caution that the ruling does not necessarily apply to a law enforcement agency employee's attendance at all arguably

comparable functions. In that regard, we would suggest that the following factors reflected in the Comptroller General's opinion are pertinent in determining whether the expenses of attendance at a given banquet or ceremonial meal are properly reimbursable under 5 U.S.C. § 4110:

1) the function was held to honor or commemorate the personnel, achievements, or operations of a law enforcement agency with which the attending employee's agency has significant working relationships;

2) the function was officially sponsored, formally scheduled, and ceremonial in nature;

3) the agency official or employee was invited to the function or attends the function in a representative capacity;

4) the attendance of a representative of the employee's agency was to some degree expected by the agency sponsoring the function; and

5) the attending employee was a suitable representative of the agency.

Application of such criteria should help to identify the circumstances where attendance at a banquet or similar function is legitimately related to the agency's authorized functions. In particular, where the agency-function criterion is based on cultivating good relationships with state or local agencies — as opposed to the training or information-gathering purposes normally served by meetings covered by 5 U.S.C. § 4110 — it is reasonable to require that the event be of significant official stature. Otherwise there would be no manageable standard for distinguishing informal social functions from those ceremonial events where representation of the agency is truly important from the standpoint of inter-agency working relationships.

Finally, we would note that an agency is not required to authorize an employee's reimbursable attendance at functions of this kind merely because the expenses may be properly reimbursable. *See* U.S. General Accounting Office, I *Principles of Federal Appropriations Laws* 4-31 (2d ed. 1991). Thus, an agency may adopt a general policy against authorizing reimbursable attendance at such functions even if attendance at particular functions of that kind may be reimbursable under the governing statute.

WALTER DELLINGER
Acting Assistant Attorney General
Office of Legal Counsel

Suspension of a United States Marshal

With the prior approval of the President, the Attorney General may suspend a United States Marshal without pay.

During the period of a United States Marshal's suspension, the Attorney General may designate an Acting United States Marshal to carry out the duties of the office.

September 23, 1993

MEMORANDUM OPINION FOR THE
ASSOCIATE DEPUTY ATTORNEY GENERAL

This memorandum will confirm oral advice, given to the Deputy Attorney General and to the Marshals Service, that the Attorney General has the power to suspend a United States Marshal without pay, with the President's prior approval. She may also designate an Acting United States Marshal during the period of the United States Marshal's suspension.

This Office has concluded repeatedly that the Attorney General may suspend a United States Marshal without pay, provided that she has the prior approval of the President.[1] The President's power to appoint a United States Marshal entails the power to remove him. *See* 28 U.S.C. § 561(c), (d); *Myers v. United States*, 272 U.S. 52, 122 (1926); *Carey v. United States*, 132 F. Supp. 218, 220 (Ct. Cl. 1955). The President's removal power includes "the lesser power to place one upon temporary leave without pay as incidental to the power to appoint and dismiss." *Id.* at 220; *see* 2 Op. O.L.C. 107 (1978) (opining that the President has the exclusive power to impose suspension and other discipline upon his appointees). In *Carey*, the court held that the President could authorize the Attorney General to suspend without pay a United States Attorney who was under investigation for allegedly soliciting a bribe. 132 F. Supp. at 222. As this Office has noted, "[i]t is hardly necessary to say that the court would have arrived at the same conclusion if a United States Marshal had been the official under investigation." Harmon Memorandum I at 1. We have also indicated that *Carey* applies equally to a suspension

[1] *See* Memorandum for the Attorney General, from Theodore B Olson, Assistant Attorney General, Office of Legal Counsel, *Re Suspension of United States Attorneys* (Sept 25, 1984) ("Olson Memorandum"); Memorandum for Paul R Michel, Acting Deputy Attorney General, from John M Harmon, Assistant Attorney General, Office of Legal Counsel, *Re Suspension of a United States Attorney or United States Marshal without pay* (Jan 14, 1980) ("Harmon Memorandum II"); Memorandum for Paul R Michel, Acting Deputy Attorney General, from John M Harmon, Assistant Attorney General, Office of Legal Counsel, *Re. Suspension of a United States Attorney or United States Marshal without pay* (Jan 7, 1980) ("Harmon Memorandum I"); Memorandum for William J. Brady, Jr , Assistant to the Deputy Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re Power of Attorney General to suspend a United States Attorney* (Aug 14, 1964).

without pay imposed as a disciplinary measure after investigation. Harmon Memorandum II at 1.

In this case, we understand that suspension without pay would be imposed upon a United States Marshal preparatory to the President's removal of him from office. We think that such a suspension would be well within the President's power as an action "incidental" to a removal. The Attorney General may take this step on behalf of the President, with the President's prior approval. *See Carey*, 132 F. Supp. at 220, 222. The President, however, must undertake the actual removal of the United States Marshal. *See Presidential Succession and Delegation in Case of Disability*, 5 Op. O.L.C. 91, 94 (1981) (opining that President may not delegate his power to remove purely executive presidential appointees).

After the United States Marshal has been suspended, we believe that the Attorney General may appoint someone to act in his stead, pursuant to her broad authority to "make such provisions as [s]he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U.S.C. § 510; *see* 28 U.S.C. § 509 (providing that all functions of the Department, with certain exceptions not relevant here, are vested in the Attorney General); 28 C.F.R. § 0.132(e) (1993) ("[T]he Attorney General may designate any official in the Department to act as head of a unit whose head is absent or disabled."); *see also* Olson Memorandum at 2-3.[2]

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Office of Legal Counsel

[2] Because there will not be a vacancy in the office until the United States Marshal has been removed by the President, the provisions that govern filling a vacancy would not apply. *See* 28 U.S.C. § 562, 28 C.F.R. § 0.132(d)

Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters

Undocumented aliens interdicted within the twelve-mile zone that comprises the United States's territorial sea are not entitled to a hearing under the exclusion provisions of the Immigration and Nationality Act

The Immigration and Naturalization Service had the authority to promulgate an interpretative rule construing the "territorial waters" of the United States, as referred to in section 287 of the INA, to extend for twelve nautical miles

October 13, 1993

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to requests made by the Office of the Associate Attorney General and the General Counsel's Office of the Immigration and Naturalization Service ("INS") for our views on the consequences under the Immigration and Nationality Act ("INA") of an undocumented alien's arrival in United States territorial waters. 8 U.S.C. §§ 1101-1537. Specifically, we have been asked whether undocumented aliens who have been interdicted within the United States's territorial waters are entitled to an exclusion hearing under section 236 of the INA,[1] 8 U.S.C. § 1226. We have also been asked to review the INS's enforcement authority under INA section 287, 8 U.S.C. § 1357, and to assess the INS's recent interpretive regulation, 8 C.F.R. § 287.1(a)(1) (1993), insofar as it purports to define the "external boundaries" of the United States under INA section 287.

We understand that resolution of these issues is of some urgency because the United States has been interdicting, within its territorial waters, vessels transporting large numbers of undocumented aliens seeking admission into the United States from various foreign countries. These activities have raised the question whether the United States must provide exclusion proceedings for such aliens. Agencies represented on the Working Group on Ocean Policy and the Law of the Sea, in particular the State Department and the United States Coast Guard, have expressed an interest in the issues. We have therefore invited, and received, the views of the State Department and the Coast Guard.

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[1] *See* Memorandum for Office of Legal Counsel, Department of Justice, from Grover Joseph Rees III General Counsel, Immigration and Naturalization Service, *Re: Immigration Consequences of Arrival into the Territorial Waters of the United States* (June 15, 1993) Together with this cover memorandum, the INS has submitted a Memorandum for Maureen Walker, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, from the Office of the General Counsel, *Re: Information Request from Working Group on Ocean Policy and Law of the Sea* (Dec 17, 1992) ("INS/OGC Memorandum") and a draft memorandum of law ("INS Draft Memorandum").

I. *Background*

The background to these requests is as follows. Historically, the United States adhered to the rule that the territorial sea extends three nautical miles out.[2] In 1988, however, President Reagan, by proclamation, extended the United States's territorial sea to a distance of twelve nautical miles. *See* Proclamation No. 5928, 3 C.F.R. 547 (1989), *reprinted in* 103 Stat. 2981 (1989), ("the Proclamation").[3] Although the Proclamation by its terms purported not to extend or otherwise alter existing Federal law or any jurisdiction, rights, legal interests, or obligations derived therefrom, questions arose concerning the possible or alleged effects of the Proclamation on domestic law or law enforcement.[4] Among these questions are the two considered in this opinion, relating to the procedural rights under the INA of undocumented aliens intercepted within twelve miles of the United States's shores, and to the authority of the INS to board and search sea vessels suspected of transporting undocumented aliens if such vessels are found within that twelve mile zone.

The INS's former General Counsel has taken the position that the Proclamation operated so as to extend the scope of the INA to the new twelve mile limit of the territorial waters. Specifically, the INS argues in the submissions considered here that an entitlement to an exclusion proceeding now arises whenever an undocumented alien arrives within the twelve mile limit. As the INS acknowledges, however, its past practice and views on this subject have not been consistent. In 1980, an INS memorandum to this Office concerning the treatment of Cuban refugees maintained that an alien apprehended within the territorial waters before landing "does not appear to have a right to apply for asylum" under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 ("Refugee Act"), and could be towed to a third country where he or she would not face persecution. *See* Memorandum for John Harmon, Assistant Attorney General, Office of Legal Counsel, from David Crosland, Acting Commissioner, INS, *Re: Cases on Illegal Entry to Cubans in Boats* at 1 (May 6, 1980) ("INS Cuba Memorandum"). However, a different INS position is reflected in a 1986 memorandum concerning procedures to be followed under Executive Order No. 12324, 46 Fed. Reg. 48,109 (1981), which provided for the return of Haitians interdicted on the high seas, with the exception of refugees. *See* Memorandum for Alan C. Nelson, Commissioner, INS, from Maurice C.

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[2] *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 n.8 (1989), *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923), *United States v. Postal*, 589 F.2d 862, 869 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979). The "territorial" or "marginal" sea is the belt of water immediately adjacent to a nation's coast. *See Restatement (Third) of the Foreign Relations Law of the United States*, § 511(a) (1986).

[3] On the Proclamation, *see Argentine Republic*, 488 U.S. at 441 n.8, John E. Noyes, *United States of America Presidential Proclamation No. 5928: A 12-Mile U.S. Territorial Sea*, 4 Int'l J. Estuarine and Coastal L. 142 (1989); Comment, *The Extension of the United States Territorial Sea: Reasons and Effects*, 4 Conn. J. Int'l L. 697 (1989).

[4] *See generally Hearing Before the Subcomm. on Oceanography and Great Lakes of the House Comm. on Merchant Marine and Fisheries*, 101st Cong. 49, 60 (1989) ("1989 Hearings")

Inman, Jr., General Counsel, INS, *Re: Interdiction of Aliens* (Feb. 21, 1986) ("INS Haiti Memorandum"). Executive Order No. 12324 stated that its provisions for the interdiction-and-return of Haitians "are authorized to be undertaken only outside the territorial waters of the United States." 46 Fed. Reg. at 48,109. Following the terms of that Executive Order, the INS memorandum stated that "[i]ndividuals interdicted within the territorial waters of the United States are transported to a port of the United States for an adjudication of their immigration status pursuant to the Immigration and Nationality Act." INS Haiti Memorandum at 3. The memorandum further asserted that "it is rather well settled that individuals within our territorial waters may not be forcibly removed to the high seas." *Id.* at 4.[5] Thus, the INS's current position is at variance with its views as of 1980 — though not with its views as of 1986 — as well as being inconsistent with the position of the State Department and the Coast Guard.[6]

We conclude in Part II below that an undocumented alien who is intercepted within the twelve mile zone now comprising the United States's territorial waters is not entitled to an exclusion hearing under the INA. We base this conclusion primarily on an examination of the text of the statute — most importantly, its explicit requirements for exclusion proceedings. *See* INA sections 235, 236, 8 U.S.C. §§ 1225, 1226. We also examine the statute's provisions for asylum and withholding of deportation, and conclude that these provisions are consistent with, and indeed support, our reading of the statutory sections regarding exclusion. *See* Refugee Act, §§ 201(b), 202(e), 94 Stat. at 105, 107 (codified as amended at 8 U.S.C. §§ 1158, 1253). We then consider the INA's definition of the term "United States," INA section 101(a)(38), 8 U.S.C. § 1101(a)(38), and reject INS's contention that this definition, coupled with the Proclamation, compels the conclusion that the INA's procedural protections must apply to undocumented aliens who have entered the twelve mile zone. We also consider, and reject, INS's alternative claim that the jurisdictional section of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, ("OCSLA") operates to extend the INA — and in particular the right to an exclusion hearing — to the limit of the territorial waters. Finally, we scrutinize the Proclamation itself, and conclude that it has no effect on the procedural entitlement that the INA provides to undocumented aliens.

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[5] No authority was cited for this proposition

[6] In a letter responding to this Office's invitation to submit views on this issue, the State Department stated, "[a]t a minimum, it appears that the conduct of INS exclusion and deportation procedures by their very nature are only relevant once an alien has reached the land territory of the United States." Letter for Robert Delahunty, Acting Deputy Assistant Attorney General, Office of Legal Counsel, from Maureen Walker, Chief, Division of Marine Law & Policy, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State at 2 (July 28, 1993) ("State Department Submission"). The State Department's views are discussed further, *infra*, p 87 n.23. In a similar submission, the Coast Guard took the position that undocumented aliens interdicted within the three mile zone encompassed by the pre-1988 territorial waters would be entitled to exclusion proceedings, but that those interdicted in the waters beyond that zone would not be entitled to such proceedings. Letter for Robert Delahunty, Acting Deputy Assistant Attorney General, Office of Legal Counsel, from David Kantor, Chief, Maritime and International Law Division, United States Coast Guard at 1 (Aug. 10, 1993).

In Part III below, we review the INS interpretative regulation, 8 C.F.R. § 287 (1993), that purports to construe the meaning of the "external boundaries" of the United States, as that term is used in INA section 287, 8 U.S.C. § 1357. The latter statute sets forth various investigative and enforcement powers of the INS. Of particular relevance, it empowers the INS to conduct certain warrantless searches within "a reasonable distance from any external boundary of the United States." INA section 287(a)(3), 8 U.S.C. § 1357(a)(3). We conclude that the INS had the authority to construe that section in a manner that reflected the enlargement of the United States's territorial waters under the Proclamation, and we offer two theories to justify that result. We also note an ambiguity in the INS's regulation, and recommend that, if INS decides to maintain its interpretation of INA section 287, it cure this defect.

II.

A. *Exclusion Proceedings Under The INA*

"It is undoubtedly within the power of the Federal Government to exclude aliens from the country." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972); 1 Charles Gordon and Stanley Mailman, *Immigration Law and Procedure*, § 1.03[2][a] (rev. ed. 1993) ("Gordon & Mailman").

The means by which the Federal Government may prevent aliens from coming into the country are varied. Some aliens seeking to enter the United States must first be accorded the procedural rights provided by the INA, including an evidentiary hearing, before any determination to exclude them from this country can be made. Other aliens may, however, be prevented from entering the United States by Executive actions that do not implicate any INA procedures. Thus, in its recent decision in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187 (1993), the Supreme Court held that neither the INA nor the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 ("the Protocol"), placed any limit "on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States."[7] The question presented here is whether undocumented aliens seeking to enter the United States but interdicted *within* its territorial waters — that is, within twelve nautical miles from the United States' baselines — must be accorded an exclusion proceeding under the INA.

[7] The Court also noted that a provision of the INA, 8 U.S.C. § 1182(f), "grants the President ample power to establish a naval blockade that would simply deny illegal . . . migrants the ability to disembark on our shores." *Sale*, 509 U.S. at 187.

Section 235(b) of the INA, 8 U.S.C. § 1225(b), "provide[s] the jurisdictional basis for an exclusion hearing before an immigration judge." *Matter of Waldei*, 19 I. & N. Dec. 189, 191 (1984). That section reads in part as follows:

> Every alien (other than an alien crewman) and except as otherwise provided in subsection (c) of this section and in section 1323(d) of this title,[8] who may not appear to the examining immigration officer *at the port of arrival* to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer.

8 U.S.C. § 1225(a) (emphasis added).

Section 236(a), 8 U.S.C. § 1226(a), provides for exclusion hearings before a "special inquiry officer" (i.e., an immigration judge, *see* 8 U.S.C. § 1101(b)(4)). Section 236(a) states:

> A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported.

As the plain language of the INA makes clear, it is a predicate for conducting exclusion proceedings that the alien seeking admission be examined "*at the port of arrival*" by an immigration officer. 8 U.S.C. § 1225(b); *see also id.* § 1225(a) ("All aliens arriving *at ports of the United States* shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe.") (emphasis added); 8 C.F.R. § 235.1 (1993) ("Application to enter the United States shall be made . . . in person to an immigration officer *at a U.S. port of entry enumerated in part 100 of this chapter.*) (emphasis added); *id.* § 100.4 (c)(2) (designating ports of entry); 1 Gordon & Mailman, at § 8.05[2][b] ("There are many places designated as ports of entry along the land borders of the United States and at international airports and seaports. It is to such a place, and at a time open for inspection, that an alien seeking entry to the United States must make his or her application for admission. . . . 'Instream' inspections are conducted aboard arriving ships.").[9] An alien inter-

[8] 8 U S C § 1225(c) refers to the temporary exclusion by summary procedures of certain aliens who appear to be excludable on national security or related grounds 8 U S.C. § 1323(d) refers to aliens who arrive as stowaways, and renders them subject to exclusion without a hearing *See Matter of Waldei*, 19 I & N. Dec at 192

[9] Mere arrival at a port of the United States, without more, does not entitle an alien to an exclusion hearing before a special inquiry officer under INA section 236 Rather, that section limits the special inquiry

dicted at sea — even if within the territorial waters of the United States — is not at any "port."[10] Consequently, there is no jurisdiction to conduct an exclusion proceeding in such a case.[11]

This construction of INA sections 235(b) and 236(a) comports with the text and structure of the INA. Both sections are located within Part IV, "Provisions Relating To Entry And Exclusion," of Subchapter II, "Immigration," of the INA. An analysis of these provisions confirms that statutory arrangements for exclusion proceedings presuppose that the alien is no longer at sea, but has reached port. The first provision of Part IV relates to the duties of persons transporting alien and citizen passengers to provide immigration officers with lists or "manifests" of the persons they are transporting. The duty to provide such a list attaches under INA section 231(a), 8 U.S.C. § 1221(a), "[u]pon the arrival of any person by water or by air *at any port* within the United States from any place outside the United States" (emphasis added); *see also* 8 C.F.R. § 231.1(a) (1993). Under INA section 232, 8 U.S.C. § 1222, aliens "arriving *at ports* of the United States" may be detained for observation and examination by immigration officers and medical officers if it is thought that they may be excludable for medical reasons (emphasis added). Before its repeal in 1986, the next section, INA section 233, 8 U.S.C. § 1223, authorized immigration officers to order the temporary removal of aliens "[u]pon the[ir] arrival *at a port* of the United States, . . . but such temporary removal shall not be considered a landing" (emphasis added). Section 234, 8 U.S.C. § 1224, deals with physical and mental examinations of certain arriving aliens, and provides for appeals therefrom. Sections 235 and 236, as discussed above, concern other inspections of arriving aliens and the institution of exclusion proceed-

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officers' authority to conduct exclusion proceedings to cases in which aliens have reached port and have been detained or taken into custody by immigration officers.

[10] *Black's Law Dictionary* (6th ed 1990) defines a "port" as:

> A place for the loading and unloading of the cargoes of vessels, and the collection of duties or customs upon imports or exports A place, on the seacoast, great lakes, or on a river, where ships stop for the purpose of loading and unloading cargo, or for the purpose of taking on or letting off passengers, from whence they depart, and where they finish their voyage. A port is a place intended for loading or unloading goods; hence includes the natural shelter surrounding water, as also sheltered water produced by artificial jetties, etc. The Baldhill, C C A N Y , 42 F 2d 123, 125.

Id. at 1161.

A "port" must thus be a "place" and, as Chief Justice John Marshall wrote, "[t]he objects with which the word '*place*' is associated, are all, in their nature, fixed and territorial." *United States v. Bevans*, 16 U S. (3 Wheat.) 336, 390 (1818) (emphasis added) (United States warship lying at anchor in Boston Harbor not a "place" within meaning of 1790 statute), *see also id.* at 340 (argument of Daniel Webster, citing common law meaning of "port"); *Devato v. 823 Barrels of Plumbago*, 20 F 510, 515 (S D N Y 1884).

Being at a port does not require that a "landing" be made A "landing" occurs when a vessel is left and the shore is reached. *Taylor v United States*, 207 U.S. 120, 125 (1907). We note that an alien who has arrived at a port but who has not landed may be entitled to an exclusion proceeding *See Matter of Pierre*, 14 I & N. Dec 467, 469-70 (1973).

[11] Even if it is assumed that an alien s presence at a "port" is not a *jurisdictional* requirement of an exclusion proceeding, the statute nonetheless makes clear that the *right* to such a proceeding does not attach unless the alien is at a "port "

ings. Section 237, 8 U.S.C. § 1227, provides for the immediate deportation of excluded aliens.

Judicial support for our interpretation is provided by *Haitian Refugee Center, Inc. v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987), a suit challenging the Government's interdiction of visaless aliens on the high seas. There the district court stated:

> The Immigration and Nationality Act has established procedures for the exclusion of aliens, including the entitlement to a hearing. *See* 8 U.S.C. § 1226. Those rights, however, are reserved for aliens arriving "by water or by air at any port within the United States from any place outside the United States." *Id.* Contrary to plaintiffs' assertion, the interdicted Haitians also have no statutory "right to counsel", which is reserved to those aliens in "exclusion or deportation proceedings." 8 U.S.C. § 1362. Again, because those "exclusion or deportation proceedings" are restricted to aliens arriving "at any port within the United States," 8 U.S.C. § 1221, it is clear that the interdicted Haitians are entitled to none of these statutorily-created procedural rights, including the right to counsel.

Id. at 1404.

In sum, then, the overall statutory scheme regulating the exclusion of an alien is activated by the alien's arrival *at a port* of the United States. That event triggers significant legal effects, including the transporter's duty to provide a manifest, the immigration officers' powers to inspect and detain, and the alien's right, if detained, to an exclusion proceeding. Nothing in the statute contemplates that the same effects are to follow if the alien is interdicted at sea before reaching port — even if interdiction occurs within United States territorial waters. For purposes of exclusion under the INA, the ports of the United States — not the limits of its territorial waters — are functionally its borders. Accordingly, we conclude that aliens interdicted within United States territorial waters do not have a right to exclusion proceedings under INA section 236.

B. *Asylum and Withholding Provisions of the INA*

Examination of the INA's basic distinction between exclusion and deportation proceedings, and of its provisions for asylum and withholding of deportation or return, confirms the conclusion reached in the previous section.

"'[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the

former category who are merely "on the threshold of initial entry."'" *Sale*, 509 U.S. at 175 (quoting *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958)) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)). The distinction in the rights and privileges accorded to these two groups is reflected in the different procedures applied to each. "The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission." *Landon v. Plasencia*, 459 U.S. at 25.

The differences between exclusion and deportation, and the varying procedural protections attached to each, turn on whether the alien has made an "entry" into the United States. "Entry" is here a term of art.[12] *See id.* at 28-29; *Matter of Patel*, 20 I. & N. Dec. 368, 370 (1991). "Physically coming into the United States does not necessarily accomplish an entry, else all inspections would effectively have to be made on foreign soil. Presence after inspection and admission, without further restraint, however, does amount to entry. So does penetrating the functional border by intentionally evading inspection before being apprehended." 1 Gordon & Mailman, at § 1.03[2][b]. Aliens who have made an "entry" are entitled to deportation proceedings; those who are seeking admission but who have *not* entered are accorded, at most, an exclusion proceeding — "a process in which the alien usually has less protection under the statute and little, if any, under the Constitution." *Id.*[13]

Before 1980, aliens who were excludable but not deportable did not have the right to apply for either asylum or withholding of deportation or return.[14] By the enactment of the Refugee Act, § 203(e), 94 Stat. at 107, Congress extended those benefits to both types of aliens.[15] Section 201(b) of the Refugee Act, as amended, now codified at 8 U.S.C. § 1158(a), prescribed that the Attorney General was to establish procedures for asylum applications. The Refugee Act's asylum provision states in part: "The Attorney General shall establish a procedure for an alien *physically present in the United States or at a land border or port of entry*, irrespective of such alien's status, to apply for asylum." 8 U.S.C. § 1158(a) (emphasis added). As explained immediately below, aliens interdicted within United States territorial waters are neither "at a land border or port of entry," nor even "physically present in the United States" within the meaning of the asylum statute.

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[12] The term "entry" is defined in the INA to "mean[] any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." 8 U.S.C. § 1101(a)(13).

[13] For an explanation of the different entitlements under each procedure, *see Landon v. Plasencia*, 459 U.S. at 25-28.

[14] *See Leng Ma May v. Barber*; *Maldonado-Sandoval v. INS*, 518 F.2d 278, 280 n.3 (9th Cir. 1975); *United States ex rel. Tom We Shung v. Murff*, 176 F. Supp. 253, 260 (S.D.N.Y. 1959), *aff'd sub nom. United States ex. rel. Tom We Shung v. Esperdy*, 274 F.2d 667 (2d Cir. 1960); *Matter of Cenatice*, 16 I. & N. Dec. 162, 164-65 (1977).

[15] *See Sale*, 509 U.S. at 176 n.33 (withholding); *id.* at 159-60 (asylum and withholding); *Haitian Refugee Center v. Gracey*, 809 F.2d at 841 (Edwards, J., concurring in part and dissenting in part), 8 C.F.R. § 208.2(a) (1993); *Matter of Salim*, 18 I. & N. Dec. 311, 314 (1982); 2 Gordon & Mailman, at § 33.05[2][a]-[b].

See Sale, 509 U.S. at 160 (INA's protections apply "only to aliens who *reside in* or *have arrived at the border of* the United States") (emphasis added).

In *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 502 U.S. 1122 (1992), the court construed the language of the asylum provision and held:

> [T]he plaintiffs in this case — who have been interdicted on the high seas — cannot assert a claim based on the INA or the Refugee Act. . . . The plain language of the statute is unambiguous and limits the application of the provision to aliens within the United States or at United States' borders or ports of entry. The plaintiffs in this case have been interdicted on the high seas and have not yet reached "a land border" or a "port of entry."

Id. at 1510 (citations omitted).

Precisely the same can be said of aliens who have been interdicted within territorial waters: they have not yet reached a land border or a port of entry.[16]

Furthermore, aliens interdicted within the territorial waters are also not "physically present in the United States," 8 U.S.C. § 1158(a), in the sense of that expression evidently intended by Congress. The statute's distinction between aliens "physically present in the United States" and aliens "at a land border or port of entry" is evidently designed to refer to the difference between *deportable* and *excludable* aliens: as pointed out above, the former are understood to be "already physically in the United States," while the latter are deemed to be "outside the United States seeking admission." *Landon v. Plasencia*, 459 U.S. at 25. Aliens interdicted within the territorial waters are undoubtedly not entitled to deportation proceedings. They are therefore not "physically present in the United States" within the meaning of the Refugee Act's asylum provision.

The Refugee Act also amended the INA to allow aliens in exclusion proceedings to seek "withholding" under INA section 243(h), 8 U.S.C. § 1253(h). *See Sale*, 509 U.S. at 175-76 ("The 1980 amendment erased the long-maintained distinction between deportable and excludable aliens for purposes of section 243(h). By adding the word 'return' and removing the words 'within the United States' from § 243(h), Congress extended the statute's protection to both types of aliens.").[17] In *Sale*, the Supreme Court held that this amendment did not limit the

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[16] We note that, in its 1980 memorandum concerning the treatment of Cuban refugees, INS itself agreed that "an alien apprehended within territorial waters before landing does not appear to have a right to apply for asylum under the Immigration and Nationality Act." INS Cuba Memorandum at 1

[17] Withholding and asylum differ in significant ways, not the least of which is that asylum is discretionary relief which the Attorney General may or may not bestow upon qualified applicants, whereas withholding is mandatory as to those who qualify for it. *See, e.g., Sale*, 509 U.S. at 162 n.11, *INS v. Cardoza-Fonseca*,

President's power to order the Coast Guard to repatriate undocumented aliens interdicted on the high seas. *Id.* at 174-77. In our view, the amendment also does not limit the President's power to order the Coast Guard to turn back undocumented aliens interdicted within United States territorial waters.

INA section 243(h), 8 U.S.C. § 1253(h), provides that:

> The Attorney General shall not deport or return[[18]] any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 243(h) by its terms applies only to the actions of the *Attorney General*. *See Sale*, 509 U.S. at 177 (Attorney General is "the government official at whom [section 243(h)] is directed"). Nothing in the language of the provision speaks to the responsibilities of the Coast Guard or of any other agency that may encounter undocumented aliens, whether in the territorial waters or elsewhere. Moreover, the INA confers authority on executive branch officers other than the Attorney General, specifically including the President. *See, e.g.*, 8 U.S.C. § 1182(f) (authorizing the President by proclamation to suspend the entry of "any class of aliens" or to "impose on the entry of aliens any restrictions he may deem to be appropriate"); *see also Sale*, 509 U.S. at 171-72. If the President orders the Coast Guard to interdict and turn back aliens within the territorial waters, nothing in section 243(h) precludes that agency from obeying his instructions, any more than the section precluded the agency from obeying a similar Presidential order with regard to aliens on the high seas. *Cf. id.* at 172.[19]

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480 U.S. 421 (1987); *INS v. Stevic*, 467 U.S. 407, 421 n.15, 423 n.18, 426 (1984). Relatedly, the alien's proof burden is more readily discharged in asylum cases. *See* 2 Gordon & Mailman, at § 33.05[3].

[18] As explained above, without having made an "entry" into the United States, an alien would not be subject to deportation; necessarily, therefore, he or she would not be eligible for withholding of deportation. An alien who has not made an "entry" but is in exclusion proceedings can, however, apply for the relief of withholding of "return." As the Supreme Court explained in *Sale*, the amendments made by the Refugee Act added the word "return" to section 243(h) to ensure that a form of relief analogous to withholding of deportation would be available in exclusion proceedings. *See Sale*, 509 U.S. at 174 ("We can reasonably conclude that Congress used the two words 'deport' and 'return' only to make § 243(h)'s protection available in both deportation and exclusion proceedings.")

[19] Furthermore, it would be incongruous if the INA provided that an alien seeking admission had the right to a hearing on a withholding claim, but not on an asylum claim, if he or she were intercepted in the territorial waters. The two forms of relief are broadly similar in substance, and petitions for both are alike founded on the fear of persecution. Applicants frequently plead (and are invited by immigration officers and judges to plead) for both types of relief together; indeed, under Board of Immigration Appeals rules, an asylum application presented initially to an immigration judge in an exclusion proceeding, or renewed in such a proceeding following denial by an INS officer, is also deemed an application for withholding. *See Matter of Gharadaghi*, 19 I. & N. Dec. 311, 316 (1985); 8 C.F.R. § 208.3(b) (1993); *see also id.* § 208.5(a) (INS shall make available application forms for asylum and withholding to requesting aliens in its custody); *id.* § 208.16(a) (if Asylum Officer denies asylum application, he or she shall also decide whether alien is entitled to withholding); *id.* § 236.3(a)(1)-(2) (immigration judge is to advise an alien expressing fear of

This analysis of the scope of section 243(h) is consistent with Congress's understanding of the scope of Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 6259, 189 U.N.T.S. 150 ("United Nations Convention"). As the Supreme Court has noted on several occasions, *see Sale*, 509 U.S. at 177-78; *INS v. Stevic*, 467 U.S. at 421, the main intent of the Refugee Act's changes in section 243(h) was to clarify the language of the provision so that it conformed to Article 33. The legislative history of the Refugee Act discloses that Congress construed the United Nations Convention to "insure fair and humane treatment for refugees *within the territory of the contracting states*." H.R. Rep. No. 96-608, at 17 (1979) (emphasis added). While this legislative reference to "refugees within the territory" of a contracting State could conceivably include aliens within the marginal waters over which the State claimed sovereignty,[20] we think it accords better with the realities of immigration practice (particularly the difficulties of patrolling a border in the sea) to understand Congress to be referring only to aliens who have reached port or who have landed.[21]

Furthermore, Article 33 does not convey any entitlements that could be relevant here but that are not provided by section 243(h) itself. *See Stevic*, 467 U.S. at 428-30 n.22; *Haitian Refugee Center v. Gracey*, 809 F.2d at 841 (Edwards, J., concurring in part and dissenting in part). Thus, Article 33 does not serve as an independent basis for requiring procedural protections not conferred by the statute.[22] In addition, the State Department has advised us of its view that the United States's international law obligations under the Protocol do not require it to provide exclusion hearings to aliens who have merely arrived in its territorial waters.[23] That conclusion concerning the territorial scope of the signatories' obligations under

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persecution that he or she may apply for asylum or withholding and shall make appropriate forms available). There is no apparent reason, therefore, why the statutory requirement that an applicant be at a port or a land border in order to seek asylum in an exclusion proceeding should not also govern applicants seeking withholding

[20] The word "territory" can in some contexts be understood to include the territorial sea *See Cunard S S. Co v Mellon*, 262 U S at 122 (Eighteenth Amendment); *Lam Mow v. Nagle*, 24 F 2d 316, 318 (9th Cir. 1928) (Fourteenth Amendment), *In re A—*, 3 I & N. Dec. 677, 679 (1949) (quoting *Mellon*, 262 U.S. at 100).

[21] Certain international law documents distinguish between a nation's "territory" and its "territorial seas." For example, the 1982 United Nations Convention on the Law of the Sea declares that in the zone contiguous to its territorial sea, a State may exercise the control necessary to prevent and punish infringements of its immigration and other laws "within its territory or territorial sea." *See* Third United Nations Conference on the Law of the Sea, Dec. 10, 1982, art. 33(1), 21 I L.M. 1245, 1276 ("1982 Conference")

[22] In any event, we have previously opined that there is no private right of action under Article 33 *See* Memorandum for Edwin D Williamson, Legal Adviser, Department of State, from Timothy E Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, *Re· Article 33 of the Refugee Convention* at 3 (Dec. 12, 1991)

[23] The State Department takes the position that "the non-refoulement obligation of the Protocol [which is reflected in the "withholding of return" language of INA § 243(h)] applies only with respect to aliens who have 'entered' the United States in the immigration law sense. That is, the international treaty obligation only applies with respect to an alien who is physically present on the land mass of the United States and who has passed a port of entry . . [T]he non-refoulement obligation of the Refugee Protocol does not apply at sea at all and therefore has no bearing on the questions presented to you by INS." State Department Submission, at 2

Article 33 is re-enforced by the negotiating history of the article and the interpretations of commentators.[24]

Accordingly, we conclude that the INA's sections relating to asylum and withholding do not require that an exclusion hearing be provided for aliens interdicted within territorial waters.

C. *The Geographical Limits of the "United States"*

Our reading of the INA is consistent with the statute's definition of the "United States," 8 U.S.C. § 1101(a)(38). "[t]he term 'United States', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States."

That definition makes no reference to the United States's territorial waters and on its face is consistent with the view, supported by other sections of the INA, that an undocumented alien is entitled to an exclusion hearing only if he or she has actually arrived at a port of entry.[25]

The INS takes a contrary view, arguing that the procedural protections of the INA are triggered whenever an undocumented alien arrives within United States territorial waters. INS Draft Memorandum, at 2. As INS concedes, however, *id.* at 3, its current position conflicts with an opinion of the INS General Counsel issued only four years ago.[26]

In its current submission, INS relies primarily upon *International Longshoremen's and Warehousemen's Union v. Meese*, 891 F.2d 1374 (9th Cir. 1989)

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[24] The materials cited in *Sale*, 509 U.S. at 179-87 reflecting the negotiations on Article 33, do not suggest that the signatories contemplated obligations extending beyond their land borders. Rather, at least some commentators imply a contrary conclusion. *See* 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 94 (1972) ("[Article 33] does not obligate the Contracting States to admit any person *who has not already set foot* on their respective territories." (emphasis added)), N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 163 (1953) ("[I]f a refugee has succeeded in eluding the frontier guards, he is safe [under Article 33]; if he has not, it is his hard luck."). A person who has merely entered the territorial waters within three or twelve miles of a nation's coast can hardly be viewed as having "set foot" in that nation or as having "eluded" its frontier guards.

[25] In numerous other statutes, Congress has specifically included a reference to the territorial waters when defining the "United States." For example, the Longshore and Harbor Workers Compensation Act defines the term "United States" "when used in a geographical sense [to include] the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. § 902(9). The Congressional Research Service has identified a large number of statutes referring explicitly to the territorial sea. *See* Memorandum for Committee on Merchant Marine and Fisheries, from American Law Division, *Re Effect of Territorial Sea Extension on Selected Domestic Law*, CRS-12 (Mar. 16, 1989), *reprinted in* 1989 Hearings, at 60.

[26] *See* INS General Counsel's Opinion 89-30, entitled "8 C.F.R. § 274a.1(h) - 'employment' and 'touches at port': in the United States" (Mar. 15, 1989). That opinion's main conclusion was that labor performed on a United States vessel within United States territorial waters, but while the vessel is not touching at a port in the United States, does not constitute "employment" in the United States within the meaning of the INA. The opinion further concluded that "[t]he term 'United States', as defined in INA § 101(a)(38), does not include its 'territorial waters'." *Id.* at 4.

("*ILWU*"). There, the INS had determined that Canadian nationals who operated cranes aboard vessels operating in U.S. coastal waters were bona fide "alien crewmen" within the meaning of 8 U.S.C. § 1101(a)(15)(D), and were therefore not required to obtain labor certification from the Department of Labor under 8 U.S.C. § 1182(a)(5). In an action challenging that determination brought by an American labor union, the court of appeals held that the crane operators did not qualify as "alien crewmen" under the INA and therefore were subject to domestic labor certification requirements. The court rejected the Government's contention that the INA's labor certification requirements were inapplicable because the crane operators never "'actually enter the United States as that term is applied to the crew of vessels in U.S. waters because the crane operators never leave the vessel.'" *Id.* at 1384. In rejecting this argument, the court stated:

> An "entry," however, is not a prerequisite to the applicability of the immigration laws, those laws are triggered whenever an alien merely arrives in the United States, regardless of whether he actually effectuates an "entry." The territorial waters surrounding this country are classified as part of the United States. Thus, if persons employed aboard a foreign vessel do not fall within the definition of an alien crewman, then their arrival into U.S. territorial waters could violate provisions of the Act.

Id. (citations omitted).

INS's reliance on *ILWU* is misplaced. The court was not presented with any question that required it to decide whether mere arrival within territorial waters entitles an undocumented alien to an exclusion hearing. Moreover, to the extent that the court's broad language implied an answer to that question, its analysis was flawed.

First, the *ILWU* court paid no attention to the detailed requirements for any exclusion hearing that are specified by the statute. It is the specific language of the specialized provisions in the INA that determines the extent of an undocumented alien's procedural rights in pursuing the various legal methods of gaining admission into the United States. In reaching out for an unduly broad result, the court failed to analyze those provisions.

Second, the court's assertion that a vessel's mere arrival in United States territorial waters triggers the general applicability of the domestic immigration laws was unsupported by any pertinent reasoning or legal authorities. The court cited only two cases, neither of which in fact supports its conclusion. One of the cases does no more than establish that the United States has the legal capacity to assert jurisdiction and apply its penal statues within territorial waters; the other case tends, if anything, to *undercut ILWU* by demonstrating the significance of reaching a port of

entry, rather than the territorial seas, for triggering jurisdictional consequences under the INA.[27]

INS also relies on *Piledrivers' Local Union No. 2375 v. Smith*, 695 F.2d 390 (9th Cir. 1982). There the court held that the INA and its labor certification requirements apply to the outer Continental Shelf because the OCSLA extended the general legal jurisdiction of the United States to the outer Continental Shelf. *See* 43 U.S.C. §§ 1331-1356. Specifically, the operative section of OCSLA extends "[t]he Constitution and laws and civil and political jurisdiction of the United States . . . to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon." *Id.* § 1333(a)(1).

While citing *Piledrivers' Local*, INS states that it "disagrees" with its holding that the INA and its labor certification requirements extend to alien workers on the outer Continental Shelf. INS adds, however, that "if the Act did apply to the outer continental shelf, *a fortiori* it would extend through the territorial sea." INS Draft Memorandum, at 3 n.2.

Our Office has previously considered the relationship between the INA and the OCSLA in *Outer Continental Shelf — Drilling Rigs — Alien Workers*, 3 Op. O.L.C. 362 (1979). Specifically, we addressed the question whether, in light of certain 1978 amendments to the OCSLA, the INA applied to drilling rigs on the outer Continental Shelf. We characterized the OCSLA, which was originally enacted in 1953, as "basically a guide to the administration and leasing of offshore mineral-producing properties." *Id.* at 362. Considering OCSLA's federal jurisdiction provision, 43 U.S.C. § 1333(a)(1), without reference to the 1978 amendments to the Act, we found that (3 Op. O.L.C. at 363-64):

> Based on a literal reading of that provision, it is certainly possible to conclude that the immigration laws should apply. The 1953 law adopts Federal law "to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." The immigration laws apply, of course, to Federal enclaves within States. It appears that § 1333(a)(1) was drafted so that it would include Federal laws which, read by themselves, might be

[27] The court cited *Cunard S.S Co v Mellon*, 262 U S at 122, and *Lazarescu v. United States*, 199 F.2d 898, 900-01 (4th Cir. 1952). *ILWU*, 891 F 2d at 1384. *Cunard* held that the Eighteenth Amendment and the National Prohibition Act implementing it applied to both foreign and domestic merchant ships within the territorial waters of the United States. 262 U S. at 124-26. *Lazarescu* involved the prosecution of a previously deported seaman for unlawful re-entry into the United States The court's discussion of the geographical factors governing application of the INA in that case does not, in fact, place controlling significance on arrival in the territorial waters. As the court observed, "[t]he port and harbor of Baltimore is territory of the United States Entry into *that* territory even in a vessel amounted to a violation of the act unless appellant was under restraint which prevented his departing from the vessel." *Id* at 900-01 (emphasis added). The court's language seems to undermine *ILWU*'s suggestion that an alien's arrival in the territorial waters (rather than at a port) triggers the INA's procedures governing exclusion.

> interpreted as being limited in their application to the continental United States.

See also id. at 364 (citing legislative history supporting such an interpretation); Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23, 38, 41-42 (1953) (to like effect).[28]

In light of our 1979 analysis, we are prepared to assume here that, except as OCSLA otherwise specifically provides, that statute extended the INA to "the subsoil and seabed of the outer Continental Shelf," as well as to "artificial islands" and certain "installations or other devices" attached to the seabed or used for transport. *See* 43 U.S.C. § 1333(a)(1). We do not see, however, how such an extension of the INA would be relevant to the question whether undocumented aliens are entitled to an exclusion hearing if they are interdicted in the territorial waters.

First, OCSLA's very definition of the "outer Continental Shelf" shows that INS's argument is mistaken. The "outer Continental Shelf" is defined at 43 U.S.C § 1331(a) to mean "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." There is an obvious distinction between the Continental Shelf's "subsoil and seabed" (and certain structures attached to the Shelf or used in exploiting its resources) and the *waters* lying above the Shelf. The extension of Federal jurisdiction to the subsoil and seabed of the Shelf would by no means require or imply its extension to the waters above it. Congress's intent in enacting OCSLA was to protect the Federal Government's "paramount rights to the *seabed* beyond the three-mile limit," and specifically its interests in "the leasing and development of the resources *of the seabed*," including oil, natural gas, and minerals. *United States v. Maine*, 420 U.S. 515, 526-27 (1975) (emphases added). Nothing in that purpose requires, or even suggests, the extension of the immigration laws to the waters lying above that seabed.

Moreover, as a matter of international law, the waters lying above the seabed and subsoil of the Continental Shelf are considered to be open sea to the extent that they are outside territorial waters. *See Oil Tanker Officer Tax Liability Case*, Bundesfinanzhof [BFHE][Supreme Tax Court] 123, 341 (F.R.G.), *translated in* 74 Int'l L. Rep. 204, 210 (E. Lauterpacht and C.J. Greenwood eds., 1987). Thus, "a

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[28] In connection with our 1979 opinion, we note *United Ass'n of Journeymen v Thornburgh*, 768 F. Supp 375 (D D C. 1991) That case dealt with the question whether aliens, in order to perform work installing oil rigs on the outer Continental Shelf, must obtain visas of the type issued to nonimmigrant aliens entering the United States to perform temporary service or labor The district court granted summary judgment, holding that the INA applied to the outer Continental Shelf, and explicitly disagreeing with our Office's conclusion that OCSLA precluded application of the INA to the Shelf. *Id.* at 379 However, the court of appeals vacated the district court's grant of summary judgment and remanded for resolution of matters of fact *See United Ass'n of Journeymen v Barr*, 981 F.2d 1269 (D C Cir 1992), *cert denied*, 117 S Ct. 49 (1996) The court of appeals specifically declined to decide "the broad question whether the Immigration and Nationality Act generally applies on the outer Continental Shelf " *Id* at 1274.

ship operating beyond the territorial sea above the area of the continental shelf is still to be regarded as being on the high seas and not subject to the sovereignty of the coastal State." *Id.* at 211. *Sale*, of course, has settled the issue of the President's power under the INA to return, without any hearing, aliens interdicted on the high seas — including, therefore, the high seas above the outer Continental Shelf.

D. *Effect Of Presidential Proclamation No. 5928*

As discussed above, Presidential Proclamation No. 5928 of December 27, 1988, announced that the territorial sea of the United States would extend to twelve nautical miles from the baselines of the United States. The President further stated:

> Nothing in this Proclamation:
>
> > (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom;

54 Fed. Reg. at 777.

Despite this expressed intent not to alter domestic law, the INS suggests that the Proclamation did operate to extend the scope of the INA. More precisely, the INS appears to argue that the Proclamation operated to enlarge the INA's definition of the "United States," found in 8 U.S.C. § 1101(a)(38). *See* INS/OGC Memorandum, at 1-3.[29]

When the Proclamation was proposed, this Office considered various issues relating to its legality. As to the possible effect of the Proclamation on domestic law, we opined:

> By its terms, the Proclamation will make clear that it is not intended to affect domestic law. Congress may, however, have enacted statutes that are intended to be linked to the extent of the United States' territorial sea under international law. The issue, therefore, in determining the effect of the proclamation on domestic law is whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea. Thus, the question is one of legislative intent.

Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. O.L.C. 238, 253 (1988).

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[29] There is no basis for assuming, as INS perhaps does, that the Proclamation's expansion of the territorial sea would uniformly affect each discrete provision or definition in the INA, without regard to its particular phrasing or function

Our 1988 opinion invites the question whether Congress intended the INA, or particular sections of the INA, to track any changes in the bounds of the United States's territorial sea. We have therefore considered whether Congress intended the INA's definition of the "United States" at 8 U.S.C. § 1101(a)(38) to track, and conform to, changes in international law determining the extent of the United States's territorial sea. We believe that Congress had no such intent. The INS has offered no evidence that Congress meant either the INA as a whole, the INA's provisions governing the treatment of aliens seeking entry in particular, or the INA's definition of the "United States," to track such changes in international law. After reviewing the legislative history, we have discovered no such evidence ourselves. Thus, we conclude that it is extremely unlikely that Congress intended the INA's definition of the "United States" to be ambulatory, and to follow changes in international law.

We shall, however, assume *arguendo* that Congress intended the INA's definition of the "United States" to track changes in the extent of the United States's territorial sea recognized by international law. *Cf. Argentine Republic*, 488 U.S. at 441 (suggesting by negative implication that if injury had occurred in territorial waters, it would have taken place within the "United States" as defined in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330). It still does not follow that exclusion proceedings must be provided for undocumented aliens interdicted within the twelve mile bounds that now comprise the territorial waters. An implicit enlargement of the INA's definition of the "United States" to include the new territorial waters has no bearing on the scope of the statute's exclusion provisions, INA sections 225-226. As discussed above, these sections do not refer to the "United States" in any relevant way; rather, they refer to "*the ports* of the United States," and condition exclusion proceedings on arrival at such ports. *Id.* (emphasis added). In short, by enlarging the territorial waters, the Proclamation may also have extended the geographical scope of the "United States" under the INA; but it does not follow that aliens for whom exclusion proceedings need not previously have been provided have become entitled to them.

Furthermore, the Proclamation should have no impact on the procedural entitlements of undocumented aliens under the INA because the statute's only significant reference to the territorial waters occurs in a provision establishing the Government's power to deter illegal immigration rather than in any of the provisions establishing an alien's procedural rights in seeking to enter the United States. A computer search shows that the terms "territorial waters" or "territorial sea" are mentioned in only one section of title 8 (which includes the INA).[30] That provision

[30] The computer search also identified a provision in the notes following 8 U S C. § 1101, referring to the "Treatment of Departures from Territorial Waters of Guam or Departures from Guam." The note states that section two of the Act of Oct 21, 1986, Pub L. No 99-505, 100 Stat 1806, had provided that "[i]n the administration of section 101(a)(15)(D)(ii) of the [INA] . an alien crewman shall be considered to have departed from Guam after leaving the territorial waters of Guam, without regard to whether the alien arrives in a foreign state before returning to Guam."

is section 287(a)(3) of the INA, 8 U.S.C. § 1357(a)(3), discussed in detail in Part III below, which authorizes the INS to conduct warrantless searches of vessels "within the territorial waters of the United States." The absence of any other use in the INA of the terms "territorial waters" or "territorial sea" — and particularly their absence in the detailed provisions governing the treatment of aliens seeking to enter the United States — strongly suggests that an alien's arrival or presence in the territorial waters is simply not a relevant consideration for establishing or expanding the rights of aliens seeking entry. Had Congress wanted to make mere entry into the territorial waters sufficient to guarantee the entrant an exclusion hearing, it could easily have written such language into an appropriate section of the INA, as it did elsewhere in the Act. Indeed, inasmuch as the only usage of the term "territorial waters" appears in section 287's description of INS's authority to search vessels in order to *thwart* aliens attempting illegal entry, there is reason to view the territorial waters as a buffer zone, rather than as a safe harbor, in the overall scheme of the INA.

Accordingly, we conclude that Presidential Proclamation No. 5928 does not have the effect of requiring exclusion hearings to be provided to undocumented aliens interdicted within the territorial sea.

III.

A. *INS's Enforcement Powers Under INA Section 287*

Section 287 of the INA, 8 U.S.C. § 1357, sets forth various investigative and enforcement powers granted to INS. Of particular relevance here, INA section 287(a)(3) provides that the INS shall have power, without a warrant —

> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, ...

8 U.S.C. § 1357(a)(3).

In the wake of the Presidential Proclamation No. 5928, INS amended its interpretative regulation construing section 287. *See* 57 Fed. Reg. 47,257 (1992), codified at 8 C.F.R. § 287.1(a)(1) (1993). This interpretative rule construes the term "external boundary," as used in INA section 287(a)(3), as follows:

> (a)(1) *External boundary.* The term *external boundary*, as used in section 287(a)(3) of the Act, means the land boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law.

8 C.F.R. at § 287.1(a)(1). The regulation does not purport to construe any provision of the INA other than section 287.

The main question posed to us concerning INA section 287 is whether the INS had the authority to construe that provision so as to reflect the enlargement of the United States's territorial waters effected by the Proclamation. We believe that INS's authority to issue the regulation could be defended on either of two theories. First, the Proclamation may have operated of its own force to enlarge the scope of section 287. Second, the INS may have the authority to construe section 287 by regulation in a manner that reflects changed circumstances, including such facts as the expansion of the territorial waters by Presidential proclamation. Of these two theories, the latter appears to us the more persuasive.

We also note that the broad enforcement powers granted to the Attorney General under section 103 of the INA, 8 U.S.C. § 1103 — powers which have been delegated to the INS — could provide a separate legal basis for a regulation establishing that INS's seaward search authority extends to the limits of the twelve-mile territorial waters and even beyond. *See United States v. Chen*, 2 F.3d 330 (9th Cir. 1993), *cert. denied*, 511 U.S. 1039 (1994), discussed *infra* in Pt. III(C).

B. *"Territorial Waters" Under INA Section 287*

As discussed in Part II above, this Office has taken the position that the question of the Proclamation's effect upon domestic law depends on a case-by-case analysis of the legislative intent behind each statute. Accordingly, we sought evidence that Congress intended the INA's definition of the "United States," 8 U.S.C. § 1101(a)(38), to track changes in international law respecting the United States's territorial waters. We discovered no such evidence. The legislative history of section 287's "territorial waters" limitation provides some guidance as to that term's origins, but we find it inconclusive on the question of whether the meaning of the term was meant to be static or dynamic.

The language of section 287 authorizing warrantless vessel searches was originally enacted as an amendment to a Justice Department appropriations bill in 1925. Appropriations for Department of State and Justice, the Judiciary, and Departments of Commerce and Labor, Pub. L. No. 68-502, 43 Stat. 1014, 1049-50 (1925). That amendment was primarily intended to provide authority for INS border patrol officials to make arrests upon sighting illegal entry of aliens, but it also provided authority for warrantless searches of vessels and other vehicles in that same context. 66 Cong. Rec. 3201-02 (1925) (statements of Sen. McKellar and Sen. Reed). The limitation of vessel searches to the territorial waters was added as a House floor amendment to the bill as reported out of the conference committee. *Id.* at 4553, 4555. The sponsor of that amendment, Mr. Connally of Texas, offered the amendment to address his concern that the absence of any limitations on the vessel

search authority was "apt to entangle our Government in difficulties with foreign nations." *Id.* at 4555. In further addressing this concern, Mr. Connally stated, "But why not limit it? It is just such loose legislation as this that produces complications with other nations." *Id.* Just before offering the amendment, Mr. Connally specifically considered using "within the 3-mile limit" as alternative language to "within territorial waters," but he opted for the latter formulation and the amendment was adopted by voice vote. *Id.* The amendment was accepted by the Senate with little discussion. *Id.* at 4519.[31]

In 1946, Congress amended the INS's search authorization statute by inserting the additional provision limiting searches to "within a reasonable distance from any external boundary of the United States." Act of Aug. 7, 1946, Pub. L. No. 79-613, 60 Stat. 865. Although there was some House debate on that bill, S. 386, 79th Cong. (1945), it did not make any reference to the term "territorial waters" or indicate that any change in the scope or effect of that term was intended. *See* 91 Cong. Rec. 5504-05, 5513 (1945). The debate did indicate that some Congressmen viewed the scope of the INS's sea search authority under the then existing territorial waters provision as quite broad. As one Member stated, "under the present law [an official] may go on any boat in *any waters* and search that boat, without a warrant, to see if there are any people there attempting to enter." *Id.* at 5505 (emphasis added).[32]

Although the legislative history of the territorial waters provision is inconclusive on the precise issue at hand, it does demonstrate that the phrase was inserted in order to avoid friction with other nations by limiting vessel searches within the three-mile territorial waters claimed by the United States in 1925. The legislative record also reveals that the author and sponsor of the territorial waters amendment considered but rejected alternative language that would have explicitly limited the vessel search authority to a "three-mile limit" — a factor that militates against the view that an immutable three-mile limit was intended. It is also apparent that the limitation ultimately imposed by Congress reflected international rather than domestic concerns. While these factors are inconclusive on the question of whether Congress intended a fixed or expandable interpretation of the territorial waters, they do suggest that the term should be interpreted with international perspective in mind. Inasmuch as the 1988 Proclamation expanded United States territorial waters in conformity with international law and practice, interpreting the term as used in section 287 to reflect that reality could be viewed as consistent with the provi-

[31] Senator Jones, the Floor Manager, commented on the amendment as follows before its adoption: "It seems to me that is entirely proper; I doubt if a vessel could be searched outside of territorial waters even if we did not have that language in it; so I think the Senate should concur in the amendment of the House." 66 Cong. Rec. at 4519.

[32] The present language of section 287(a)(3) was enacted as part of the INA in 1952. That language, which made no significant changes to the statute as modified in 1945, was adopted by unanimous consent, without any debate or discussion as a floor amendment to the bill — H.R. 5678, 82d Cong. (1952) — that became the INA. 98 Cong. Rec. 4400 (1952).

sion's original design — i.e., limiting the INS's search authority to within United States's territorial waters as declared and recognized under international law.

Accordingly, there is little evidence to show that Congress intended its use of the term "territorial waters" to constitute an irrevocable commitment to the three-mile limitation in effect at the time of section 287's enactment. A reasonable interpretation of that term, taking into account the statute's evident intention to provide sufficient enforcement powers to prevent illegal immigration, would therefore incorporate the expansion of the territorial sea declared in the Presidential proclamation.

Alternatively, it can be argued that even if the Proclamation did not of its own force enlarge section 287's reference to the territorial waters, it nonetheless provided a sufficient basis for INS to promulgate its interpretative regulation. Under section 103(a) of the INA, 8 U.S.C. § 1103(a), the Attorney General has broad authority to promulgate regulations interpreting and implementing provisions of the INA in furtherance of her duties, including the duty to protect the Nation's borders against illegal entry by unauthorized aliens.[33] The courts have accorded substantial deference to the Attorney General's regulations under the INA.[34]

INS appears to have regulatory authority to construe the terms "external boundary" and "territorial waters" in INA section 287 to refer to the twelve-mile territorial sea announced in Presidential Proclamation No. 5928, rather than to the historic three-mile territorial sea. Even if the Proclamation did not operate of its own force to alter the scope of section 287, it represented a significant change in circumstances — the international law definition of the United States's territorial waters — which INS could reasonably take into account in deciding to revise its construction of that statutory provision.

Neither the language of section 287 nor (as discussed above) the legislative history demonstrates an unambiguous congressional intent either to link the term "territorial waters" permanently to the historic three-mile boundary or to track sub-

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[33] INA section 103(a) provides.

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as [power is delegated to other Executive Branch officials] . He shall establish such regulations . . as he deems necessary for carrying out his authority under the provisions of this chapter . . . . He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens . . .

See 8 U S C § 1103(a).

The INA further provides that the Attorney General's determinations and rulings "with respect to all questions of law [under the INA] shall be controlling." *Id.* Without divesting the Attorney General of any powers, privileges or duties, the Attorney General's authority under section 103(a), including the authority to promulgate regulations, has been delegated to the Commissioner of INS *See* 8 C F.R. § 2 1 (1993); 1 Gordon & Mailman, at § 3 03[1]

[34] *See, e g , Jean v. Nelson*, 727 F 2d 957, 967 (11th Cir 1984), *aff'd*, 472 U.S 846 (1985) (INA "permits wide flexibility in decision-making on the part of executive officials involved, and the courts are generally reluctant to interfere"), *Narenji v Civiletti*, 617 F.2d 745 (D C. Cir. 1979), *cert denied*, 446 U S 957 (1980) (immigration regulations promulgated by the Attorney General under the INA will be upheld as long as they are "directly and reasonably related to the Attorney General's duties and authority under the Act")

sequent developments in the law, including international law. Accordingly, in adopting its interpretative rule, INS has not failed to "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Rather, because "the statute is silent or ambiguous with respect to the specific issue," the question is whether INS's construction of section 287 was "permissible." *Id.* at 843. Here, we believe, INS was engaging in rulemaking to fill a "gap" implicitly left open by Congress. In such a case, Congress has impliedly delegated the question of construction to the enforcing agency. *Id.* at 843-44. The INS's interpretation should therefore be upheld so long as it is "a reasonable one." *Id.* at 845. We think that the interpretation *was* reasonable.

First, the INS's interpretation ensures that section 287 will be understood in a manner that is consistent with the current international law understanding of the United States's "territorial waters," as declared by the Proclamation. As discussed above, the territorial waters limitation was originally inserted in section 287 in order to promote just such clarity of understanding with other nations as to the scope of United States search authority at sea.

Moreover, the special problems of maritime enforcement of the law appear to support the extension of the INS's authority to board and search vessels beyond the three-mile limit. Such problems have been recognized in the context of customs enforcement, but they apply to immigration enforcement with equal force. Thus, in *United States v. Tilton*, 534 F.2d 1363, 1365 (9th Cir. 1976), the court observed that "it is not practical to set up checkpoints at the outer perimeters of the territorial waters. Nor is it likely that incoming vessels will pick up or discharge passengers or cargo between their points of entry into territorial waters and their anchorages at United States ports." Accordingly, the courts have upheld warrantless customs searches of vessels beyond the three-mile limit but within "customs waters" as valid border searches under the Fourth Amendment.[35] *See id.* (holding that a customs search of a vessel within customs waters can be valid as a border search); *United States v. Victoria-Peguero*, 920 F.2d 77, 80-81 & n.3 (1st Cir. 1990) (pointing out that customs officers are statutorily authorized to search vessels within customs waters, and noting suggestions that the contiguous zone, i.e., the waters lying between three and twelve nautical miles off the coast, be considered the functional equivalent of the border for purposes of the Fourth Amendment); *cert. denied*, 500 U.S. 932 (1991); *United States v. Hidalgo-Gato*, 703 F.2d 1267, 1273 (11th Cir. 1983) (holding the contiguous zone to be the functional equivalent of the border); *United States v. MacPherson*, 664 F.2d 69, 72 & n.2 (5th Cir. 1981) (similar to *Victoria-Peguero*); Note, *High On The Seas: Drug Smuggling,*

[35] "[T]he laws of the United States have since 1790 prohibited various acts within 12 miles, or 4 leagues, of the shore, as a means to enforce compliance with the customs laws." William W. Bishop, *International Law: Cases and Materials* 622-23 (3d ed. 1971). The offshore waters reaching to the twelve-mile limit in which such enforcement was authorized were known as the "customs waters." *See* 19 U.S.C. § 1401(j).

The Fourth Amendment, And Warrantless Searches At Sea, 93 Harv. L. Rev. 725, 733-34 (1980) (detailing difficulties in law enforcement at sea near borders, and arguing for "functional" understanding of borders that could extend them beyond three-mile limit). Analogously, the special difficulties in policing the seaward boundaries can justify INS's regulatory extension of its search authority up to the twelve-mile limit.[36]

Finally, it is no objection to INS's regulation that it might be said to represent a departure from the agency's prior position. An agency's position is "not instantly carved in stone," and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64; *see also Rust v. Sullivan*, 500 U.S. 173, 186 (1991).[37]

C. *INA Section 103 Authority and "United States v. Chen"*

Although we have been specifically asked to examine the validity of the INS interpretive regulation expanding its authority to conduct warrantless searches in the territorial waters under section 287 of the INA, it should be pointed out that the broad enforcement powers granted the Attorney General under section 103 of the INA could provide the legal basis for a substantive regulation authorizing an equal or even greater range for INS search authority at sea. Section 287 authorizes and limits INS's direct authority to conduct searches at sea, but its territorial limitations do not apply to the Attorney General's broader enforcement powers (which are delegable to INS) under the INA. The recent opinion in *United States v. Chen*, 2 F.3d 330 (9th Cir. 1993) provides strong support for this position.

In *Chen*, the court unanimously held that section 103 of the INA provided INS with adequate statutory authority (under delegation from the Attorney General) to conduct an undercover "sting" operation some *three hundred and twenty miles* off the coast of the United States to thwart the smuggling of illegal aliens from China.

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[36] We also believe that INS officials would have authority to make arrests under the provisions of INA section 287(a)(2) within the twelve-mile territorial sea recognized in the INS regulation Section 287(a)(2) authorizes INS officials, without warrant, "to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of [the immigration laws regulating admission, exclusion, or expulsion of aliens] " Although undocumented aliens detected in the twelve-mile territorial waters before reaching a port might not yet be "entering" the United States, there will be circumstances where an INS official's observations provide reasonable grounds to believe that aliens are "attempting to enter" in violation of the immigration laws, thereby providing the basis for arrest under section 287(a)(2).

[37] We also can discern no international law objection to the INS regulation *See* 1982 Conference, at 1276 (allowing regulation within contiguous zone for purpose of enforcing immigration law), U.N Conference on the Law of the Sea, Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* Apr 29, 1958, art 24, 15 U S T 1606, 1612, 516 U N T.S 205, 220 (entered into force Sept. 10, 1964) (same), *see also Church v Hubbart*, 6 U S (2 Cranch) 187, 234-35 (1804); *United States v Bengochea*, 279 F. 537, 539-41 (5th Cir 1922) In *Molvan v Attorney General*, [1948] App Cas 351 (P.C 1964), the Privy Council implied that international law was not violated by a British destroyer's seizing a vessel on the high seas and forcing it to port when the seized vessel was carrying several hundred undocumented aliens who intended to land illegally

The operation upheld in the *Chen* opinion included the apprehension of approximately 132 aliens, who were transferred to a vessel operated clandestinely by INS agents for transport to custody in the United States. The court specifically held that the territorial limitations on warrantless INS searches set forth in section 287(a)(3) did not offset or contradict INS's authority to conduct such an extraterritorial enforcement operation when exercising the enforcement powers delegated to it by the Attorney General. *Id.* at 334.

The court pointed out that section 274 of the INA, 8 U.S.C. § 1324, prohibiting the smuggling of illegal aliens into the United States, was intended to have extraterritorial application. It then stressed that "Congress intended to grant the Attorney General the corresponding power to enforce the immigration laws both within and without the borders of the United States." *Chen*, 2 F.3d at 333. Noting that the Attorney General has delegated these broad enforcement powers to the INS, the court reasoned that INS has "the power to take such acts as are deemed necessary for the enforcement of the immigration laws, including extraterritorial enforcement." *Id.* at 334. In rejecting the defendants' argument that section 287(a)(3)'s territorial limitations on INS warrantless search authority also circumscribed its power to conduct enforcement operations in international waters (i.e., on the high seas), the court stated, "because the Attorney General may delegate her authority, the list of powers granted [to INS] in section 1357(a) cannot be read as exhaustive." *Id.*

Thus, the *Chen* decision demonstrates that INS may draw upon the broad section 103 authority delegated to it by the Attorney General to conduct undercover investigations and seizures of undocumented aliens in international waters extending far beyond the territorial waters of the United States. That same authority would appear to provide ample basis — apart from the authority granted directly to INS by section 287 — for a substantive regulation authorizing INS to conduct warrantless searches of vessels transporting illegal aliens within the limits of the twelve-mile territorial waters and beyond.[38]

D. *The INS Regulation*

Although we conclude that INS had authority to promulgate a regulation interpreting the section 287 search authority to encompass the twelve-mile territorial sea, the language of the regulation adopted is susceptible to ambiguous and uncertain application when read in relation to the statute. We recommend that if the policy decision to retain the regulation is made, INS should redraft it to dispel this

[38] We note that the INS regulation at issue here was intended to be only an "interpretative" regulation that construed section 287, not a substantive regulation deriving from the authority ascribed to the Attorney General by *Chen*. A substantive regulation issued pursuant to the Attorney General's broad section 103 authority to enforce the immigration laws would not be limited by the particularized restrictions of section 287, which were specifically designed to place limits on the warrantless search authority of the INS's Border Patrol.

ambiguity or, if it concludes that curative legislation is necessary, submit such a proposal to Congress.

Section 287 limits INS authority for warrantless searches at sea to vessels found "within the territorial waters," but then superimposes the additional limitation that such searches (along with INS searches of vehicles on land) must be confined "within a reasonable distance from any external boundary of the United States." As outlined in Part III(B) above, these two limitations — which on their face are difficult to reconcile — were inserted in the statute at different times and for different purposes. The territorial waters limitation was added as an amendment to the original 1925 enactment to provide a *seaward* limitation upon searches of vessels at sea. In contrast, the "reasonable distance" limitation was added to the statute in 1946 for the apparent purpose of allowing INS officials to stop and search "vehicles" within a reasonable distance *inland* from the external boundaries of the United States.

Despite the different functions and origins of section 287's two limiting phrases, the INS regulation attempts to combine them in its definition of the "external boundary" of the United States. *See* 8 C.F.R. § 287.1(a)(1). It provides that, for purposes of section 287, the external boundary means both the land boundary *and* the twelve-mile territorial sea. It then provides that the "reasonable distance" limitation (100 air miles) is to be measured from the external boundary thus defined — i.e., it can be measured either from the land boundary or from the outer limit of the territorial waters. *Id.* § 287.1(a)(2).

Because section 287 expressly limits INS's vessel-search authority to the territorial waters, the question arises whether the separate "reasonable distance from any external boundary" limitation has any relevance to searches of vessels at sea. Whether the statute's reference to territorial waters is equated with the pre-1988 three-mile zone or the expanded twelve-mile zone, it seems clear that any search within either of those zones would also be well within "a reasonable distance from any external boundary." In that regard, the courts have upheld distances of up to one hundred (land) miles from that boundary as constituting a reasonable distance within the meaning of section 287. *See Fernandez v. United States*, 321 F.2d 283, 286 (9th Cir. 1963). It therefore seems that section 287's "reasonable distance" provision does not impose any additional *limitation* upon the INS's authority to search any vessel found *within the territorial waters*. Nor does the "reasonable distance" provision serve to *expand* the area of permissible INA searches of vessels at sea. Since vessel searches are confined to vessels within the territorial waters by the specific terms of section 287, the "reasonable distance" provision cannot operate to override that specific limitation.

These considerations support the view that the reasonable distance limitation has no meaningful application to INS searches at sea. INS points out, however, that the reasonable distance limitation may have conceivable application to searches of vessels on the *inland waters*. As the INS Draft Memorandum states (at 6-7):

> Although there appears to be surface tension between the requirement that the enforcement powers be exercised within the territorial waters and the provision that it may be exercised within 100 miles of any external boundary, this tension is resolved if the "reasonable distance" provisions are read to limit the distance *inland* from any external boundary within which Service officers may board and search vessels or carry out their other enforcement powers under section 287(a)(3) of the INA. Read together, § 287(a)(3) of the INA and 8 C.F.R. §§ 287.1(a)(1)-(2) provide that the Service may, without a warrant, board and search vessels beginning twelve miles seaward from the coast line and extending 100 air miles inland.

However, this interpretation of section 287 also generates complications. If INS may search vessels found on waters located 100 miles inland of "*any* external boundary of the United States," *see* 8 C.F.R. § 287.1(a)(2) (emphasis added), there appears to be no need to deviate from use of the *land boundary* alone as the baseline for such purposes. Using the outer limit of the territorial sea as the baseline for fixing the *inland* scope of the section 287 authority — an interpretation suggested by INS's current submission (INS Draft Memorandum at 7, quoted above) and its past practice[39] — would appear to *reduce* the scope of inland search authority that would otherwise be allowed by reference to the land boundary as the baseline.

The INS regulation would be clarified by explicitly recognizing that searches at sea are limited only by the scope of United States territorial waters, and that inland searches (including searches on inland waters) are separately governed by the reasonable distance inland measured from the land boundary. This would entail providing separate definitions for the "external boundary" and the "territorial waters," and linking the reasonable distance limitation solely to the "external [land] boundary."

IV. *Conclusion*

Undocumented aliens interdicted within the twelve-mile zone that now comprises the territorial sea of the United States are not entitled to a hearing under the exclusion provisions of the INA, and may be turned back from the United States by the Coast Guard if the President so orders.

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[39] INS applied the reasonable distance limitation in this fashion as long ago as 1952. *See* Memorandum for the INS Commissioner, from the General Counsel, *Re. Meaning of "external boundary" of the United States in Act of February 27, 1925, as amended, 8 U.S.C. 110, with relation to coastlines: Texas gulf coast* (July 7, 1952). There, INS took the position that the "external boundary" baseline from which a reasonable distance inland should be measured for search purposes was the outer limit of the three-mile territorial waters off the eastern shore of Padre Island, Texas, a narrow strip of land ten miles from the coast line which enclosed an arm of the Gulf of Mexico.

The INS had the authority to promulgate an interpretative rule construing the "territorial waters" of the United States, as referred to in INA section 287, to extend for twelve nautical miles, and not merely three nautical miles.

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Office of Legal Counsel

Liability of the United States for State and Local Taxes on Seized and Forfeited Property

In civil forfeiture proceedings (under 21 U S C § 881), the United States is obligated to pay liens for state and local taxes accruing after the commission of the offense leading to forfeiture and before the entry of a judicial order of forfeiture, if the lien-holder establishes, before the court enters the order of forfeiture, that it is an innocent owner of the interest it asserts

In criminal forfeiture proceedings (under 18 U S C. § 1963 or 21 U S C. § 853), the United States may not pay such liens because state and local tax lien-holders are not bona fide purchasers for value of the interests they would assert, and therefore do not come within any applicable exception to a statute that, upon entry of a court's final order of forfeiture, vests full ownership retroactively in the United States as of the date of the offense.

October 18, 1993

MEMORANDUM OPINION FOR THE DIRECTOR AND CHIEF COUNSEL
EXECUTIVE OFFICE FOR ASSET FORFEITURE

You have asked us to reconsider our opinion that property seized by and forfeited to the United States is not subject to state or local taxation for the period between the commission of the offense that leads to the order of forfeiture and the entry of the order of forfeiture. *See Liability of the United States for State and Local Taxes on Seized and Forfeited Property*, 15 Op. O.L.C. 69 (1991) ("Harrison Memorandum"). In light of the Supreme Court's decision in *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993), we partially reverse our opinion.

Because states and localities may not tax federal property (absent express congressional authorization),[1] the time at which ownership of forfeited property passes to the United States and the extent of the ownership interest that passes to the United States determine whether state and local taxes are owed. In many property transactions, the time and the extent of transfer of ownership are unambiguous and independent issues. In cases of transfers of ownership under the federal forfeiture statutes, however, the answer to the question of when ownership is transferred has been a matter of dispute, and of great consequence for the extent of the interest transferred.

The Harrison Memorandum expresses the Justice Department's traditional view that title vests in the United States at the time of the offense. This view is based on

[1] *See, e g , United States v City of Detroit*, 355 U S 466, 469 (1958) ("a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress"), *M'Culloch v. Maryland*, 17 U S (4 Wheat.) 316 (1819).

an interpretation of the "relation back" doctrine, which provides that a judicial order of forfeiture retroactively vests title to the forfeited property in the United States as of the time of the offense that leads to forfeiture, not as of the time of the judicial order itself. *See* 21 U.S.C. § 881(h) ("[a]ll right, title, and interest in property [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture . . . ."); 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c) (substantially identical to quoted language from 21 U.S.C. § 881(h)). Under the Department's traditional interpretation, title in forfeited property vests in the federal government at the time of the offense. The date of the judicial order of forfeiture is not significant. From the date of the offense, states and other parties are barred from acquiring interests in the property from the owner whose interests are forfeited to the United States. *See In re One 1985 Nissan*, 889 F.2d 1317, 1319-20 (4th Cir. 1989); *Eggleston v. Colorado*, 873 F.2d 242, 245-48 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (cases decided before *Buena Vista* and consistent with the Harrison Memorandum).

The Harrison Memorandum considers and rejects several possible grounds for limiting the operation of the relation back doctrine and requiring payment of state and local tax liens for the period between the offense and the forfeiture order. The two grounds of principal concern here are the "innocent owner" defense in the civil drug forfeiture statute, *see* 21 U.S.C. § 881(a)(6)[2], and the "bona fide purchaser" defense in the criminal drug forfeiture statute, *see* 21 U.S.C. § 853(c), and in the forfeiture provision of the RICO statute, *see* 18 U.S.C. § 1963(c). The Harrison Memorandum concludes that these defenses do not protect a state or locality (or anyone else) who innocently acquires a property interest after the time of the offense. The Supreme Court's decision in *Buena Vista* forces us to reconsider this conclusion. We conclude that the Harrison Memorandum's conclusion concerning the innocent owner defense must be reversed, but that the Harrison Memorandum's conclusion regarding the bona fide purchasers defense is correct (although this latter conclusion is less certain than the Harrison Memorandum indicates and we reach it through an analysis different from that set forth in the Harrison Memorandum).

I.

The civil drug forfeiture statute provides that "no property shall be forfeited . . . , to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(6). The Harrison Memorandum

[2] The conclusions with regard to § 881(a)(6), the innocent owner provision immediately at issue in *Buena Vista* and applicable to all "things of value" traceable to an exchange for a controlled substance also apply to § 881(a)(7), which contains a nearly identical innocent owner provision applicable to real property used in a drug offense. *See* notes 3, 7, *infra*.

accepted that "owner" could include a state or locality holding a tax lien on the property. *See* Harrison Memorandum, 15 Op. O.L.C. at 72 . The Memorandum concluded, however, that this "innocent owner" provision does not apply to asserted property interests that arise after the time of the offense because, as of the moment of the offense, the property belongs (by operation of the relation back doctrine) to the United States, and not to the person from whom a third party innocently acquires an interest.

We conclude, consistent with the Harrison Memorandum, that a state or locality holding a tax lien can be an "owner" as that term is defined in the civil forfeiture statute's innocent owner provisions. The broad language of the statute — "[a]ll . . . things of value" and "[a]ll real property, including any right, title and interest" — provides no reason to exclude a tax lien-holder from the definition of "owner." 21 U.S.C. § 881(a)(6), (7). The legislative history urges a broad reading.[3] And the courts have followed, sometimes explicitly, the path suggested by Congress.[4] The "innocence" requirement of an innocent owner defense would seem to be easy to satisfy in most cases. Like an innocent donee or purchaser, a state or locality holding a tax lien generally has obtained its interest without knowledge of the offense giving rise to the forfeiture.

The Harrison Memorandum's further conclusion with regard to the innocent owner defense, however, cannot survive the ruling in *Buena Vista*. The plurality and concurring opinions reject the interpretation of the relation back doctrine set forth in the Harrison Memorandum, and agree that the innocent owner defense is available to persons who acquire interests in forfeitable property after the commission of the offense that rendered the property subject to forfeiture. The opinions differ only as to the reading of the statute that leads to this result.

The plurality and the concurrence both analyze the common law doctrine of relation back as transferring ownership of forfeited property retroactively to the date of the offense, *but only* upon the entry of a judgment of forfeiture. Until a court issues such a judgment, this retroactive vesting of ownership in the United States does not occur, and all defenses to forfeiture that an owner of the property otherwise may invoke will remain available. Thus, a person who has acquired an interest in the property may raise any such defense in a forfeiture proceeding. If that

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[3] *See* Joint Explanatory Statement of Titles II and III of Pub L No 95-633, 95th Cong , 2d Sess. (1978), *reprinted in* 1978 U S C C A N 9522 (in § 881(a)(6), "[t]he term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized"), *see also* S. Rep. No 98-225, at 195, 215 (1984), *reprinted in* 1984 U.S.C C A N 3182, 3378, 3398 (describing § 881(a)(7) as, in effect, extending § 881(a)(6) to cover real property used in a drug offense but not acquired with proceeds of prohibited drug transactions)

[4] *See, e g., United States v. 717 S. Woodward St* , 2 F 3d 529, 535 (3d Cir.1993) (citing legislative history); *United States v 6960 Miraflores Ave* , 995 F.2d 1558, 1561 (11th Cir 1993) ("Lien holders have the right to assert their claim[s] of innocent ownership" under § 881(a), as interpreted in *Buena Vista*); *United States v 6109 Grubb Rd.*, 886 F 2d 618, 625 n 4 (3d Cir 1989) (cited in *Buena Vista* and citing legislative history); *see also United States v. 2350 N W 187 St* , 996 F.2d 1141, 1144 (11th Cir 1993) (*Buena Vista* analysis of § 881(a) innocent owner provisions assumed to apply where purported innocent owner is local tax lien holder).

person prevails, a judgment of forfeiture will not vest (retroactively) ownership of that property interest in the United States. *Buena Vista*, 507 U.S. at 125-27, 128-30 (plurality opinion) 131-38 (Scalia, J., concurring).

The plurality and the concurrence both conclude that the federal civil forfeiture statute is fully compatible with the common law, and that the statutory innocent owner clause provides a defense for a third party who innocently acquires ownership of the property after the offense and before a judgment of forfeiture. The plurality notes that § 881(h), which sets forth the relation back doctrine for the civil forfeiture statute, applies that doctrine only to "property described in subsection (a) of this section." Subsection (a)(6) excepts, from its description of forfeitable property, the property of an innocent owner. Therefore, in the plurality's analysis, subsection (a) places the property of an innocent owner beyond the reach of the forfeiture and relation back provisions in subsection (h). *See Buena Vista*, 507 U.S. at 127-30. Accordingly, an ownership interest in forfeitable property that is transferred to an innocent person (after the offense giving rise to forfeiture) does not vest in the United States as of the time of the offense. Indeed, it does not vest in the United States at all.

Interpreting the civil forfeiture statute as a more straightforward codification of common law doctrine,[5] the concurrence reads the phrase, in subsection (h), "'shall vest in the United States upon commission of the act giving rise to forfeiture'" as meaning "'shall vest in the United States upon forfeiture, effective as of commission of the act giving rise to forfeiture.'" *Buena Vista*, 507 U.S. at 134 (Scalia, J., concurring).[6] The result, of course, is the same as under the plurality's analysis: a property interest innocently acquired after the offense is not forfeited to the United States if an owner asserts the interest in a proper and timely way, before the entry of a forfeiture judgment.

In sum, we reverse the Harrison Memorandum's conclusion that the innocent owner defense, set forth in 21 U.S.C. § 881(a), does not protect state and local claims for tax liabilities arising between the time of an offense rendering property subject to forfeiture and the issuance of a court order of forfeiture.[7]

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[5] The concurrence specifically rejects the plurality's reading of the phrase, in subsection (h), "property described in subsection (a)" as meaning, in effect, "property forfeitable under subsection (a)." The concurrence stresses that subsection (h) refers to "property *described* in subsection (a)," not property deemed forfeitable under subsection (a) Since subsection (a) describes property generally and does not declare that property that cannot be forfeited is not "property," the "property described in subsection (a)" refers to all relevant property interests, including those of innocent owners *Buena Vista*, 507 U S. at 133 (Scalia, J., concurring)

[6] The concurrence "acknowledge[s] that there is some textual difficulty with th[is] interpretation," but argues, first, that the imprecision imputed to the quoted language in subsection (h) is to be expected "in a legal culture familiar with retroactive forfeiture" and, second, that the civil forfeiture statute as a whole, including subsection (d) and its adoption of forfeiture procedures applicable under 19 U.S C. §§ 1602-1631, does not make sense if one rejects the concurrence's reading of subsection (h) (and the plurality s reading of subsections (a) and (h)). *Buena Vista*, 507 U S at 134 (Scalia, J . concurring).

[7] The local tax lien cases decided by lower courts since the Supreme Court s decision in *Buena Vista* do not alter our conclusion In *2350 N.W 187 St* , 996 F 2d 1141, the court vacated the judgments in two cases in which the district courts had relied on the interpretation of the relation back doctrine described in the

II.

The two federal criminal forfeiture statutes addressed in the Harrison Memorandum do not contain an innocent owner defense. Those statutes, however, do provide protection for a "transferee [who] establishes in a hearing [to 'amend' an order of forfeiture] that he is a bona fide purchaser for value of [the] property [subject to criminal forfeiture] who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(c); 18 U.S.C. § 1963(c) (same). The Harrison Memorandum concluded that this statutory "bona fide purchaser" defense is not available to a state or locality asserting a lien for tax liability incurred after the offense that made the property subject to forfeiture.

We conclude, consistent with the apparent assumption of the Harrison Memorandum, that such tax liens are "property" or an "interest" in property under the two criminal forfeiture statutes. Both statutes define property broadly, as including all "real property" and all "tangible and intangible personal property, including rights, privileges, interests, claims and securities." 21 U.S.C. § 853(b); 18 U.S.C. § 1963(b) (same); *see also* 21 U.S.C. § 853(c), (n)(6); 18 U.S.C. § 1963(c), (l)(6) (forfeiture and bona fide purchaser defense provisions referring to "interest" in such property). The legislative history and the courts' application of this statutory language also suggest a definition of property interests broad enough to include state and local tax liens on real property.[8]

Harrison Memorandum, and had granted summary judgment against a county invoking the innocent owner defense in 21 U.S.C. § 881(a)(6), (7) to assert liens for property taxes owed for some of the period between an offense giving rise to forfeiture and the entry of a judgment of forfeiture. The appellate court remanded the cases for further consideration in light of the Supreme Court's decision in *Buena Vista*

In *United States v 7501 S W Virginia St.*, No 92-921-BE (D Ore Aug. 3, 1993), the district court held that a county asserting a lien, for taxes accruing after the offense, in a forfeiture proceeding was an innocent owner under § 881(a)(6), but that the relation back doctrine had vested the title in the United States as of the date of the offense and therefore precluded payment of the tax lien. To support this conclusion, the court quoted the plurality's statement in *Buena Vista* that "[o]ur decision denies the Government no benefits of the relation back doctrine " Slip op. at 6 (quoting 507 U.S at 129). The court has taken this quotation out of context, interpreting it as meaning, in effect, "our decision denies the Government no benefits of the relation back doctrine as it had been understood, erroneously, in the case law that *Buena Vista* rejects " The district court simply misunderstands or ignores the Supreme Court's holding. This misinterpretation does not appear to be widely shared by courts applying the *Buena Vista* analysis of the relation back doctrine in analogous contexts *See, e.g , United States v Daccarett*, 6 F 3d 37, at 53-54 (2d Cir 1993); *United States v 41741 Nat'l Trails Way*, 989 F.2d 1089, 1091 (9th Cir. 1993); *2350 N.W 187 St.*, 996 F.2d 1141, 1144; *United States v. One 1990 Lincoln Town Car*, 817 F. Supp. 1575, 1579-80 (N D Ga 1993).

[8] *See* S. Rep No. 98-225, at 193, *reprinted in* 1984 U S C.C A N at 3376 (section enacting current 18 U S C § 1963(c) and 21 U.S C § 853(c) "allows the use of criminal forfeiture as an alternative to civil forfeiture in all drug felony cases"), *id.* at 211, *reprinted in* 1984 U.S.C C A N at 3394 (property defined as subject to criminal forfeiture under 18 U S C. § 1963(a) and 21 U S C. § 853(a) is equivalent to property subject to civil forfeiture under 21 U S C § 881(a)), *United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987) (unsecured creditor who has reduced his claim to judgment and acquired a lien could seek an amendment to a forfeiture order under 21 U S C § 853(n)); *United States v Robinson*, 721 F. Supp. 1541, 1545 (D.R.I. 1989) (a leasehold interest ordinarily is a real property interest within the definition in 21 U.S C § 853(b)), *see also United States v Monsanto*, 491 U S. 600, 606-09 (1989) (noting breadth of forfeitable property under 21 U S.C. § 853(a))

The Harrison Memorandum suggests two arguments — one based on the relation back doctrine and another based on the definition of bona fide purchaser — to support its conclusion that the bona fide purchaser defense does not extend to holders of property interests that consist of liens for state and local taxes for the period after the offense and before a judgment of forfeiture.

A.

The Harrison Memorandum's central argument concerning the relation back doctrine addresses the bona fide purchaser defense no less than the innocent owner defense. *See* Harrison Memorandum, 15 Op. O.L.C. at 72. On the interpretation set forth in the Harrison Memorandum, the United States has owned the property since the commission of the offense giving rise to the criminal forfeiture, and no one, including a bona fide purchaser, can later acquire any interest from the former owner.

Although the question is a closer one than in the civil forfeiture context, we conclude that the Supreme Court's decision in *Buena Vista* rejects this argument as well.[9] We recognize that the plurality's holding is based on a reading of the civil forfeiture statute (and its innocent owner provisions) and does not address the criminal forfeiture statutes (and their bona fide purchaser provisions). That holding also does not require the plurality to adopt the interpretation of the common law relation back doctrine that the opinion sets forth. Nonetheless, the plurality's discussion of the common law doctrine makes clear that it agrees with the concurrence that the relation back doctrine vests ownership retroactively in the United States only upon entry of a final judgment of forfeiture. Under that reading, if a state or locality establishes that it is a "bona fide purchaser" of an interest in the property by virtue of a tax lien, and does so before a court orders forfeiture, the order of forfeiture will not extend to the lien-holder's interest and, therefore, will not vest title to that interest in the United States.[10]

We also recognize that the concurrence in *Buena Vista* suggests that the relation back doctrine precludes a bona fide purchaser defense under the criminal statutes where it allows an innocent owner defense under the civil statute. As the concurrence points out, the criminal forfeiture statutes establish a procedure by which a person asserting a bona fide purchaser defense raises that defense *after* the court has entered an order of forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). In contrast, the civil forfeiture process (on both the plurality's and the concurrence's

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[9] *Cf. United States v Harry*, 831 F Supp. 679, 686-87 (E D Iowa) (drawing on *Buena Vista* discussion of innocent owners to resolve bona fide purchaser issue under the criminal forfeiture statute)

[10] This conclusion would follow rather simply from the Court's analysis in *Buena Vista* when the state or locality asserts its bona fide purchaser defense at or before the proceedings in which the court issues an order of forfeiture The conclusion is less certain under the procedure set forth in the criminal forfeiture statutes, which provides for assertion of bona fide purchaser claims at a hearing held after the court issues an initial order of forfeiture The remainder of this subsection addresses this issue

reading) contemplates that a person asserting an innocent owner defense will do so *before* the court enters an order of forfeiture. As the concurrence sees it, in the former case, the court order already has vested title retroactively in the United States (effective as of the date of the offense) before the "transferee" asserts a claim to be a bona fide purchaser. In the latter case, however, the court will not yet have issued the order vesting title retroactively when the "owner" asserts an innocent owner claim. (The concurrence argues that the civil statute's use of the term "owner" and the criminal statutes' use of "transferee" reflects this distinction and suggests its significance.) On this view, if a transferee's claim to be a bona fide purchaser succeeds and the court amends the order of forfeiture, the amendment does not void, retroactively, the initial retroactive vesting of title in the United States. The amendment to the initial order of forfeiture simply effects a new transfer of title to the bona fide purchaser, leaving undisturbed the United States' ownership from the time of the offense to the time of the amendment to the forfeiture order. *See Buena Vista*, 507 U.S. at 136 (Scalia, J., concurring).

The *Buena Vista* concurrence fails to establish, however, that the criminal forfeiture statutes' bona fide purchaser defense does not protect liens for state and local tax liabilities incurred after the offense giving rise to the forfeiture. Only the concurrence advances the argument. The plurality does not join in it, and nothing in the dissenting opinion suggests that the dissenters would adopt the concurrence's views.

Further, the concurrence's argument reads too much into the actual, multi-step procedures by which a court adjudicates a criminal forfeiture claim. It thereby overlooks — or confuses those procedures with — the more fundamental legal (and fictional) process through which a retroactive transfer of ownership occurs. The better interpretation of the criminal forfeiture statutes is that the procedures of entering an order of forfeiture, holding a hearing at which transferees assert claims to be bona fide purchasers, and amending the order of forfeiture upon successful presentation of such a claim are but phases in a single (if protracted) process for determining what property interest vests, retroactively, in the United States when the court enters its final, amended order of forfeiture. The entire process is the equivalent of the single order of forfeiture in the civil context.

This interpretation fits more easily with the statutory language, especially when that language is read in light of the discussion in *Buena Vista* of common law relation back doctrine. The criminal forfeiture statutes provide that title in property subject to forfeiture "shall be ordered forfeited to the United States *unless* the transferee establishes" that he is a bona fide purchaser for value, and that "the United States shall have clear title to [the] property" only "*following* the court's disposition of all petitions" filed by transferees asserting claims to be bona fide purchasers. 21 U.S.C. § 853(c), (n)(7); 18 U.S.C. § 1963(c), (l)(7) (emphasis added). Such language would seem to suggest that the United States *never obtains* title from a bona fide purchaser, not that the United States first obtains title and

then must give it back. Only after the entry of the final, amended order of forfeiture would ownership vest retroactively in the United States.[11]

This conclusion also avoids an incongruity that the concurrence's interpretation would create: an innocent owner (under the civil statute) would owe state and local taxes from the moment he or she acquired the property, but a bona fide purchaser for value (under the criminal statutes) would not owe taxes from the time he or she acquired the property until the time the court amended the order of forfeiture.

Finally, the conclusion we reach also is consistent with the statutory distinction between "owner" and "transferee." A person claiming to be a bona fide purchaser is nothing more than a transferee until he or she establishes to the court that he or she is a bona fide purchaser (whether the transferee does so after an initial forfeiture order, as the statute contemplates, or at some earlier stage). Only after the transferee has made this showing is he or she recognized as an owner (indeed, an innocent owner) of a particular type. Similarly, a person claiming to be an innocent owner is recognized as an innocent owner only after he or she proves to the court that he or she meets the standards of innocent ownership. Before that, such a person is, in the eyes of the court, merely a transferee. The civil forfeiture laws simply do not address or refer explicitly to those who assert, but have not yet established, that they are innocent owners.

For these reasons, we do not believe that the concurrence's discussion of the legal significance of the differences between the civil and criminal forfeiture statutes (which, in any case, is unnecessary to its conclusions) is correct.

B.

The Harrison Memorandum also states that state and local tax authorities cannot "qualify as bona fide purchasers for value" under the criminal forfeiture statutes. Harrison Memorandum, 15 Op. O.L.C. at 72. The Memorandum does not set forth the basis for this conclusion. The *Buena Vista* plurality and concurrence have nothing to say about this issue and, thus, do not require a reversal of the Harrison Memorandum. Although the matter is not free from doubt, we believe that the stronger argument is that state and local tax lien-holders are not "bona fide purchasers."

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[11] Although the statutory language does not fit perfectly with the interpretation adopted here, somewhat imprecise drafting concerning the sequence of events leading to a retroactive vesting of title is, as the *Buena Vista* concurrence points out, perhaps to be expected in a legal culture familiar with retroactive vesting *See Buena Vista*, 507 U S at 134.

Moreover, the legislative history of the criminal forfeiture provisions also seems to support the interpretation set forth in this Memorandum. It refers to bona fide purchaser claims, raised after the initial forfeiture order, as "in essence, . . . challenges to the *validity* of the order of forfeiture," and, when successful, as "render[ing] that portion of the order of forfeiture reaching [the bona fide purchaser's] interest *invalid*" S Rep. No. 98-225, at 208, *reprinted in* 1984 U S C.C.A.N. at 3391 (emphasis added)

The courts have not adopted a clear and uniform view of how to interpret "bona fide purchaser" under the criminal forfeiture statutes. *See, e.g., United States v. Lavin*, 942 F.2d 177, 182-89 (3d Cir. 1991) (bona fide purchaser acquires interest through volitional, advertent and, generally, commercial transaction; victim of embezzlement acquired interest through unwitting and inadvertent tortious action of another and therefore was not a bona fide purchaser); *Reckmeyer*, 836 F.2d at 206-08 (bona fide purchaser includes a general, unsecured creditor of defendant who gave value to defendant in arms'-length transaction with expectation that he would receive equivalent value in the future, and whose interest must have been in some part of the forfeited property because debtor's entire estate had been forfeited); *cf. United States v. Campos*, 859 F.2d 1233, 1237-38 (6th Cir. 1988) (general, unsecured creditor is not a bona fide purchaser, because he does not have a legal interest in the forfeited property); *Torres v. $36,256.80 U.S. Currency*, 827 F.Supp. 197, 203 (S.D.N.Y. 1993) (similar to *Campos*; also pointing out significance, for general, unsecured creditor, of unusual circumstance in *Reckmeyer* that entire estate had been seized); *United States v. Mageean*, 649 F. Supp. 820, 824, 829 (D. Nev. 1986) (definition of bona fide purchaser cannot be "stretch[ed]" to include tort claimants, but "there is no reason that a good-faith provider of goods and services," although an unsecured creditor, "cannot be a bona fide purchaser"), *aff'd without opinion*, 822 F.2d 62 (9th Cir. 1987); *see also United States v. 3181 S.W. 138th Place*, 778 F. Supp. 1570, 1574-75 (S.D. Fla. 1991) (civil forfeiture case stating that locality is not bona fide purchaser by virtue of tax lien), *vacated on other grounds*, 996 F.2d 1141 (11th Cir. 1993); S. Rep. No. 98-225, at 201, 209, *reprinted in* 1984 U.S.C.C.A.N. at 3384, 3392.

We are aware of no case that has decided the precise question at issue here. We acknowledge that some of the claims that courts have rejected are weaker than those presented by tax liens, and that at least one court has pointed to a primary purpose of the criminal forfeiture statutes' relation back provisions that would not be served by denying the bona fide purchaser defense to holders of liens for state and local taxes. *See Reckmeyer*, 836 F.2d at 208 ("Congress's primary concern in adopting the relation-back provision was to make it possible for courts to void sham or fraudulent transfers that were aimed at avoiding the consequences of forfeiture"). Nonetheless, we have found no authority that has construed bona fide purchaser broadly enough to encompass such a tax lien-holder.

A state or locality does provide something of value, in the form of government services, in return for the interest it acquires in property (ultimately in the form of a lien) by virtue of its taxing authority. This exchange, however, does not fit the transactional, arms'-length exchange of values contemplated in the case law and suggested by the statutory phrase "bona fide purchaser for value."[12]

[12] *See, e.g., Lavin*, 942 F.2d at 185-86 (Congress derived bona fide purchaser exception "from hornbook commercial law" principle of protecting the "'innocent purchaser for valuable consideration'" which had developed at common law "in order to promote finality in commercial transactions and thus to . . . foster

Therefore, we do not reverse the Harrison Memorandum's conclusion that the bona fide purchaser provisions cannot be relied upon to require payment of state and local tax liens.[13]

III.

For the reasons set forth above, we reach the following conclusions: In civil forfeiture proceedings (under 21 U.S.C. § 881), the United States may — and, indeed, must — pay liens for state and local taxes accruing after the commission of the offense leading to forfeiture and before the entry of a judicial order of forfeiture, if the lien-holder establishes, before the court enters the order of forfeiture, that it is an innocent owner of the interest it asserts. In criminal forfeiture proceedings (under 18 U.S.C. § 1963 or 21 U.S.C. § 853), however, the United States may not pay such liens because state and local tax lien-holders are not bona fide purchasers for value of the interests they would assert, and therefore do not come within any applicable exception to a statute that, upon entry of a court's final order of forfeiture, vests full ownership retroactively in the United States as of the date of the offense.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

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commerce"), *Reckmeyer*, 836 F.2d at 208 (scope of bona fide purchaser provision "construed liberally" is to protect "all persons who give value to the defendant in an arms'-length transaction with the expectation that they would receive equivalent value in return").

[13] The Harrison Memorandum also found that payment of liens for state and local taxes, accruing after the offense, was not within the Attorney General's discretionary authority under 28 U.S.C. § 524(c)(1)(D) ("payment of valid liens . . . against property that has been forfeited") or 28 U.S.C. § 524(c)(1)(E) (payments "in connection with remission or mitigation procedures relating to property forfeited"). We reach the same conclusion through a different analysis. A tax lien-holder who establishes that he or she is an innocent owner under the civil forfeiture statute or a bona fide purchaser under the criminal statutes is protected from the operation of the relation back doctrine, and need not rely on the Attorney General's discretionary payment of a valid lien or remission or mitigation of a forfeiture that has not occurred with respect to the lien-holder's interest. *See* S. Rep. No. 98-225, at 207-08, 217, *reprinted in* 1984 U.S.C.C.A.N. at 3390-91, 3400, *Lavin*, 942 F.2d at 185 (bona fide purchaser provisions designed to require protection previously left to discretion of Attorney General). If the tax lien-holder fails to establish that he or she is protected by one of these defenses to forfeiture, there can be no "valid lien" for taxes to be paid and no forfeited interest (in the form of tax liabilities) for the Attorney General to "remi[t] or mitigat[e]." Because ownership of the property will have vested in the United States as of the commission of the offense, state and local authorities cannot (absent a congressional waiver of immunity from state and local taxation that we do not find in 28 U.S.C. § 524 or elsewhere) levy taxes on such property after the date of the offense any more than they could levy taxes on a federal courthouse or post office.

Applicability of the Emoluments Clause to Non-Government Members of ACUS

The Emoluments Clause of the Constitution prohibits non-government members of the Administrative Conference of the United States from accepting, absent Congress's consent, a distribution from their partnerships that includes some proportionate share of the revenues generated from the partnership's foreign government clients

Non-government members of ACUS are also generally forbidden, absent Congress's consent, from accepting payments from commercial entities owned or controlled by foreign governments.

October 28, 1993

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

This memorandum responds to your request of July 30, 1993, which sought clarification of a portion of our April 29, 1991, letter to the Deputy Counsel to the President.[1] Specifically, you raise two questions concerning the advice we gave on that occasion concerning the scope and application of the Emoluments Clause, U.S. Const. art. I, § 9, cl. 8. After noting that a significant number of the 101 members of the Administrative Conference (the "Conference" or "ACUS") are lawyers in private practice, professors of law, or other experts in administrative law, you ask whether the Emoluments Clause prevents service on the Conference by a private individual who receives a partnership distribution from his or her firm that may include income received by the firm from a foreign government solely because of the pooling of partnership revenues. Further, you ask whether the Clause prevents service on the Conference by a private individual who receives payment from government-owned or controlled instrumentalities that do not engage in traditional functions — including, but not limited to, foreign public universities.

I.

Congress established the Conference "to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regula-

[1] Your request is set forth in the Letter for Daniel Koffsky, Esq., Acting Assistant Attorney General, Office of Legal Counsel, from Gary J. Edles, General Counsel, Administrative Conference of the United States (July 30, 1993) ("ACUS Letter"). The opinion to which your letter refers is *Applicability of 18 U.S.C § 219 to Members of Federal Advisory Committees*, 15 Op. O.L.C. 65 (1991) ("the April 1991 Opinion")

tory activities and other Federal responsibilities may be carried out expeditiously in the public interest." 5 U.S.C. § 591; *see also* Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. Pitt. L. Rev. 813, 814-19 (1992) ("Breger") (discussing origins and purposes of ACUS). "The bulk of the Conference's work has been its research function and it is here that it has performed its most important role as a ventilator of new ideas in administrative procedure." *Id.* at 829. The Conference must transmit an annual report to the President and Congress and such interim reports as the Chairman considers desirable. *See* 5 U.S.C. § 595(c). In addition, "[o]n a number of occasions, Congress has specifically mandated that the Conference undertake particular activities." Breger at 835.

The Conference consists of not more than 101 nor fewer than 75 members, including a Chairman appointed by the President with the advice and consent of the Senate, the chairman (or designee) of each independent regulatory board or commission, the head (or designee) of each executive department or other administrative agency which is designated by the President, certain other governmental members, certain Presidential appointees, and "not more than 40 other members appointed by the Chairman." 5 U.S.C. § 593. The Chairman's appointees "may at no time be less than one-third nor more than two-fifths of the total number of members." *Id.* § 593(b)(6). The Chairman is to select appointees "in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure." *Id.*

Apart from the Chairman, the members of the Conference are not entitled to payment for their services. 5 U.S.C. § 593(c). Non-government members of the Conference may be deemed to be special government employees within the meaning of 18 U.S.C. § 202 and subject to the provisions of 18 U.S.C. §§ 201-224. *See* 1 C.F.R. § 302.5(a) (1993).

The membership of the Conference meeting in plenary session constitutes the Assembly. 5 U.S.C. § 595(a). The Assembly has various powers, including that of "adopt[ing] such recommendations as it considers appropriate for improving administrative procedure." *Id.* § 595(a)(1). "Conference recommendations and statements are published in the *Federal Register* and then codified in the Code of Federal Regulations." Breger at 827-28. "Since its establishment, the Conference's recommendations have had a significant effect on the workings of the federal government." *Id.* at 831.

The Conference includes a Council composed of the Chairman and ten other members appointed by the President, "of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments." 5 U.S.C. § 595(b). The Council may exercise various powers, including calling meetings of the Conference, proposing by-laws and regulations, making recommendations to

the Conference on subjects germane to its purpose, and receiving and considering reports of Conference committees[2] and distributing such reports to Conference members with the Council's own views and recommendations. *Id.*

II.

The Emoluments Clause, U.S. Const. Art. I, § 9, cl. 8, provides:

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

The Emoluments Clause was adopted unanimously at the Constitutional Convention, and was intended to protect foreign ministers and other officers of the United States from undue influence and corruption by foreign governments. James Madison's notes on the Convention for August 23, 1787, report:

> Mr[.] Pinkney urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence and moved to insert — after Art[.] VII sect[.] 7. the clause following — "No person holding any office of profit or trust under the U.S. shall without the consent of the Legislature, accept of any present, emolument, office or title of any kind whatever, from any King, Prince or foreign State["] which passed nem: contrad.

2 *The Records of the Federal Convention of 1787*, at 389 (Max Farrand ed., rev. ed. 1966 reprint); *see also* 3 *id.* at 327 (remarks of Governor Randolph); *President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, 188 (1981) (discussing history of ratification of Clause).

A.

The ACUS Letter represents that, typically, half of the Council members come from outside the Federal government, as do somewhat less than half (i.e., approximately forty) of the remaining Conference members. It points out that these private members "are typically lawyers in private practice, law professors, and other

[2] Under its by-laws, the Conference has six standing committees: adjudication, administration, governmental processes, judicial review, regulation and rulemaking. *See* 1 C.F.R. § 302.3. In addition, with the approval of the Council the Chairman may establish special ad hoc committees and assign special projects to them. *Id.* The committees, which include both government and non-government members, are "vital to the Conference's research and review process." Breger at 826.

experts in administrative law and government." ACUS Letter at 1. Some of the Conference members are partners in law firms that include foreign governments among their clients. Although we are informed that these Conference members do not personally represent foreign governmental clients and have no dealings with them, "their partnership arrangements provide that client revenues are pooled in some fashion so that the member receives a partnership distribution from the firm that includes some proportionate share of revenues generated by those partners who have the foreign government among their clients." *Id.* at 2. ACUS asks whether such members are barred from Conference service by the Emoluments Clause.

As a threshold matter, ACUS does not dispute that Conference members from the private sector (who are unpaid for their services to the Conference) occupy an "Office of . . . Trust" within the meaning of the Emoluments Clause. We believe that Conference membership is such an office. To begin with, the Conference is a Federal agency established by statute. *See* 5 U.S.C. § 593. By virtue of their positions within that agency, Conference members are necessarily brought within the Clause. Although the Conference is an advisory committee as well as an agency, *see* ACUS Letter at 1, the April 1991 opinion stated that "Federal advisory committee members hold offices of profit or trust within the meaning of the Emoluments Clause," 15 Op. O.L.C. at 68, and we do not understand ACUS to be contesting that view. Moreover, the Conference's advice and recommendations have had (and were intended to have) a significant effect on the Government's administrative processes. Indeed, Congress has from time to time assigned specific statutory missions to the Conference, requiring it to assist other Federal agencies and demonstrating that the Conference's membership occupies a trusted and confidential role in governmental decisionmaking.[3] Finally, under the Conference's own by-laws, its members may be considered to be special government employees subject to Federal conflict of interest statutes and regulations. *See* 1 C.F.R. § 302.5(a). Accordingly, we have no difficulty in concluding that the non-government members of the Conference occupy offices subject to the Clause. *See Offices of Trust*, 15 Op. Att'y Gen. 187, 188 (1877) (Commissioners appointed by the President for the Centennial Exhibition hold offices of "Trust" under Clause because they were entrusted with duties "on account of their personal qualifications and fitness for the place."); *see also Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 98 (1986) (reviewing prior opinions).

[3] For example, the Magnuson-Moss Warranty Act, § 202(d) 15 U S C. § 57a note, directed ACUS to study the Federal Trade Commission's "hybrid" rulemaking procedures. The Government in the Sunshine Act § 3(a), 5 U S C. § 552b(g), required agencies affected by the Act's open meeting requirements to consult with ACUS in developing their regulations The Equal Access to Justice Act § 203(a)(1), 5 U S C. § 504(c)(1), required agencies to consult with ACUS before establishing uniform procedures for the submission and consideration of applications for awards of fees and expenses *See* Breger at 835-36.

ACUS suggests that the Emoluments Clause does not apply to a Conference member's acceptance of a proportionate share of partnership earnings attributable to his or her law firm's representation of a foreign government. ACUS argues that such payments are not emoluments "from" a foreign State, but rather from the partnership itself. ACUS Letter at 2-3. In support of that analysis, ACUS cites an opinion of this Office, *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156 (1982). In that opinion, we considered the question whether an employee of the Nuclear Regulatory Commission ("NRC") was authorized to work on his leave time for an American consulting firm on a contract to design a nuclear power plant being built by an electrical commission of the Mexican government. The employee was to be paid by the consulting firm from funds received from the Mexican government in connection with the contract, although not all the proceeds of the contract were to go to him. On the facts, we concluded that "ultimate control, including selection of personnel, remains with the Mexican government," so that "the interposition of the American corporation [does not] relieve[] the NRC employee of the obligations imposed by the Emoluments Clause." *Id.* at 158-59. ACUS infers that this opinion "strongly suggests that the receipt of income from a partnership arrangement, standing alone, does not violate the Constitutional prohibition" on accepting emoluments from a foreign State. ACUS Letter at 2.

We agree with ACUS that our prior opinions suggest that when an employment relationship formally exists between a domestic employer and a Federal officeholder, the question whether the latter may be paid from foreign governmental funds that the employer receives turns on whether the employer is acting as a mere conduit for those funds. This test may be illustrated by contrasting the opinion that ACUS cites (which found that the foreign government would in effect be paying for the covered person's services) with an earlier opinion that arrived at a different result. In Memorandum for John G. Gaine, General Counsel, Commodity Futures Trading Commission, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Expense Reimbursement in Connection with [X's] Trip to Indonesia* (Aug. 11, 1980), we considered a proposed contract under which Harvard University provided expert consultants to the government of Indonesia. The Indonesian government had no control over the selection of the experts and their payments, nor had it sought to influence the selection of experts during the years in which the consulting relationship had been in effect. We concluded in that case that the payment of the individual consultant would not be "from" the foreign government, but rather from the employing university.[4] *Id.* at 5.

[4] The Comptroller General appears to have adopted the same tests for determining whether a proposed payment from a domestic employer would violate the Emoluments Clause. In 69 Comp Gen. 220 (1990), reconsidering and affirming 65 Comp Gen. 382 (1986), the General Accounting Office ruled that a retired military officer employed under a contract between a domestic corporation and the Saudi Arabian Navy was subject to the Emoluments Clause There was sufficient evidence to conclude that the officer "is in actuality an employee of the Royal Saudi Naval Forces since this entity may control and supervise him as well as

In the present case, our inquiry focuses on the partnership relation rather than the employer-employee relation. "A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business *and when there is community of interest in the profits and losses.*" *Commissioner v. Tower*, 327 U.S. 280, 286 (1946) (emphasis added); *see also Meehan v. Valentine*, 145 U.S. 611, 623 (1892) ("those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions."). There is typically no such community of interest or proportionate sharing of profits in the employment relation. Hence, our precedents in the employment area, while relevant and suggestive, are not directly on point.

ACUS contends that, "absent some direct personal contact or relationship between the Conference member and a foreign government," the member should not be barred from accepting "a proportionate share of partnership earnings . . . solely because his or her firm has a foreign government among its clients." ACUS Letter at 3. To the extent that our opinions in the employment area suggest that the proper test is whether the domestic employer or the foreign government has the power to *control* the covered person's activity, those opinions lend some support to ACUS's argument. A Conference member who did not personally represent a foreign government, and indeed had no personal contact with that client of the firm, could not be said to be subject to the foreign government's "control" in his or her activities on behalf of the partnership. But we think that this consideration is not decisive. More important, in our view, is the fact that the Conference member would draw a proportionate share of the partnership's pooled profits, which would include any profits the firm earned from representing its foreign governmental client. Because the amount the Conference member would receive from the partnership's profits would be a function of the amount paid to the firm by the foreign government, the partnership would in effect be a conduit for that government. Thus, some portion of the member's income could fairly be attributed to a foreign government. We believe that acceptance of that portion of the member's partnership share would constitute a prohibited emolument.

ACUS points out that our April 1991 Opinion stated that 18 U.S.C. § 219 does not implicitly disqualify an individual from serving on an advisory committee simply because he or she is a partner at a firm that is required by statute to register as a foreign agent. *See* ACUS Letter at 3; 15 Op. O.L.C. at 66 n.4. ACUS urges that we adopt a similar conclusion with respect to the Emoluments Clause. Section 219, a criminal statute, makes it an offense for a public official (including members of advisory committees covered by the Federal Advisory Committee Act, 5 U.S.C.

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terminate his employment." 65 Comp. Gen. at 385. Similarly, the General Accounting Office ruled that a retired military officer who was employed and paid by a domestic corporation and then assigned to work for an Israeli government instrumentality was within the Clause. It was shown that the domestic corporation was in effect merely an employment agency, and that the officer was actually working for the foreign government that had procured his services. *See* 53 Comp. Gen. 753 (1974).

app. 2, §§ 1-16) to be or act as the agent of certain foreign principals. We think that the action of one partner acting as such a foreign agent cannot under this criminal statute be fairly imputed to another partner who serves on an advisory committee. But it by no means follows that a partner does not receive income from a foreign government within the meaning of the Emoluments Clause when an identifiable portion of his or her partnership draw can be attributed to the partnership's fees from such a client.

Accordingly, we conclude that, absent the consent of Congress, the Emoluments Clause would prohibit members of the Conference from accepting a share of partnership earnings, where some portion of that share is derived from the partnership's representation of a foreign government.

B.

ACUS further informs us that some private Conference members from time to time have among their personal clients foreign government-owned or -controlled instrumentalities, or business or proprietary corporations in which foreign governments have ownership interests. Other Conference members may from time to time receive payment for teaching at foreign public universities. ACUS Letter at 2.

ACUS suggests that payments accepted by private members for services rendered to a foreign government should not be considered to be forbidden emoluments when such a government is acting through commercial instrumentalities that it owns or controls, or through public academic institutions. *See* ACUS Letter at 3-4. Such payments, ACUS suggests, would not not be accepted "from any . . . foreign State."

We deal first with the question of foreign government-owned or -controlled commercial enterprises. In our opinion, such a corporation should indeed be considered to be a "foreign State" within the meaning of the Emoluments Clause. *Accord* 53 Comp. Gen. at 756 (corporation owned by government of Israel held within purview of Clause). It may be true, as ACUS says, that when foreign governments act in their commercial capacities, they do not exercise powers peculiar to sovereigns. *See* ACUS Letter at 3 (citing *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976)); *but see id.* at 715 (Powell, J , concurring) ("the line between commercial and political acts of a foreign state often will be difficult to delineate").[5] But nothing in the text of the Emoluments Clause limits its application solely to foreign governments acting *as sovereigns*.

[5] In *Dunhill*, the Court declined to extend the Act of State doctrine "to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities " 425 U S. at 695. The case is at best marginally relevant to the issues here. Moreover, underlying the presumptive distinction between foreign governmental business corporations and the sovereigns that own or control them are concerns for "economic development and efficient administration," reinforced by "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity." *First Nat'l City Bank v Banco Para El Comercio*, 462 U.S. 611, 626 (1983) But even in commercial contexts where concerns for economy and

The language of the Emoluments Clause is both sweeping and unqualified. *See* 49 Comp. Gen. 819, 821 (1970) (the "drafters [of the Clause] intended the prohibition to have the broadest possible scope and applicability"). It prohibits those holding offices of profit or trust under the United States from accepting "*any* present, Emolument, Office, or Title, *of any kind whatever*" from "*any* . . . foreign State" unless Congress consents. U.S. Const. art. I, § 9, cl. 8 (emphasis added). There is no express or implied exception for emoluments received from foreign States when the latter act in some capacity other than the performance of their political or diplomatic functions. The decision whether to permit exceptions that qualify the Clause's absolute prohibition or that temper any harshness it may cause is textually committed to *Congress*, which may give consent to the acceptance of offices or emoluments otherwise barred by the Clause.

Moreover, a foreign government's ownership or control of a corporation may render the corporation that government's agent. *See First Nat'l City Bank v. Banco Para El Commercio*, 462 U.S. at 629. Indeed, as the Court has noted, "[a] typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed *by a board selected by the government in a manner consistent with the enabling law*." *Id.* at 624 (emphasis added). We believe that the Emoluments Clause should be interpreted to guard against the risk that occupants of Federal office will be paid by corporations that are, or are susceptible of becoming, agents of foreign States, or that are typically administered by boards selected by foreign States. Accordingly, we think that, in general, business corporations owned or controlled by foreign governments will fall within the Clause.[6]

The question whether the Emoluments Clause extends to foreign public universities is somewhat more difficult. Our prior opinions on this subject have not been a seamless web. Thus, in Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Emoluments Clause Questions raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales* (May 23, 1986), we concluded that while the University of New South Wales was clearly a public institution, it was not so clear that it was a "foreign State" under the Emoluments Clause, given its functional and operational independence from the government of Australia and state political instrumentalities. Accordingly, we opined that the question posed there — whether a NASA employee could accept a

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efficiency loom larger than they do here, the Court has been prepared to hold that presumptive distinction overcome *Id* at 630-33

[6] We acknowledge that the Foreign Gifts and Decorations Act, which provides Congress's consent to certain transactions otherwise forbidden by the Emoluments Clause, does not expressly subsume corporations owned or controlled by foreign States within its definition of a "foreign government." *See* 5 U S.C § 7342(a)(2) Rather, that definition extends primarily to "any unit of foreign governmental authority," *id.* § 7342(a)(2)(A), and it is plausible to argue that such corporations are not units of governmental authority. However, we do not assume that the Act's definition is necessarily coextensive with the constitutional concept of a "foreign State."

fee of $150 for reviewing a Ph.D. thesis — had to be answered by considering the particular circumstances of the case, in order to determine whether the proposed arrangement had the potential for corruption or improper foreign influence of the kind that the Emoluments Clause was designed to address. On other occasions, however, we have construed the Emoluments Clause to apply to public institutions of higher education in foreign countries.[7]

In support of its view that the Emoluments Clause does not apply to foreign public universities, ACUS argues that the Clause was designed to guard against the exercise of improper influence on Federal office-holders by the political or diplomatic agencies of foreign States, because payments by those agencies are most likely to create a conflict between the recipient's Federal employment and his or her outside activity. *See* ACUS Letter at 4. Because public universities do not generally perform political or diplomatic functions, they ought not, on ACUS's analysis, to be brought within the Clause. We think, however, that the contrary view is the better one.

To begin with, we reiterate that the language of the Emoluments Clause does not warrant any distinction between the various capacities in which a foreign State may act. *Any* emoluments from a foreign State, whether dispensed through its political or diplomatic arms or through other agencies, are forbidden to Federal office-holders (unless Congress consents). Further, it serves the policy behind the Emoluments Clause to construe it to apply to foreign States even when they act through instrumentalities which, like universities, do not perform political or diplomatic functions. Those who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty. *See* 10 Op. O.L.C. at 100. That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government, even when those benefits took the form of remuneration for academic work or research.[8] Thus, United States Government officers or employees might well find themselves exposed to conflicting claims on their interests and loyalties if they were permitted to accept employment at foreign public universities.

Finally, Congress has exercised its power under the Emoluments Clause to create a limited exception for academic research at foreign public institutions of learning. The Foreign Gifts and Decorations Act provides in part that Federal em-

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[7] *See, e g* , Memorandum for Files from Robert J. Delahunty, Acting Special Counsel, Office of Legal Counsel, *Re: Applicability of Emoluments Clause to Employment of CFTC Attorney by East China Institute of Politics and Law* (Aug 27, 1992), Memorandum for Files from Barbara E Armacost, Attorney-Adviser, Office of Legal Counsel, *Re Emoluments Clause and Appointment to the President's Committee on the Arts and Humanities* (Nov. 15, 1990) The General Accounting Office has reached a similar result *See* 44 Comp Gen 130 (1964) (retired Coast Guard officer subject to recall to active duty held not entitled to retirement pay for period in which he was teaching for the Department of Education of the State of Tasmania, Australia)

[8] Consistent with this view, we have opined that an employee of the National Archives could not serve on an international commission of historians created and funded by the Austrian Government to review the wartime record of Dr. Kurt Waldheim, the President of Austria *See Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op O.L.C 89 (1987)

ployees may accept from foreign governmental sources "a gift of more than minimal value when such gift is in the nature of an educational scholarship." 5 U.S.C. § 7342(c)(1)(B).[9] Thus, Congress has recognized that foreign governmental bodies may wish to reward or encourage scholarly or scientific work by employees of our Government, but has carefully delimited the circumstances in which Federal employees may accept such honors or emoluments. That suggests that Congress believes both that the Emoluments Clause extends to paid academic work by Federal employees at foreign public universities, and that the Clause's prohibition on such activity should generally remain in force.

Accordingly, we conclude that foreign governmental entities, including public universities, can and presumptively do constitute instrumentalities of foreign States under the Emoluments Clause, even if they do not engage specifically in political or diplomatic functions.[10]

Conclusion

Non-government members of the Administrative Conference are prohibited by the Emoluments Clause from accepting a distribution from their partnerships that includes some proportionate share of the revenues generated from the firm's foreign government clients.

Similarly, non-government members of the Conference are in general forbidden by the Emoluments Clause from accepting payments from commercial entities owned or controlled by foreign States. This prohibition also extends to the acceptance of payments for teaching at foreign universities that are instrumentalities of foreign States.

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Office of Legal Counsel

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[9] We have opined that this exception applied to an award of approximately $24,000 by a foundation acting on behalf of the West German Government to a scientist employed by the Naval Research Laboratory We reasoned that a "program designed to honor United States scientists and enable them 'to stay for an extended period at research institutes in the Federal Republic of Germany to carry out research of the Awardee's own choice' seems to be in the nature of an educational scholarship, acceptance of which Congress has permitted " Letter for Walter T Skallerup, Jr., General Counsel, Department of the Navy, from Robert B Shanks, Deputy Assistant Attorney General, Office of Legal Counsel at 4 (Mar. 17, 1983)

[10] ACUS points out that it is an advisory committee, and that "the nature of an advisory committee is that an individual — or even the committee as a whole — cannot determine the course of governmental action " ACUS Letter at 4 But, as we have noted above, ACUS is also, by statute, a Federal *agency*. Moreover, even considered solely as an advisory committee, ACUS could influence governmental decisionmaking. *See Association of Am Physicians and Surgeons, Inc v Clinton*, 997 F 2d 898, 913-14 (D.C. Cir. 1993) Hence, the advisory nature of ACUS does not render it immune from the possibility that a foreign State might exert improper influence on and through it ACUS also objects that "[i]t would be particularly unusual for a recommendation by the Administrative Conference to be of significant interest to a foreign government " ACUS Letter at 5 But there may be no way of fine-tuning the prohibitions on the acceptance of foreign governmental emoluments to reach precisely such "unusual" cases In any event, the Constitution itself lays down a stark and unqualified rule, and leaves it to the legislative process to work out any needed qualifications

Constitutionality of Health Care Reform

The proposed Health Security Act is well within the authority of Congress under the Commerce Clause, and it does not violate Tenth Amendment or other principles of federalism.

The proposal contains no unconstitutional takings of private property or infringement of liberty interests.

The proposed delegation of administrative authority to the National Health Board, and, from it, to state alliances, is not an impermissible delegation of legislative authority

October 29, 1993

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL
AND THE ASSOCIATE ATTORNEY GENERAL

The Health Security Act ("Act") creates for all citizens the security that health care coverage will always be available to them. It accomplishes this by building on the existing American system for providing health care, which largely operates through employers. Much of the system will be administered by the states, which will have primary responsibility to ensure that regional health alliances are established, to certify accountable health plans, and to provide mechanisms to resolve complaints and disputes.

This legislation is well within the long-recognized authority of the federal government. It is fair to say that, just as the substantive contents of the legislation draw on existing models and approaches to health care delivery and financing, the structure, processes and mechanisms the legislation uses to accomplish its substantive objectives draw on already existing and validated techniques that the national government has employed on numerous other occasions.

Notwithstanding the well-established legitimacy of the means that the Act employs to achieve a public purpose of paramount importance, some special interests have such financial stake in the current system that they have strong incentives to challenge the Act even on highly implausible grounds, if the consequences of doing so were to alter the ultimate design of the system even slightly in their favor.

Congressman Richard Gephardt has described the Act as the most historic piece of social legislation since the Social Security Act of 1935, and in a curious way the challenges to the constitutionality of the Health Security Act's basic structure replay arguments levelled at the Social Security Act and other New Deal legislation enacted over fifty years ago. These arguments were considered and dismissed then, they remain unsound to this day, and they should not be allowed in any way to deflect consideration of the merits of the President's proposal — nor could they

succeed against that proposal without threatening to unravel numerous vital statutes enacted since the 1930's.

- **The National Government Possesses the Constitutional Authority to Undertake National Health Care Reform.**

The most fundamental constitutional challenge to national health care reform is that it lies beyond the power of Congress and the President to enact. Fortunately, the Supreme Court has long since rejected the crabbed view of national legislative authority that necessarily lies behind such a challenge.

During the mid-1930's, when for a brief time the Court invalidated some aspects of the New Deal, a majority of the Justices accepted the argument that Congress lacks the power "to protect the general public interest and the health and comfort of the people."[1] That argument was predicated on an exceedingly narrow conception of the authority of the federal government to address problems of national dimension under the commerce clause of the Constitution. The Court quickly abandoned that attack on the New Deal as inconsistent with the text and structure of the Constitution and, indeed, with the Court's own precedents.[2] Noting that "there has long been recognition of the authority of Congress to obtain . . . social, health or economic advantages from the exercise of constitutional powers,"[3] the Court concluded that Congress's authority over "commerce among the several States" empowers the national government to address all activity, "whatever its nature . . . if it exerts a substantial economic effect on interstate commerce."[4] Upholding Congress's power to regulate the sale and distribution of coal because of the impact of that industry on American economic and social life, the Court stated:

> If the strategic character of this industry in our economy and the chaotic conditions which have prevailed in it do not justify legislation, it is difficult to imagine what would. To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislo-

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[1] *Carter v. Carter Coal Co.*, 298 U.S. 238, 290 (1936). Justice Cardozo, joined by Justices Brandeis and Stone, dissented from the majority's denial to Congress of the power to deal with a problem — unrestrained competition in the coal industry — that "choked and burdened" commerce and had produced "bankruptcy and waste and ruin." *Id.* at 331 (Cardozo, J., dissenting). Five years later, the Supreme Court explicitly endorsed Justice Cardozo's understanding of congressional power with only one Justice in dissent. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 395 (1940). The following Term, a unanimous Court dismissed the views of the *Carter Coal* majority as inconsistent with sound constitutional principle. *United States v. Darby*, 312 U.S. 100, 123 (1941).

[2] The Court's flirtation with a limited view of national power was brief indeed. *Carter Coal* was decided on May 18, 1936, and effectively repudiated by a trilogy of cases decided on April 12, 1937. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[3] *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 163 (1942).

[4] *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

> cate an important segment of our economy and to disrupt and burden interstate channels of trade. . . . Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of laissez-faire.[5]

The American health care industry is one of the largest and fastest growing segments of the American economy, and it has the most direct and crucial impact on the lives of all Americans. Spiralling health care costs and inequities in the provision of health care services have an immediate and massive effect on the national economy and thus upon interstate commerce. As a result Congress unquestionably possesses the power "to deal directly and specifically" with health care in order to obtain "social, health [and] economic advantages" for the American people.

- **National Health Care Reform Preserves our Federal System.**

The President's health care reform plan will invite state participation in the formulation and administration of national health policy; if an individual state government should choose not to participate, the federal government will administer the health care system in that state. This type of cooperative federal-state program is now quite common in federal legislation. Examples range from many of the major modern environmental laws, including the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act, to much older legislation, such as Title IX of the Social Security Act, establishing a system for unemployment compensation. Challenges to such legislation based on constitutional principles of federalism were made during the New Deal, when it was alleged that the national reform legislation of that era stripped the states of powers that were reserved to them by the Tenth Amendment. But that argument was wholly without merit then, and it remains wholly without merit today.

In rejecting the notion that principles of federalism somehow rendered the old age benefits of the Social Security Act of 1935 invalid under the Tenth Amendment, the Supreme Court admonished that "nation-wide calamit[ies] . . . may be checked, if Congress so determines, by the resources of the Nation [in order] to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near."[6] More fundamentally, that same day, the Court also rejected a Tenth Amendment challenge to elements of the Social Security Act that created a cooperative plan whereby states were free to provide unemployment compensation and thereby trigger benefits under the Act for employers in the state. In so doing, the Court issued a resounding declaration that Congress may enact legislation that addresses a "problem . . . na-

[5] *Sunshine Anthracite Coal Co. v Adkins*, 310 U.S. at 395-96
[6] *Helvering v. Davis*, 301 U.S. 619, 641 (1937)

tional in area and dimensions" by providing the states with the option to share in the solution or not, at the choice of the individual state.[7] The Court did not accept the claim that a state is "coerced" by Congress when, pursuant to federal legislation the state "cho[oses] to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers."[8] The Court described such legislation as "the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil."[9] Similarly, under the President's health care proposals, states will have the option to formulate specific plans for implementing the federally guaranteed package of benefits and to oversee the provision and quality of care to their residents as a means of addressing our "common" health care crisis.

- **Health Care Reform will Respect the Constitutional Rights of Individuals.**

The President's plan will guarantee to all Americans an extensive package of health care benefits while protecting the individual's right to make fundamental choices about health care. The plan will ensure the availability of health care by taking into account the economic needs of providers and freeing them from unnecessary paperwork. At the same time, as the President has stated, an essential principle of national health care reform is the exercise of responsibility by health care providers and consumers.

Reports in the media already suggest that opponents of health care reform are preparing to object to the plan as an intrusion into the Constitution's protections of liberty or as a "taking" of private property.[10] Neither argument can be sustained. Indeed, both arguments were pressed unsuccessfully by those who sought to undermine the New Deal.

Almost sixty years ago, the Supreme Court rejected the claim that New Deal-era regulation of the economic choices individuals or businesses make is unconstitutional. While the Justices acknowledged that "[u]nder our form of government the use of property and the making of contracts are normally matters of private and not of public concern," the Court stated that

> Equally fundamental with the private right is that of the public to regulate it in the common interest. . . . Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. . . . [N]o exercise of the legislative prerogative to regulate the conduct of the citizen [can be imagined]

[7] *Steward Machine Co. v Davis*, 301 U S 548, 586 (1937)
[8] *Id* at 590.
[9] *Id* at 587.
[10] *See* Edward Felsenthal, *AMA to Fight Limits on Doctors' Fees*, Wall St. J., Sept. 9, 1993.

> which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.[11]

Three years later, the Court explained that the liberty protected by the Constitution "is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[12] Health care reform will require responsible participation by providers and consumers alike "in the interests of the community."[13] In doing so the President's plan preserves "'the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.'"[14]

The contention that health care reform would in some manner effect an unconstitutional "taking" of the property of providers rests on a mistaken equation of the Constitution's requirements with the dictates of a particular economic theory.[15] Health care reform undeniably will have an impact on the business decisions and economic interests of providers, and it will require financial contributions and personal accountability on the part of consumers. As such, however, the plan will be an "adjust[ment of] the benefits and burdens of economic life to promote the common good"[16] rather than a taking of private property.[17]

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[11] *Nebbia v. New York*, 291 U S 502, 523-25 (1934) While the particular question before the Court in *Nebbia* concerned the relationship between individual liberty and the power of a state, the Court expressly stated that within its sphere Congress also possesses the "power to promote the general welfare": "Touching the matters committed to it by the Constitution, the United States possesses the power " *Id* at 524

[12] *West Coast Hotel Co v Parrish*, 300 U S. 379, 391 (1937). As in *Nebbia v New York*, the Justices were addressing the meaning of liberty in the context of a challenge to state legislation but made it clear that their reasoning applied to the Constitution's restraints on the federal government as well.

[13] *West Coast Hotel Co. v Parrish*, 300 U.S. at 391

[14] *Planned Parenthood v Casey*, 505 U.S. 833, 850 (1992) (O'Connor, Kennedy, & Souter, JJ.) (quoting *Poe v. Ullman*, 367 U.S 497, 542 (1961) (Harlan, J., dissenting))

[15] When a majority of the Supreme Court's members appeared to make just such an equation, Justice Holmes pointed out the error in their reasoning in a famous dissent The "constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire." *Lochner v New York*, 198 U S 45, 75 (1905) The Court came to decide that Justice Holmes was right and the *Lochner* majority wrong many decades ago. *See Ferguson v Skrupa*, 372 U.S. 726, 729-30 (1963) (citing Justice Holmes's dissent and noting that "[t]he doctrine that prevailed in *Lochner* . has long since been discarded").

[16] *Penn Central Transp Co v New York City*, 438 U.S 104, 124 (1978) By requiring responsibility on the part of all, the plan clearly avoids economic impositions "disproportionately concentrated on a few persons" — the hallmark of an unconstitutional taking. *Id*

[17] That health care reform will have differing economic impacts on different persons, while obviously true, does not mean that those impacts will be "takings" within the meaning of the Constitution "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law" *Pennsylvania Coal Co v Mahon*, 260 U S. 393, 413 (1922) *See also United States v. Sperry Corp* , 493 U.S. 52 (1989)

- **The President and Congress May Establish a National Health Board and State Health Alliances to Implement National Health Care Reform.**

The health care reform initiative will set up a National Health Board and corresponding state health alliances to implement the plan pursuant to congressionally prescribed standards. National level administrative agencies are commonplace components of many federal statutes, and are necessary for the sound administration of complicated systems. The devolution of some administrative responsibility to states, which then establish health alliances, is vital to the Act's objective of building to the extent possible on the private sector aspects of our current health care delivery system.

Once more, the Supreme Court's New Deal jurisprudence clearly establishes the legitimacy of such delegations of administrative authority. The creation of administrative bodies to carry out legislative mandates was a touchstone of New Deal reforms. At first, the Court concluded that such schemes constituted impermissible delegations of legislative power.[18] Quickly and firmly, however, the Court moved away from that approach — which was at odds with over a century of the Court's own constitutional interpretations. For example, in sustaining actions taken by an official of the Department of Labor pursuant to the Fair Labor Standards Act against a delegation doctrine challenge, the Court admonished that the Constitution did not "preclude Congress from resorting to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of Congressional policy, have been made prerequisite to the operation of its statutory command."[19] Similarly, in rejecting a delegation doctrine challenge to actions of the Secretary of Agriculture under the Tobacco Inspection Act of 1935, the Court observed that the statute set forth Congress's "policy for the establishment of standards . . . . [T]he provision that the Secretary shall make the necessary investigations to that end and fix the standards according to kind and quality is plainly appropriate and conforms to familiar legislative practice."[20] Relying on a constitutional precedent from the early days of the nation, the Court stated that

> [w]e have always recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly . . . . In such cases, "a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[21]

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[18] *See Panama Refining Co. v Ryan*, 293 U S 388 (1935), *Schechter Poultry Corp v. United States*, 295 U.S 495 (1935)

[19] *Opp Cotton Mills, Inc. v Administrator*, 312 U S. 126, 144 (1941)

[20] *Currin v. Wallace*, 306 U S. 1, 16-17 (1939).

[21] *Id* at 15 (quoting *Wayman v Southard*, 23 U S (10 Wheat.) 1, 43 (1825))

The health care reform initiative is such a case. Simply put, the establishment of administrative bodies to implement the plan is entirely consistent with our constitutional tradition.

- **Conclusion: The President's Health Care Reform Plan is Legislation Based on Well-Established Constitutional Principles.**

As President Clinton has observed, finding a solution to the problems with our health care system will require a willingness to change, and his reform plan is a comprehensive proposal for far-reaching change in both the public and the private sectors. It is possible that some confusion concerning the constitutional legitimacy of the Health Security Act will arise precisely because it is so comprehensive and detailed, and thus necessarily will affect all the major components of our current health care delivery system. There may indeed be no historical analogue of a single bill that does so many things at once. Its comprehensiveness, however, should not mask the fact that the basic means and mechanisms of the plan rest on long-settled principles of constitutional law, principles that seldom have been challenged since the New Deal and that stem ultimately from the work of the Founders of the Republic. The President's plan, far from being constitutionally questionable, rests on what has rightly been called "the first of the constitutional achievements of the American people . . . the formation of a national government that may lawfully deal with all national needs."[22]

The Nation's debate over how best to deal with the great national need for health care reform should proceed untrammelled by worries over the national government's lawful powers that were laid to rest over half a century ago.

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[22] Charles L Black, Jr., *The Humane Imagination* 120 (1986)

The Legal Significance of Presidential Signing Statements

Many Presidents have used signing statements to make substantive legal, constitutional, or administrative pronouncements on the bill being signed. These uses of Presidential signing statements generally serve legitimate and defensible purposes.

November 3, 1993

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum provides you with an analysis of the legal significance of presidential signing statements. It is addressed to the questions that have been raised about the usefulness or validity of such statements. We believe that such statements may on appropriate occasions perform useful and legally significant functions. These functions include: (1) explaining to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption; (2) directing subordinate officers within the executive branch how to interpret or administer the enactment; and (3) informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the executive branch to the extent that such enforcement would create an unconstitutional condition.[1]

These functions must be carefully distinguished from a much more controversial — and apparently recent — use of presidential signing statements, i.e., to create legislative history to which the courts are expected to give some weight when construing the enactment. In what follows, we outline the rationales for the first three functions, and then consider arguments for and against the fourth function.[2] The Appendix to the memorandum surveys the use of signing statements by earlier Presidents and provides examples of such statements that were intended to have legal significance or effects.

I.

To begin with, it appears to be an uncontroversial use of signing statements to explain to the public, and more particularly to interested constituencies, what the

[1] In addition, signing statements have frequently been used for purposes of little or no legal or constitutional significance, e.g., to applaud or criticize the policy behind certain provisions, to advise Congress how the President will respond to future legislation, to condemn practices such as attaching riders to omnibus bills, to congratulate members of Congress or the public who have assisted in the bill's passage, and so forth

[2] We do not in this memorandum attempt to reach a definitive conclusion on the question whether the use of signing statements to create legislative history on which the courts are to rely is or is not legitimate We would be pleased to provide you with further research and analysis on that question should you so desire.

President understands to be the likely effects of the bill, and how the bill coheres or fails to cohere with the Administration's views or programs.[3]

A second, and also generally uncontroversial, function of presidential signing statements is to guide and direct executive officials in interpreting or administering a statute. The President has the constitutional authority to supervise and control the activity of subordinate officials within the executive branch. *See Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). In the exercise of that authority he may direct such officials how to interpret and apply the statutes they administer.[4] *Cf. Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."). Signing statements have frequently expressed the President's intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality), and such statements have the effect of binding the statutory interpretation of other executive branch officials.[5]

A third function, more controversial than either of the two considered above, is the use of signing statements to announce the President's view of the constitutionality of the legislation he is signing. This category embraces at least three species: statements that declare that the legislation (or relevant provisions) would be unconstitutional in certain applications; statements that purport to construe the legislation in a manner that would "save" it from unconstitutionality; and statements that state flatly that the legislation is unconstitutional on its face. Each of these species of statement may include a declaration as to how — or whether — the legislation will be enforced.

Thus, the President may use a signing statement to announce that, although the legislation is constitutional on its face, it would be unconstitutional in various applications, and that in such applications he will refuse to execute it. Such a Presidential statement could be analogized to a Supreme Court opinion that upheld

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[3] For example, on signing the Omnibus Crime Control and Safe Streets Act of 1968, President Johnson explained in some detail how the wiretapping and eavesdropping provisions of the bill both agreed with and differed from his Administration's original proposals to Congress, criticized Congress's decision to sanction certain law enforcement eavesdropping and wiretapping, asked Congress to reconsider that decision, served notice that the Department of Justice would continue to follow a narrower policy of confining wiretapping and eavesdropping to national security cases only, and urged caution and restraint on the states in exercising the powers that the bill allowed them *See* 1 *Pub. Papers of Lyndon B Johnson* 726-27 (1968-69). And President Kennedy signed an education bill "with extreme reluctance," objecting to several provisions, including "the continuation of the discriminatory and ineffective non-Communist disclaimer affidavit." *Pub. Papers of John F. Kennedy* 637 (1961)

[4] There are, of course, limits to this Presidential authority Thus, the President cannot read into the Immigration and Nationality Act protection for a class of asylum seekers whom Congress did not include among those eligible for asylum *See* Memorandum for the Attorney General, from Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel at 3 (Aug. 20, 1993)

[5] For example, when signing legislation governing the recruitment of agricultural workers from Mexico, President Kennedy made clear that the Labor Department would administer it so as to protect "the wages and working conditions of domestic agricultural workers." *Pub. Papers of John F Kennedy* at 640 Similarly, President Truman explained that the National Security Council would make broad use of the powers given to it under a rider to a foreign aid bill restricting trade with the Communist bloc to create exceptions from such restrictions *See Pub Papers of Harry S. Truman* 319 (1951).

legislation against a facial constitutional challenge, but warned at the same time that certain applications of the act would be unconstitutional. *Cf. Bowen v. Kendrick*, 487 U.S. 589, 622-24 (1988) (O'Connor, J., concurring). Relatedly, a signing statement may put forward a "saving" construction of the bill, explaining that the President will construe it in a certain manner in order to avoid constitutional difficulties. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824-25 (D.C. Cir. 1993) (Silberman, J., joined by Wald, J.) (citing two presidential signing statements adopting "saving" construction of legislation limiting appointment power), *cert. dismissed*, 513 U.S. 88 (1994). This, too, is analogous to the Supreme Court's practice of construing statutes, if possible, to avoid holding them unconstitutional, or even to avoid deciding difficult constitutional questions.

More boldly still, the President may declare in a signing statement that a provision of the bill before him is flatly unconstitutional, and that he will refuse to enforce it. This species of statement merits separate discussion.[6]

In each of the last three Administrations, the Department of Justice has advised the President that the Constitution provides him with the authority to decline to enforce a clearly unconstitutional law.[7] This advice is, we believe, consistent with the views of the Framers.[8] Moreover, four sitting Justices of the Supreme Court have joined in the opinion that the President may resist laws that encroach upon his powers by "disregard[ing] them when they are unconstitutional." *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., joined by O'Connor, Kennedy and Souter, JJ., concurring in part and concurring in judgment).[9]

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[6] One reason such signing statements may be controversial is that the refusal to execute a statutory provision has substantially the effect of a line-item veto.

[7] *See, e.g*, *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op O.L.C. 55, 59 (1980) (Civiletti, A.G.); *Recommendation that the Department of Justice not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 8 Op. O.L.C. 183, 195 (1984). This advice is consistent with that given by Attorneys General to earlier Presidents, including Presidents Buchanan, *see Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 469-70 (1860), and Wilson, *see Income Tax — Salaries of President and Federal Judges*, 31 Op. Att'y Gen. 475, 476 (1919), that the President was not bound by a law that unconstitutionally encroached on his powers.

[8] For example, James Wilson, a prominent Framer, legal theorist, and later Associate Justice of the Supreme Court, told the Pennsylvania ratifiers that

> the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before *the judges* . . . it is their duty to pronounce it void . . . *In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that violates the Constitution*

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 446 (Jonathan Elliot, ed., 2d ed. 1836) (third emphasis added).

Also relevant (despite the fact that he did not attend the Philadelphia Convention) are the views of Thomas Jefferson. Believing that the Sedition Law was unconstitutional even though it had been upheld by the courts, Jefferson used his power as President to (in his own words) "remit the execution" of the Act by pardoning all offenders. *See* Norman J. Small, *Some Presidential Interpretations of the Presidency* 21 (Da Capo Press 1970) (1932).

[9] Further, as former Attorney General Civiletti has noted, the President refused to comply with the Act of Congress at issue in *Myers v. United States*, 272 U.S. 52 (1926), and the Solicitor General argued that that Act was unconstitutional. Yet the Court ruled that the President's action in defiance of the statute had been

If the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his powers, then it arguably follows that he may properly *announce* to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority.[10] And indeed, in a recent decision by the United States Court of Appeals for the District of Columbia Circuit, *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994), the court cited to and relied upon a Presidential signing statement that had declared that a Congressionally-enacted limitation on the President's constitutional authority to appoint officers of the United States was without legal force or effect. *Id.* at 824-25.

The contrary view — that it is the President's constitutional *duty* not to sign legislation that he believes is unconstitutional — has been advanced on occasion. For example, Secretary of State Thomas Jefferson advised President Washington in 1791 that the veto power "is the shield provided by the constitution to protect against the invasions of the legislature 1. [of] the rights of the Executive 2. of the Judiciary 3. of the states and state legislatures." Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *reprinted in* 3 *The Founders' Constitution* 247 (Philip B. Kurland & Ralph Lerner eds., 1987). James Madison appears to have held a similar view and as President once vetoed a bill on constitutional grounds even though he supported it as a matter of policy. *See* 2 *A Compilation of the Messages and Papers of the Presidents* 569, 570 (James D. Richardson ed., 1897) ("Messages") (while praising the bill's "beneficial objects," Madison wrote that he "ha[d] no option but to withhold [his] signature from it" because he thought it unconstitutional). Jefferson and Madison, however, did not in fact always act on this understanding of the President's duties: in 1803 President Jefferson, with Secretary of State Madison's agreement, signed legislation appropriating funds for the Louisiana Purchase even though Jefferson thought the purchase unconstitutional. *See* 1 William M. Goldsmith, *The Growth of Presiden-*

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lawful. It gave rise to no actionable claim for damages under the Constitution or an Act of Congress in the Court of Claims . . .

Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day they are declared unconstitutional by the courts.

4A Op O.L.C. at 59

[10] Indeed, more broadly, the President may use a signing statement as a vehicle to announce his unwillingness to accept a blatantly unconstitutional statute, even if it does not encroach upon his prerogatives, but otherwise violates a constitutional mandate. The executive branch has from time to time challenged Acts of Congress for such reasons for example, it joined the plaintiffs in *United States v. Lovett*, 328 U.S. 303, 306 (1946), in attacking an unconstitutional bill of attainder, and it intervened in *Simkins v. Moses H. Cone Memorial Hosp.*, 211 F. Supp. 628, 640 (M.D.N.C. 1962), *rev'd*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), to contest the constitutionality of an Act of Congress that provided Federal funding for racially segregated hospitals.

tial Power 438-50 (1974). In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision, although of course it is entirely appropriate for the President to do so.

II.

Separate and distinct from all the preceding categories of signing statements, and apparently even more controversial than any of them, is the use of such statements to create legislative (or "executive") history that is expected to be given weight by the courts in ascertaining the meaning of statutory language. *See* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 Harv. J. on Legis. 363, 366 (1987). Although isolated examples can perhaps be found earlier, signing statements of this kind appear to have originated (and were certainly first widely used) in the Reagan Administration.

In 1986, then-Attorney General Meese entered into an arrangement with the West Publishing Company to have Presidential signing statements published for the first time in the *U.S. Code Congressional and Administrative News*, the standard collection of legislative history. Mr. Meese explained the purpose of the project as follows:

> To make sure that the President's own understanding of what's in a bill is the same . . . or is given consideration at the time of statutory construction later on by a court, we have now arranged with the West Publishing Company that the presidential statement on the signing of a bill will accompany the legislative history from Congress so that all can be available to the court for future construction of what that statute really means.

Address by Attorney General Edwin Meese III, National Press Club, Washington, D.C. (Feb. 25, 1986), *quoted in* Garber and Wimmer, *supra* at 367.

We do not attempt finally to decide here whether signing statements may legitimately be used in the manner described by Attorney General Meese. We believe it would be useful, however, to outline the main arguments for and against such use.

In support of the view that signing statements can be used to create a species of legislative history, it can be argued that the President as a matter both of constitutional right and of political reality plays a critical role in the legislative process. The Constitution prescribes that the President "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3, cl. 1. Moreover, before a bill is enacted into law, it must be presented to the President. "If he approve he shall sign it, but if not

he shall return it, with his Objections to that House in which it shall have originated." U.S. Const. art. I, § 7, cl. 2.[11] Plainly, the Constitution envisages that the President will be an important actor in the legislative process, whether in originating bills, in signing them into law, or in vetoing them. Furthermore, for much of American history the President has *de facto* been "a sort of prime minister or 'third House of Congress.' . . . [H]e is now expected to make detailed recommendations in the form of messages and proposed bills, to watch them closely in their tortuous progress on the floor and in committee in each house, and to use every honorable means within his power to persuade . . . Congress to give him what he wanted in the first place." Clinton Rossiter, *The American Presidency* 96 (Johns Hopkins Press 1987) (1956). It may therefore be appropriate for the President, when signing legislation, to explain what his (and Congress's) intention was in making the legislation law, particularly if the Administration has played a significant part in moving the legislation through Congress. And in fact several courts of appeals have relied on signing statements when construing legislation. *See United States v. Story*, 891 F.2d 988, 994 (2d Cir. 1989) (Newman, J.) (citation omitted) ("though in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent, President Reagan's views are significant here because the Executive Branch participated in the negotiation of the compromise legislation."); *Berry v. Department of Justice*, 733 F.2d 1343, 1349-50 (9th Cir. 1984) (citing President Johnson's signing statement on goals of Freedom of Information Act); *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661-62 (4th Cir. 1969) (relying on President Truman's description in signing statement of proper legal standard to be used in Portal-to-Portal Act).

On the other side, it can be argued that the President simply cannot speak for Congress, which is an independent constitutional actor and which, moreover, is specifically vested with "[a]ll legislative Powers herein granted." U.S. Const. art. I, § 1, cl. 1. Congress makes legislative history in committee reports, floor debates and hearings, and nothing that the President says on the occasion of signing a bill can reinterpret that record: once an enrolled bill has been attested by the Speaker of the House and the President of the Senate and has been presented to the President, the legislative record is closed. *See Field v. Clark*, 143 U.S. 649, 672 (1892). A signing statement purporting to explain the intent of the legislation is, therefore, entitled at most to the limited consideration accorded to other kinds of post-passage legislative history, such as later floor statements, testimony or affidavits by legislators, or amicus briefs filed on behalf of members of Congress. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) (citation omitted) ("post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the act's passage. Such statements

[11] Significantly, the President's veto power is placed in Article I, thereby indicating that he has a share of the legislative power, rather than in Article II, which deals with the executive power. *See* 1 William Crosskey, *Politics and the Constitution* 419 (1953).

'represent only the personal views of these legislators.'") (quoting *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967)).[12] Finally, it is arguable that "by reinterpreting those parts of congressionally enacted legislation of which he disapproves, the President exercises unconstitutional line-item veto power." Garber & Wimmer, *supra* at 376; *see also Constitutionality of Line-Item Veto Proposal*, 9 Op. O.L.C. 28, 30 (1985) ("under the system of checks and balances established by the Constitution, the President has the right to approve or reject a piece of legislation, but not to rewrite it or change the bargain struck by Congress in adopting a particular bill").

Conclusion

Many Presidents have used signing statements to make substantive legal, constitutional or administrative pronouncements on the bill being signed. Although the recent practice of issuing signing statements to create "legislative history" remains controversial, the other uses of Presidential signing statements generally serve legitimate and defensible purposes.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

[12] *But see Seatrain Shipbuilding Corp v Shell Oil Co*, 444 U.S 572, 596 (1980) (according "significant weight" to post-passage statements, particularly "when the precise intent of the enacting Congress is obscure").

APPENDIX

So far as we have been able to determine, the practice of using presidential signing statements to create legislative history for the use of the courts was uncommon — if indeed it existed at all — before the Reagan and Bush Presidencies. However, earlier Presidents did use signing statements to raise and address the legal or constitutional questions they believed were presented by the legislation they were signing. Examples of signing statements of this kind can be found as early as the Jackson and Tyler Administrations, and later Presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice.

According to Louis Fisher of the Congressional Research Service,

> Andrew Jackson sparked a controversy in 1830 when he signed a bill and simultaneously sent to Congress a message that restricted the reach of the statute. The House, which had recessed, was powerless to act on the message. A House report later interpreted his action as constituting, in effect, an item veto of one of the bill's provisions. President Tyler continued the custom by advising the House in 1842 that after signing a bill, he had deposited with the Secretary of State "an exposition of my reasons for giving it my sanction." He expressed misgivings about the constitutionality and policy of the entire act. A select committee of the House issued a spirited protest, claiming that the Constitution gave the President only three options upon receiving a bill: a signature, a veto, or a pocket veto. To sign a bill and add extraneous matter in a separate document could be regarded "in no other light than a defacement of the public records and archives."

Louis Fisher, *Constitutional Conflicts between Congress and the President* 128 (3d rev. ed. 1991) (citations omitted).

President Lincoln stated that he was signing the Confiscation Bill on the understanding that the bill and the joint resolution explaining it were "substantially one." He attached to his signing statement the draft veto message he had prepared before the joint resolution was adopted. In that draft, he raised various objections to the bill, some of which appear to be constitutionally-based. Thus, the draft singled out a provision that "assumes to confer discretionary powers upon the Executive;" but Lincoln stated that he would have "no hesitation to go as far in the direction indicated" even without such legislative authority. 8 *Messages*, *supra* at 3287; *see also* Norman Small, *Some Presidential Interpretations of the Presidency* 183 (1932).

President Andrew Johnson signed but protested against an Army appropriations bill, claiming that one of its sections "in certain cases virtually deprives the President of his constitutional functions as Commander in Chief of the Army." 8 *Messages*, *supra* at 3670.

In 1876, when signing a river and harbor appropriations bill that included "many appropriations . . . for works of purely private or local interest, in no sense national," President Grant issued a signing statement saying that "[u]nder no circumstances will I allow expenditures upon works not clearly national." 10 *Messages*, *supra* at 4331. On the same day, Grant sent the House another signing statement relating to an appropriation for consular and diplomatic services that had in part prescribed the closing of certain consular and diplomatic offices. Grant objected that "[i]n the literal sense of this direction it would be an invasion of the constitutional prerogatives and duty of the Executive," and announced his intention of construing the section as intended merely "to fix a time at which the compensation of certain diplomatic and consular officers shall cease, and not to invade the constitutional rights of the Executive." *Id.* at 4331-32.

President Theodore Roosevelt established several volunteer unpaid commissions to investigate certain factual situations and report back their findings to him. This practice "came to be denounced in Congress as 'unconstitutional,' and an amendment to the Sundry Civil Act of 1909 undertook to forbid the practice. Mr. Roosevelt signed the measure but proclaimed his intention of ignoring the restriction. "'Congress,' he argued, 'cannot prevent the President from seeking advice.'" Edward Corwin, *The President: Office and Powers* 67 (1940) (citation omitted).

President Wilson signed a merchant marine bill in 1920, but determined not to enforce a provision he found unconstitutional. He stated that executing the provision "'would amount to nothing less than the breach or violation'" of some thirty-two treaties. *See* Fisher, *supra* at 130 (quoting 17 *Messages* at 8871-72).

In 1941, President Franklin Roosevelt confided an unpublished Presidential legal opinion objecting to the "two-House veto" provision in the Lend Lease bill to then-Attorney General Robert Jackson. Roosevelt found the provision "clearly unconstitutional," but signed the bill as a matter of diplomatic and political necessity. Robert H. Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1357 (1953). President Roosevelt also signed the Urgent Deficiency Appropriations Act of 1943, which included a section prohibiting the payment of a government salary or other compensation to certain named government employees deemed to be subversive. While signing the bill because it appropriated funds urgently needed to carry on the war, Roosevelt "'plac[ed] on record my view that this provision is not only unwise and discriminatory, but unconstitutional.'" *United States v. Lovett*, 328 U.S. 303, 313 (1946).

President Truman issued a statement on the occasion of signing the General Appropriation Act of 1951 in which he addressed a provision of the bill authorizing loans to Spain. Truman construed the provision in a manner that avoided what

he thought would be an unconstitutional outcome, declaring that "I do not regard this provision as a directive, which would be unconstitutional, but instead as an authorization, in addition to the authority already in existence under which loans to Spain may be made." *Pub. Papers of Harry S. Truman* 616 (1950).

President Eisenhower sought to put a "saving" construction on a 1959 bill amending the Mutual Security Act. He stated that

> I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.

Pub. Papers of Dwight D. Eisenhower 549 (1959). And in 1960, on the occasion of signing a bill providing for the admission of refugees, Eisenhower noted that "[t]he Attorney General has advised me that there is a serious question as to whether this [one-House veto] provision is constitutional," but declared that "it would be better to defer a determination of the effect of such possible action [i.e., a legislative veto] until it is taken." *Pub. Papers of Dwight D. Eisenhower* 579 (1960-61).

On the occasion of signing the Omnibus Crime Control and Safe Streets Act of 1968, President Lyndon Johnson criticized as "vague and ambiguous" certain provisions dealing with Federal rules of evidence in criminal cases, but stated that the Attorney General had advised him that those provisions could "be interpreted in harmony with the Constitution, and Federal practices in this field [e.g., the Federal Bureau of Investigation's practice of warning suspects of their constitutional rights] will continue to conform to the Constitution." 1 *Pub. Papers of Lyndon B. Johnson* 727 (1968-69).

President Nixon signed a 1971 military authorization bill, but objected to a provision in it (the Mansfield Amendment, which set a final date for the withdrawal of U.S. Forces from Indochina) as being "without binding force or effect." *Pub. Papers of Richard Nixon* 1114 (1971).

President Ford, upon signing the Defense Appropriation, 1976, objected to a provision of that bill that restricted the Executive's ability to obligate funds for certain purposes until it received approval from several Congressional committees. Ford stated that he could not "concur in this legislative encroachment," and that consequently he would treat the restriction "as a complete nullity." 1 *Pub. Papers of Gerald R. Ford* 242 (1976-77).

President Carter issued several signing statements, including statements on the FY 1980-81 Department of State Appropriations Act, the FY 1981 Department of

Defense Authorization Act and the International Security and Development Cooperation Act of 1980. The first of these cases was a bill which, like the 1876 bill President Grant had objected to but signed, purported to mandate the closing of certain consular posts. Carter objected that Congress "cannot mandate the establishment of consular relations at a time and place unacceptable to the President," and accordingly stated his determination to construe the provision as merely precatory. 2 *Pub. Papers of Jimmy Carter* 1434 (1979).

As noted above, the Reagan and Bush Administrations made frequent use of Presidential signing statements, not only to declare their understanding of the constitutional effect of the statutory language, but also to create evidence on which the courts could rely in construing such language. *See, e.g.*, President's Statement on Signing S. 1200 Into Law, 22 Weekly Comp. Pres. Doc. 1534, 1536 (Nov. 6, 1986) (interpreting language of Immigration Reform and Control Act); President's Statement on Signing S. 124 Into Law, 22 Weekly Comp. Pres. Doc. 831, 832 (June 19, 1986) (interpreting language of Safe Drinking Water Act); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37 (1990) (provision of foreign relations authorization bill unconstitutionally infringed on President's authority to conduct negotiations; if President chose to sign bill, he would be entitled not to enforce provision); *Appointments to the Commission on the Bicentennial of the Constitution*, 8 Op. O.L.C. 200, 201-02 (1984) (discussing Senator Hatch's objections to constitutional claims made by President Reagan's signing statement on bill).

Whether Missouri Municipalities May Tax the Portion of Federal Salaries Voluntarily Contributed to the Thrift Savings Plan

Intergovernmental tax immunity does not preclude municipalities in Missouri from levying an earnings tax on the voluntary contributions of federal employees to the Thrift Savings Plan.

November 10, 1993

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF AGRICULTURE

You have requested our opinion on the following question: Must the National Finance Center ("NFC") of the Department of Agriculture ("USDA") withhold and remit local earnings taxes levied by the municipalities of St. Louis and Kansas City, Missouri, upon that portion of federal employees' salaries voluntarily contributed to the Thrift Savings Plan ("TSP")?[1] The Financial Management Service ("FMS") of the Department of the Treasury ("Treasury") has taken the position that NFC should not withhold the Kansas City earnings taxes on TSP contributions of FMS employees because similar payments made by municipal employees are not subject to the earnings tax.[2] As we explain in further detail below, we disagree with this approach because TSP contributions, which are held in trust for the contributors, can be distinguished from the deferred compensation plan payments that are exempt — by a court ruling — from earnings taxes. Thus, intergovernmental tax immunity does not preclude the Missouri municipalities from levying an earnings tax on voluntary TSP contributions. The St. Louis and Kansas City earnings taxes should be withheld and remitted.

I.

The Thrift Savings Plan, 5 U.S.C. §§ 8431-8440d, which was established as part of the Federal Employees' Retirement System ("FERS"), 5 U.S.C. §§ 8401-8479, enables each federal employee covered by FERS to elect to contribute, in any pay period, as much as ten percent of the employee's "basic pay" to the employee's TSP retirement account. 5 U.S.C. § 8432(a). All TSP contributions are

[1] Letter for Daniel Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, from James S Gilliland, General Counsel, Department of Agriculture (July 12, 1993).

[2] Neither FMS nor any other unit of Treasury has submitted a brief in response to the USDA request, but the position of Treasury is set forth in a memorandum written by Attorney-Advisor Elton A Ellison of the Office of Chief Counsel dated May 1, 1990, and a letter drafted by Assistant Commissioner Bland T. Brockenborough dated January 2, 1992

channeled into a Thrift Savings Fund in the Treasury of the United States.[3] *Id.* § 8437(b). These contributions are then held in the Fund in trust for the employees who made the contributions. *Id.* § 8437(g). By law, the Thrift Savings Fund is "treated as a trust described in section 401(a) of [the Internal Revenue] Code which is exempt from taxation under section 501(a) of such Code," *id.* § 8440(a)(1), and contributions to the Thrift Savings Fund are "treated in the same manner as contributions to" such a trust. *Id.* § 8440(a)(2).

II.

Two cities in Missouri — St. Louis and Kansas City — have adopted ordinances that impose a tax on salaries, wages, and other compensation earned or received by city residents and nonresidents who work in the cities. Kansas City, Mo., Code 32.141(a)(1) & (2); St. Louis, Mo., Code § 5.22.020(A) & (B). Kansas City imposes "a one per centum (1.0%) per annum" municipal tax:

(1) On all salaries, wages, commissions and other compensation earned or received by resident individuals of the city for work done or services performed or rendered.

(2) On all salaries, wages, commissions and other compensation earned or received by nonresident individuals of the city for work done or services performed or rendered in the city.

Kansas City, Mo., Code § 32.141(a). Similarly, St. Louis imposes an earnings tax "for general revenue purposes of one percent" on all "salaries, wages, commissions and other compensation" earned by its residents and by nonresidents for "work done or services performed" in the city. St. Louis, Mo., Code § 5.22.020(A) & (B).

In 1989, however, the Missouri Court of Appeals determined that the City of Kansas City could not levy its municipal earnings tax upon sums paid at the direction of an employee of the Board of Police Commissioners to the Kansas City Police Department Deferred Compensation Plan. *Whipple v. City of Kansas City*, 779 S.W.2d 610 (Mo. Ct. App. 1989). The *Whipple* court reasoned that, because all sums paid to the Deferred Compensation Plan were exchanged for nothing more than "the unsecured promise of the board to pay the employee whatever balance may be in the account at the employee's retirement or separation from the department," *id.* at 611, such sums were not subject to the municipal earnings tax. *Id.* at 613-14. As the court explained: "The city's position that it may extract a tax from employees based on sums they have not received and may never receive is simply untenable." *Id.* at 614.

[3] The Thrift Savings Fund also contains other assets such as contributions made by government agencies that employ the federal workers who participate in the TSP. 5 U.S.C. § 8437(b), *see also id.* § 8479(b).

The *Whipple* court, of course, did not address the validity of municipal earnings taxes imposed upon federal employees who partake of the TSP program. Nevertheless, as your letter points out, under the Supreme Court's ruling in *Davis v. Michigan Department of the Treasury*, 489 U.S. 803 (1989), neither states nor municipalities may differentiate between similarly situated federal employees and state or municipal employees in levying state and local taxes. This restriction flows from the constitutional principle of intergovernmental tax immunity and 4 U.S.C. § 111, which states:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, *if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.*

4 U.S.C. § 111 (emphasis added). Interpreting this provision in conjunction with the constitutional conception of intergovernmental tax immunity, *see Davis*, 489 U.S. at 813 (characterizing § 111 and modern constitutional doctrine as "coextensive"), the Supreme Court concluded that intergovernmental tax immunity precludes taxation of federal employees "to the extent that such taxation discriminates on account of the source of the compensation." *Id.* at 810. Applying this rule, the Court held that the State of Michigan could not levy an income tax on retirement benefits paid by the federal government while exempting from taxation retirement benefits paid by the state or its political subdivisions. *Id.* at 814-17. Simply put, the Michigan taxation scheme failed because the inconsistent treatment of state and federal employees was not "directly related to, and justified by, 'significant differences between the two classes.'" *Id.* at 816 (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)).

The Supreme Court applied this understanding of the rule of intergovernmental tax immunity in *Barker v. Kansas*, 503 U.S. 594 (1992), where the Court struck down a Kansas scheme that levied taxes on the benefits paid to military retirees but exempted benefits received by retired state and local government employees. Again, the Court emphasized that it "evaluate[s] a state tax that is alleged to discriminate against federal employees in favor of state employees by inquiring 'whether the inconsistent tax treatment is directly related to, and justified by, "significant differences between the two classes."'" *Id.* at 598 (quoting *Davis*, 489 U.S. at 816) (quoting *Philips Chem.*, 361 U.S. at 383). Not surprisingly, the Court invalidated the Kansas taxation scheme by applying this basic principle. *Id.* at 598-605.

III.

The issue raised by your inquiry must be resolved through the application of the principle set forth in *Davis* and *Barker*. By judicial decision, the sums paid to the Missouri Police Department Deferred Compensation Fund are exempt from the Kansas City earnings tax. *See Whipple*, 779 S.W2d 610 (Mo. Ct. App. 1989). In contrast, the voluntary TSP contributions of federal employees historically have been subject to the Kansas City earnings tax. The validity of the taxation of voluntary TSP contributions turns on "whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'" *Davis*, 489 U.S. at 816 (quoting *Philips Chem.*, 361 U.S. at 383); *accord Barker*, 503 U.S. at 598. We believe that a significant difference between voluntary TSP contributions and sums paid to the Missouri Police Department Deferred Compensation Fund justifies the existing disparity in tax treatment.

Voluntary TSP contributions are held in trust for the benefit of the employees who participate in the plan. *See* 5 U.S.C. § 8437(g). The legal nature of the Thrift Savings Fund creates a legitimate and enforceable expectation of the return of contributions to TSP participants. Indeed, this is precisely what Congress anticipated. *See* S. Rep. No. 99-166, at 14 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1405, 1419 ("Employees are immediately vested in their own contributions and earnings attributable to them. . . . At retirement an employee may withdraw the account balance either in a lump sum . . . or in installments."); H.R. Conf. Rep. No. 99-606, at 134-135 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1508, 1517-1518 (adopting provision for full and immediate vesting of both employer and employee contributions, and discussing options for withdrawal of contributions).

In comparison, the return of any sums paid to the deferred compensation plan at issue in *Whipple* is essentially speculative. As the *Whipple* court explained:

> [A participating employee's] account reflects the current status of the employee's prospective benefits, but the account is the property of the board . . . . The sole interest of the employee in his deferred compensation is the unsecured promise of the board to pay the employee whatever balance may be in the account at the employee's retirement or separation from the department.

Whipple, 779 S.W.2d at 611. Indeed, the deferred compensation plan included language that qualified each participant's claim to any sums paid at a participant's direction to the plan:

> All amounts of Compensation deferred under this Plan, all property and rights which may be purchased by the Employer with such amounts and all income attributable to such amounts, property or

> rights to property shall remain the sole property and rights of the Employer without being restricted by the provisions of this Plan subject only to the claims of the Employer's general creditors. The obligation of the Employer under this Plan is purely contractual and shall not be funded or secured in any way.

Id. Based on these provisions, the court of appeals concluded that an "employee has no guarantee that any payment of deferred compensation will be made." *Id.* at 612.

The provisions of the deferred compensation plan discussed in *Whipple*, which significantly qualified the claims of participants to payments made at their direction, render sums paid to the plan in *Whipple* readily distinguishable from voluntary TSP contributions. Thus, Kansas City and St. Louis cannot be forbidden, by either the constitutional principle of intergovernmental tax immunity or by 4 U.S.C. § 111, to impose a municipal earnings tax upon voluntary TSP contributions. Unless a Missouri court rules that earnings taxes cannot be levied upon voluntary TSP contributions as a matter of state law, the Kansas City and St. Louis earnings taxes should be withheld and remitted for voluntary TSP contributions.[4]

IV.

Your request for an opinion on the validity of earnings taxes levied by Missouri municipalities necessitated a comparison of voluntary TSP contributions and sums paid to a specific deferred compensation plan that are exempted, by a judicial ruling, from the earnings tax. Our analysis turns upon a material distinction between the two types of contributions. We find, based upon this material distinction, that intergovernmental tax immunity does not foreclose the imposition of an earnings

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[4] Your inquiry assumes that voluntary TSP contributions "are not included in an employee's gross wages for Federal income tax purposes." This fact, however, does not affect our analysis of the intergovernmental tax immunity issue. As a general matter, states and municipalities may tax earnings that are exempt from taxation under the Internal Revenue Code, and the earnings taxes levied by Kansas City and St. Louis apparently sweep more broadly than the federal income tax laws. *See Whipple*, 779 S.W.2d at 613 n.3.

To be sure, a TSP participant could challenge, under Missouri law, the application of the earnings tax to TSP contributions by filing a declaratory judgment action in state court. Indeed, the *Whipple* decision strongly suggests that such an action would be successful. *Id.* at 613-14 & n.3. As the *Whipple* court observed, a Missouri statute proscribes the taxation of any payment made to a deferred compensation program "'to the same extent as it is exempt from income tax imposed by the United States.'" *Id.* at 613 (quoting and interpreting Mo. Ann. Stat. § 105.900.2). This statute, when read in conjunction with limitations imposed by Missouri law upon the taxing authority of municipalities, prompted the *Whipple* court to opine that Kansas City lacked the capacity under state law to tax such payments as earnings. *Id.* at 613-14 & n.3.

This argument might well be persuasive in a declaratory judgment action in a Missouri court, but it is not the province of this Office to issue authoritative interpretations of state laws and municipal codes. *See* Letter for Hon. Wendell H. Ford from Mary C. Lawton at 3 (Apr. 5, 1976) (explaining that "we of course are not in a position to give an authoritative interpretation of State law"); *cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (noting impropriety of federal courts instructing state officials "on how to conform their conduct to state law"). Hence, our opinion does not address the validity of the municipal earnings taxes as a matter of Missouri law.

tax by the Missouri municipalities. Therefore, we anticipate that the NFC will withhold and remit earnings taxes for TSP contributions.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Vesting Magistrate Judges with Jurisdiction Over Asset Forfeiture Cases

A statute vesting magistrate judges with jurisdiction over asset forfeiture cases would violate Article III of the Constitution

December 6, 1993

MEMORANDUM OPINION FOR THE
DEPUTY DIRECTOR, POLICY AND LITIGATION
ASSET FORFEITURE OFFICE

You have asked whether Congress may constitutionally enact a statute requiring that asset forfeiture cases involving property valued below a certain level be heard by a United States Magistrate Judge rather than a United States District Judge. The limitations imposed by Article III forbid Congress to assign jurisdiction over such cases to a Magistrate Judge without the assent of the parties. Therefore, we must advise you that the provision you have described would be unconstitutional.

The Supreme Court has explained that the power to adjudicate private rights must be vested in an Article III court. *See Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-76 (1982) (plurality opinion). Although the adjudication of public rights need not be assigned to an Article III court, both civil and criminal forfeiture cases involve disputes over private, not public, rights. The Court has held that no criminal case can be conceptualized as a public rights dispute even though the United States is a party to all criminal proceedings. *Id.* at 70 n.24 (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)). Similarly, the Court has ruled that Congress generally "cannot 'withdraw from [Art. III] judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,'" *id.* at 69 n.23 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)), and every civil forfeiture action indubitably constitutes a matter that is the subject of a suit at the common law or in equity. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974) (tracing history of forfeiture).

Congress has the authority in some situations to "fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of" Article III, *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989) (discussing congressional authority to abrogate Seventh Amendment right to trial by jury), but the Supreme Court has only sustained the exercise of this authority when Congress creates a regulatory framework that includes administrative adjudication of such claims. *See Atlas Roofing v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450-61 (1977) (collecting cases); *see also*

Granfinanciera, 492 U.S. at 51-52; *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932). Absent the creation of a separate administrative mechanism for administration and adjudication of civil forfeitures, such cases must be assigned in the first instance to Article III judges. Assignment of such cases to Magistrate Judges, who are mere adjuncts to United States District Judges, *see Gomez v. United States*, 490 U.S. 858, 872 (1989), cannot satisfy the Article III requirement.

In upholding 28 U.S.C. § 636(c), which authorizes Magistrate Judges to conduct civil trials with the consent of the parties, the *en banc* Ninth Circuit stated "that parties to a case or controversy in a federal forum are entitled to have the cause determined by Article III judges." *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984). Therefore, the Ninth Circuit concluded that a "mandatory provision for trial of an unrestricted class of civil cases by a magistrate and not by Article III judges would violate the constitutional rights of the litigants." *Id.* at 542. Based upon this rule, any statute vesting jurisdiction over federal forfeiture cases — even a limited class of civil forfeiture cases involving small amounts of money — in federal Magistrate Judges would almost certainly be constitutionally infirm.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils

The appointed members of Regional Fishery Management Councils established under the Magnuson Fishery Conservation and Management Act and other personnel of those Councils are not executive branch employees for purposes of Executive Order No. 12674 and its implementing regulations, and thus are not subject to that Order.

December 9, 1993

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF COMMERCE

This memorandum responds to your request[1] for our opinion whether Executive Order No. 12674, 3 C.F.R. 215 (1990) ("Order"), and the regulations implementing it apply to officials of the Regional Fishery Management Councils ("Councils") established under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 ("Magnuson Act" or "FCMA").[2] The officials in question are the Council members appointed by the Secretary of Commerce ("Secretary") and the Councils' executive directors and administrative employees. We conclude that, under the unusual statutory scheme of the Magnuson Act, appointed Council members and the other Council personnel under consideration are not executive branch "employees" subject to the Order.

I.

The Magnuson Act created eight Councils from regional groupings of coastal States and gave them certain authority concerning ocean fisheries to the seaward of their member States. *See* 16 U.S.C. § 1852(a). The Secretary appoints a majority of the voting membership for three-year terms. *Id.* § 1852(a)-(b). The remaining members, voting and nonvoting, are State and Federal officials who serve *ex officio*. *Id.* § 1852(b)-(c).[3] The appointed Council members may be removed by the Secretary only "for cause . . . if the Council concerned first recommends removal

[1] *See* Letter for Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel, Department of Justice, from Department of Commerce (July 17, 1992) ("Commerce Letter").

[2] The Order was amended by Exec. Order No. 12731, 3 C.F.R. 306 (1991), in respects not pertinent to this discussion. The Office of Government Ethics' regulations implementing the Order took effect on February 3, 1993. *See* 57 Fed. Reg. 35,006 (1992) (to be codified at 5 C.F.R. pt. 2635).

[3] The Pacific Council also has one nonvoting member appointed by, and serving at the pleasure of, the Governor of Alaska. 16 U.S.C. § 1852(c)(2). We understand from discussions with your staff that the term "members," as used in the Commerce Letter, is limited to members of a Council appointed by the Secretary. Consequently, we have focused our analysis on this category. We use the term "appointed" Council members to distinguish such members from those who serve *ex officio*.

by not less than two-thirds of the members who are voting members." *Id.* § 1852(b)(5).

Each Council has the authority to appoint an executive director and such other administrative employees as the Secretary deems necessary. *Id.* § 1852(f)(1). The Secretary pays appointed Council members "the daily rate for GS-16 of the General Schedule, when [such member is] engaged in the actual performance of duties for [a] Council." *Id.* § 1852(d).[4] The Secretary also pays "appropriate compensation" to the executive director and administrative employees. *Id.* § 1852(f)(7). The Administrator of General Services furnishes the Councils with such offices and office supplies as any agency would receive. *Id.* § 1852(f)(4).

The Councils advise the Secretary in formulating fishery management plans within their respective geographical areas. *Id.* § 1852(h). The management plans must conform to national standards, *id.* § 1851, with respect to which the Secretary has promulgated implementing guidelines. *See* 50 C.F.R. pt. 602 (1993). The Councils generally are required to open their proceedings to the public and must hold hearings to consider comments from interested persons during the development of management plans. 16 U.S.C. § 1852(h)(3). After a management plan is prepared by a Council, it is submitted to the Secretary, who reviews it and either approves, disapproves, or partially disapproves it. *Id.* § 1854(a), (b). If a Council fails to develop and submit a management plan, or fails to change a plan that the Secretary has partially or completely disapproved, the Secretary may prepare a management plan for that region. *Id.* § 1854(c). However, "the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system [with respect to a fishery] . . . unless such system is first approved by a majority of the voting members, present and voting, of each appropriate Council." *Id.* § 1854(c)(3). After a management plan has been prepared or approved by the Secretary, the Secretary promulgates implementing regulations. *Id.* § 1855(a). The Secretary is responsible for the enforcement of the FCMA and implementing regulations. *See id.* §§ 1858, 1861.

In the words of the FCMA's principal sponsor, Senator Warren G. Magnuson, the Councils

> are unique among institutions that manage natural resources. They are neither state nor federal in character, although they possess qualities of each. Their powers are derived from the constitutional authority of the federal government, yet the Councils are self-determinant in their own affairs. Enforcement and administration of the Councils' plans and regulations are carried out by the responsible federal agencies.

[4] The GS-16 level in the General Schedule no longer exists *See* Exec. Order No 12786, 3 C F R 376, 378 (1992).

* * *

> Although the Councils are to be relatively independent, each Council must operate within the uniform standards promulgated by the Secretary of Commerce that govern the administration of the Act. The principal function of the Councils is to formulate fishery management plans upon which management and conservation regulations are to be based.

Warren G. Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 Wash. L. Rev. 427, 436-37 (1977).

II.

The Order's preamble recites that it is intended to set forth "standards of ethical conduct for all executive branch employees."[5] The term "employee" is defined only as follows: "any officer or employee of an agency, including a special Government employee." *Id.* § 503(b).[6] An "agency" means any "executive department . . ., Government corporation . . ., or an independent establishment in the executive branch," as those terms are defined in 5 U.S.C. §§ 101, 103, and 104. *Id.* § 503(c). A "Special Government employee" is "as defined in 18 U.S.C. 202(a)." *Id.* § 503(e).[7]

The Commerce Letter concludes that the Order and its implementing regulations do not apply to appointed Council members and staff. It reasons that because the authority for prescribing regulations governing standards of conduct is derived from 5 U.S.C. § 7301,[8] the definitions of "officer" and "employee" in title 5 should determine whether the Order applies to the Councils.[9] The Commerce Letter fur-

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[5] The Order supersedes Exec. Order No. 11222. *See* 56 Fed. Reg. 33,778, 33,778 (1991).

[6] As the Commerce Letter notes, the terms "officer" and "employee" do not receive any further definition, thus making the Order's definition of "employee" partly circular.

[7] Section 202(a) of title 18 defines a "special Government employee" in part as any

> officer or employee of the executive . . . branch who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis.

[8] 5 U.S.C. § 7301 provides that "[t]he President may prescribe regulations for the conduct of employees in the executive branch."

[9] An "officer" under 5 U.S.C. § 2104 is:

> [A]n individual who is —
>
> (1) required by law to be appointed in the civil service by one of the following acting in an official capacity—
>
> (A) the President;
>
> (B) a court of the United States;
>
> (C) the head of an Executive agency, or
>
> (D) the Secretary of a military department,

ther argues, in reliance on a 1976 opinion of the Acting General Counsel of the former United States Civil Service Commission,[10] that "Council staffs and members are not Federal employees for the purposes of 5 U.S.C. § 2105 because although the public members of the Councils are appointed by a Federal official (namely the Secretary of Commerce) and Council members perform a Federal function authorized by statute (*e.g.*, preparing fishery management plans), there [is] no supervisory relationship between the Secretary of Commerce and the Councils within the meaning of section 2105(a)(3)." Commerce Letter at 5.[11]

III.

We accept the premise of the Commerce Letter that the terms "officer" and "employee," as used in § 503(b) of the Order, are identical in scope and meaning with the terms "officer" and "employee" as used in 5 U.S.C. §§ 2104 and 2105. We further believe that, as those terms are used in 5 U.S.C. §§ 2104 and 2105, they do not reach the appointed Council members.

A.

Three considerations point to the conclusion that the terms "officer" and "employee" in the Order have the same meaning as those terms in 5 U.S.C. §§ 2104 and 2105. First, in the absence of any definition of "employee" in the criminal conflict-of-interest statutes applicable to Federal employees in title 18, we have generally assumed that the term "was no doubt intended to contemplate an employer-employee relationship as that term is understood in other areas of the law,"

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(2) engaged in the performance of a Federal function under authority of law or an Executive act, and

(3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office

An "employee" under 5 U.S.C. § 2105 is

[A]n officer and an individual who is —

(1) appointed in the civil service by one of the following acting in an official capacity—

(A) the President,

(B) a Member or Members of Congress, or the Congress,

(C) a member of a uniformed service,

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation, or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32,

(2) engaged in the performance of a Federal function under authority of law or an Executive act, and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

[10] Letter for Joseph E. Kasputys, Assistant Secretary for Administration, Department of Commerce, from Joseph B. Scott, Acting General Counsel, Civil Service Commission (Aug. 3, 1976) ("CSC Opinion")

[11] The Commerce Letter does not specifically address the possibility that appointed Council members might be within title 5's definition of an "officer." However, § 2105's definition of an "employee" explicitly extends to "officers." In contending that appointed Council members are not "employees," therefore, the Commerce Letter impliedly excludes their being "officers."

and in particular have turned to 5 U.S.C. § 2105 as providing "the most obvious source of a definition" for title 18 purposes. *See Conflict of Interest — Status of an Informal Presidential Advisor as a "Special Government Employee,"* 1 Op. O.L.C. 20, 20 (1977).[12] Because the objectives of the Order and its implementing regulations are closely related to those of the conflicts statutes, we think it reasonable to look to title 5's definition of "employee" when elucidating the Order. *Cf. Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973) (similarity of language and purpose in different statutes suggests that they be construed similarly).[13]

Second, although the Order does not expressly adopt title 5's definition of an "employee," it does adopt that title's definition of an "agency." *See* Order § 503(c) ("'Agency' means any executive agency as defined in 5 U.S.C. 105 . . . ."). We think it unlikely that the Order was intended to cover personnel who were employed by "agencies" within the meaning of title 5 but who were not themselves "employees" within the same title.

Third, although the Order's preamble locates the President's authority to issue the Order in "the Constitution and laws of the United States" without specifying any particular statutory provision, we agree with the Commerce Letter that the most obvious statutory source of authority for the Order is 5 U.S.C. § 7301. That section states that the President "may prescribe regulations for the conduct of employees in the executive branch," 5 U.S.C. § 7301, and is a general statutory source of authority for Presidential regulation of executive branch personnel. *See Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 n.5 (1974); *Crandon v. United States*, 494 U.S. 152, 183 (1990) (Scalia, J., concurring in the judgment) (Executive Order No. 11222 was issued "under the President's authority and pursuant to 5 U.S.C. § 7301"). Because the section occurs in title 5, its interpretation is governed by the definition of an "employee" in § 2105 of the same title.[14] To the extent that the Order rests upon § 7301, therefore, its coverage must be limited to the class of employees within § 2105.

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[12] *See also* Memorandum for Irving P. Margulies, Deputy General Counsel, Department of Commerce, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: President's Private Sector Survey on Cost Control* at 10 (Dec 15, 1982) ("the Title 5 definition of employee is frequently used as a starting point for any analysis of whether the conflict of interest laws apply to a particular individual . . although the Title [5] definition is not necessarily conclusive for conflicts purposes").

[13] The Order expressly covers both regular and special Government employees of an agency *See* Order § 503(b) An individual's status as a special (as distinct from regular) Government employee turns on whether the appointment is for no more than 130 days out of any consecutive 365 days. *See Restrictions on a Federal Appointee's Continued Employment by a Private Law Firm*, 7 Op O L.C. 123, 126 (1983). We have applied the elements of title 5's definition of "employee" to both regular and special Government employees. *See* 1 Op. O L C at 21, *Federal Advisory Committee Act (5 U.S C. App. I) — United States-Japan Consultative Group on Economic Relations*, 3 Op O.L C 321, 322-23 (1979).

[14] Section 2105 specifies that its definition applies generally in title 5, "except as otherwise provided by this section or when specifically modified." Section 7301 does not undertake to modify § 2105's definition of an "employee," and thus does not fall within this exception

B.

Assuming then that the Order applies only to "employees" within the meaning of § 2105, an appointed Council member would have to meet each of the three tests in § 2105 to be deemed a covered "employee." He or she would have to be (1) "appointed" by an appropriate official, (2) engaged in the performance of a Federal function, and (3) subject to the supervision of an appropriate Federal officer or employee. *See Horner v. Acosta*, 803 F.2d 687, 691-92 (Fed. Cir. 1986) (collecting cases); *Costner v. United States*, 665 F.2d 1016, 1019-20 (Ct. Cl. 1981).

It is not disputed that appointed Council members satisfy the first two of these tests. The Commerce Letter contends, however, that the third test is not met. In its view, because these Council members are not subject to the supervision of the Secretary, they are not "employees" within § 2105 or the Order. We agree that the third test is not met.

We begin by considering the text of the Magnuson Act. As we have observed, "[t]he FCMA 'adopts a somewhat convoluted scheme to achieve its purposes of conservation and management of fishery resources.'" *Litigating Authority of the Regional Fishery Management Councils*, 4B Op. O.L.C. 778, 778 (1980) (quoting *Washington Trollers Ass'n v. Kreps*, 466 F. Supp. 309, 311 (W.D. Wash. 1979), *rev'd on other grounds*, 645 F.2d 684 (9th Cir. 1981)) ("Litigating Authority").[15] Two features of the Act in particular demonstrate that Congress did not intend appointed Council members to be "subject to the supervision of" the Secretary within the meaning of § 2105. First, the Secretary's removal power as to an appointed Council member cannot be exercised except upon the prior recommendation of two-thirds of a Council. *See* 16 U.S.C. § 1852(b)(5). This provision severely limits the Secretary's removal power and is designed to constrain narrowly the Secretary's ability to supervise and control the Council members he appoints. *See Morrison v. Olson*, 487 U.S. 654, 694, 696 (1988) (power to remove officials provides ability to supervise and control them); *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (same).[16]

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[15] In enacting the Magnuson Act, Congress "creat[ed] really a unique animal in these management councils, something that had not existed before We tr[ied] to create something unique, and we did in the regional management councils We did not make them regular Federal employees, because we did not want them to be regular Federal employees." *See Fishery Conservation and Management Act: Hearings Before the Subcomm on Fisheries and Wildlife Conservation and the Environment of the House Comm on Merchant Marine and Fisheries*, 96th Cong 448-49 (1979) ("1979 Hearings") (remarks of Rep Studds)

[16] Consistent with that intent, the House Report on the 1983 amendments to the Magnuson Act stated that the Councils "enjoy some degree of independence from the Secretary ' *See* H R Rep No 97-549, at 15 (1982), *reprinted in* 1982 U S C C A N 4320, 4328 ("1982 House Report") (accompanying H R 5002 enacted as Pub L. No 97-453, 96 Stat 2481 (1983)) Representative Studds went further in emphasizing the Councils' autonomy:

> I would have been outraged looking at that statement "The councils enjoy some degree of independence from the Secretary " That was backwards, absolutely inside-out and backward In some limited ways, the councils have some responsibilities which involve the Secretary They are

Second, any fishery management plan drafted by the Secretary may not limit access to a fishery unless a majority of the voting membership of each affected Council approves. *See* 16 U.S.C. § 1854(c)(3). Thus, the statute empowers the Councils to prevent certain regulatory actions by the Secretary and, in effect, puts the Councils on a footing with the Secretary in regulating access to regional fisheries. In view of both the powerful constraints on the Secretary's removal authority and the Councils' apparent "veto" power over some of the Secretary's initiatives, it cannot be said that the Council members are subject to the Secretary's supervision.

Legislative history (albeit history relating to amendments to the original Magnuson Act) supports this reading of the statute. The House Report on the 1983 amendments to the Magnuson Act stated that "Council members and administrative staffs are not Federal employees in the sense of 5 USC 2105 because they are not appointed by, or subject to the supervision of Federal officials in their day-to-day activities." 1982 House Report at 15.[17] Moreover, the Commerce Department itself denies (and has long denied) that the Secretary of Commerce exercises supervisory authority over the Councils. The Commerce Department's position is buttressed by the 1976 CSC Opinion. *See* Commerce Letter at 6.

Consequently, we conclude that appointed Council members are not "employees" subject to the Order. In addition, the executive directors and administrative employees of the Councils also are not "employees" because they are appointed and supervised by the Councils, *see* 16 U.S.C. § 1852(f)(1), a majority of whose members are not federal employees, so that the requirements of 5 U.S.C. § 2105 again are not met. *Accord* 1982 House Report at 15.[18]

In reaching these conclusions, we do not suggest that the existence of statutory limitations on removal is generally inconsistent with the retention of supervisory power in the person who can exercise the power to remove. On the contrary, the case law clearly supports the view that "for cause" limitations on removal power can be compatible with the continuing power and duty to supervise.[19] In the case of the Councils, however, the statute does not restrict the Secretary's removal

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fundamentally independent from the Secretary They do not enjoy some degree of independence from the Secretary, they are basically, fundamentally and critically independent of the Secretary. 1979 Hearings at 449-50

[17] We note that the House Report is in error insofar as it states broadly that Council members are not appointed by Federal officials. The Secretary appoints the Council members whose status is in question here

[18] However, Federal employees detailed to the Councils pursuant to 16 U.S C § 1852(f)(2) would retain their status as "employees" within the meaning of 5 U S C § 2105.

[19] *See, e.g., Morrison v. Olson*, 487 U S at 692 ("good cause" limitation on the Attorney General's power to remove independent counsel did not prevent Attorney General from exercising sufficient supervisory authority to assure that counsel performed competently and in accordance with statutory mandate), *Bowsher v Synar*, 478 U.S 714, 726, 728-29 (1986) (Congress's power to remove the Comptroller General for causes including "inefficiency," "neglect of duty," and "malfeasance" enabled it to control execution of laws by Comptroller General). Indeed, the very ability to remove for "cause" presupposes that the officer or body that has the removal power must supervise the subordinate officer at least to the extent needed to determine whether "cause" for removal exists

power merely by requiring that "cause" for removal exist. It also demands that, before a Council member can be removed, two-thirds of the Council's voting membership recommend such removal. In effect, the statutory scheme not only circumscribes the removal power, but also vests that power *jointly* in the Secretary and the Councils themselves. This unusual feature of the Magnuson Act distinguishes it from more traditional legislation in which some form of "cause" is all that is required before removal can occur. As a result, the Councils possess greater autonomy than that enjoyed, for example, by typical "independent" agencies.[20]

We also do not suggest that the Secretary utterly lacks any supervisory authority with regard to the Councils. On the contrary, it is clear that under this unusual statutory scheme, Congress intended the Secretary to exert substantial control over basic aspects of the Councils' activities. Thus, as we have pointed out:

> However independent the Councils may be in their day-to-day operations, ultimate authority over a majority of their membership, budgets, and their major area of concern — the fishery management plans — remains with the Secretary or other federal agencies. The Councils perform the basic research, hold hearings, draft the plan for their area, and propose regulations. It is the Secretary, however, to whom the drafts and proposals are submitted and it is the Secretary who either approves the management plan or amends it to his satisfaction. It is also the Secretary who reviews the regulations to insure their legality and who implements them.

Litigating Authority, 4B Op. O.L.C. at 782 (footnotes and citations omitted).[21]

In our judgment, however, the Secretary's powers with respect to the Councils do not suffice to render appointed Council members "employees" subject to the Secretary's supervision. As Senator Magnuson put it, "the Councils are self-determinant in their own affairs." Magnuson, *supra* at 436. The unusually severe constraints on the Secretary's removal power, coupled with the Councils' ability to "veto" the Secretary's draft fishery management plan if the plan limits access to a fishery, are incompatible with the ordinary meaning of supervision. Consequently,

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[20] *Compare* 16 U S C § 1852(b)(5) (prior recommendation of two-thirds of Council needed before Secretary may remove member for "cause") *with, e g*, 15 U S C. § 41 (President may remove member of Federal Trade Commission for "inefficiency, neglect of duty, or malfeasance in office") We have found only one other statute, 16 U S C § 4009, establishing certain seafood marketing councils, that limits the removal power in a fashion comparable to 16 U S.C § 1852(b)(5).

[21] *See also* Christopher L. Koch, Comment, *Judicial Review of Fishery Management Regulations Under the Fishery Conservation and Management Act of 1976*, 52 Wash L. Rev. 599, 616, 620 (1977) (Secretary is final arbiter in promulgation of fishery management measures and is responsible for ensuring that management schemes comport with legislative standards, fact that Secretary must review Councils' decisions permits scrutiny of management plans for self-serving measures that Councils dominated by fishing industry might put forward).

we conclude that appointed Council members are not employees covered by the Order.

Conclusion

As a matter of statutory construction, and on the basis of the specific features of the Magnuson Act, we conclude that Executive Order No. 12674, as amended by Executive Order No. 12731, and the implementing regulations relating to that Order, do not apply to appointed members, executive directors, or administrative employees of the Regional Fishery Management Councils.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Authority to Pay State and Local Taxes on Property After Entry of an Order of Forfeiture

The Attorney General has discretionary authority to make payments of state and local tax claims against civilly forfeited property after a forfeiture order has been issued, based on her equitable discretion to administer civilly forfeited property, under 21 U S C § 881(b)-(e) and 28 U.S.C. § 524(c)(1)

The Attorney General has discretion to pay state and local tax claims against criminally forfeited property, under the authority in those statutes to "take any other action to protect the rights of innocent persons which is in the interests of justice."

December 9, 1993

MEMORANDUM OPINION FOR THE DIRECTOR AND CHIEF COUNSEL
EXECUTIVE OFFICE FOR ASSET FORFEITURE,
AND THE DEPUTY DIRECTOR
ASSET FORFEITURE OFFICE, CRIMINAL DIVISION

You have requested advice on two matters: a proposed Directive from the Executive Office for Asset Forfeiture ("Directive") that would authorize payment of state and local taxes on some civilly forfeited property for which the court had notice of a state or local tax claim before the court entered an order of forfeiture, and a draft Memorandum from the Asset Forfeiture Office, Criminal Division, to the Attorney General ("AG Memo") concluding that the Attorney General may pay state and local taxes on criminally forfeited property (and proposing an Attorney General Order to delegate such authority to the Director of the Asset Forfeiture Office). The proposed Directive and the draft AG Memo both raise the question of the Attorney General's discretionary authority to pay taxes, for the period from the offense giving rise to forfeiture to the entry of an order of forfeiture, on property for which a court has already entered an order of forfeiture.

The focus of our previous opinion, to which the Directive and the AG Memo both refer, was the liability of the United States for payment of such taxes on property for which a court had not yet entered a forfeiture order. *See Liability of the United States for State and Local Taxes on Seized and Forfeited Property*, 17 Op. O.L.C. 104 (1993) ("Copeland Memorandum"). Accordingly, that opinion, which reconsidered an earlier Office of Legal Counsel ("OLC") opinion in light of *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993) ("*Buena Vista*"), did not specifically address the circumstances at issue in the Directive and the AG Memo. We now conclude that payment of taxes on civilly forfeited property on the terms set forth in the proposed Directive would not be inconsistent with the civil forfeiture

statute and would not exceed the Attorney General's equitable discretion under the civil forfeiture laws. We also conclude that payment of taxes on criminally forfeited property in the circumstances apparently envisioned by the draft AG Memo would not be unlawful under the criminal forfeiture laws or beyond the Attorney General's equitable, discretionary authority under such laws. In addition, we describe revisions to the draft AG Memo necessary to ensure accuracy in its description of OLC advice.

I.

The proposed Executive Office for Asset Forfeiture Directive provides, in relevant part:

> This directive . . . permits the payment of taxes upon civilly forfeited properties: (1) which have not yet been sold, or (2) which are the subject of pending litigation regarding payment of taxes, *provided, however*, that a tax claim was filed with the federal district court prior to entry of the order of forfeiture, or that a valid lien had been recorded among the pertinent land records giving the federal district court notice of the tax claim prior to entry of the order of forfeiture.

Directive at 2.[1]

Where an appeal from an order of forfeiture is no longer available or was unsuccessful, a state or locality asserting a tax claim has no legal right and no judicial remedy under the civil forfeiture statute's "innocent owner" provision as interpreted in *Buena Vista*. *See* Copeland Memorandum, 17 Op. O.L.C. at 106-07, 113 n.13. Nonetheless, a permissible interpretation of the statutes governing civil forfeitures would authorize payment of the taxes described in the Directive as an exercise of the Attorney General's equitable discretion in administering civilly forfeited property. *See* 21 U.S.C. § 881(b)-(e); 28 U.S.C. § 524(c)(1) (Attorney General's authority in administering civil forfeiture laws); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (deference to reasonable agency construction of statute it administers, so long as not contrary to clearly expressed congressional intent); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1309 (D.C. Cir. 1991) (*Chevron* principles apply to agency interpretations that are not full "legislative" rules); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (same), *cert. denied*, 471 U.S. 1074 (1985).

Two related arguments support this conclusion. First, a reasonable construction of the civil forfeiture statute could consider the tax liens described in the Directive

[1] You have informed us, and the following analysis assumes, that the modifying language following "*provided, however,*" applies to both enumerated categories of civilly forfeited property

to be the equivalent of a pre-offense ownership interest, or other interest, that could be forfeited to the United States and that the Attorney General subsequently could restore, after a court order of forfeiture, to the person who previously held such an interest.

As interpreted by the Supreme Court in *Buena Vista*, the civil forfeiture statute protects the property of an "owner" who "prove[s]," before the entry of an order of forfeiture, "that [he or] she is an innocent owner." *Buena Vista*, 507 U.S. at 127 (plurality opinion); 21 U.S.C. § 881(a)(6), (7) (commonly referred to as the "innocent owner" provision, stating that "no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner"); *id.* § 881(h) (commonly referred to as the "relation back" provision, stating that "[a]ll right, title, and interest in property described in [section 881(a)] shall vest in the United States upon commission of the act giving rise to forfeiture"). As the Copeland Memorandum explains, a state or locality holding a tax lien against a property is an "owner" of that property, and in almost all cases, there will be no doubt that the state or locality will satisfy the statute's "innocence" requirement. *See* Copeland Memorandum, 17 Op. O.L.C. at 106; *cf.* Directive at 1.

In light of these considerations, it would not be unreasonable to conclude that *notice* to the federal district court of the tax claim before the entry of an order of forfeiture can constitute the showing or proof required by the statute, in light of *Buena Vista*.[2] While an unappealed or unsuccessfully appealed forfeiture order in such a case would have the effect of vesting the taxing authority's interest in the United States, retroactive to the date of the offense giving rise to forfeiture, the taxing authority still would have demonstrated a protected innocent ownership interest that the court merely failed to recognize before issuing its order. On this analysis, the affirmed or unchallenged forfeiture order would have effected a forfeiture of that interest to the United States, one which the Attorney General could remit or mitigate after the conclusion of the forfeiture proceedings. *See* 21 U.S.C. § 881(d) (laws relating to seizure and forfeiture of property, including mitigation and remission of forfeiture, under the customs laws generally apply to civil forfeiture under § 881, except that the Attorney General and her delegees are substituted for the Secretary of the Treasury and customs authorities); 19 U.S.C. § 1618 (authority of Secretary of the Treasury, customs officials to "remit or mitigate" forfeiture upon a finding that the "forfeiture was incurred without willful negli-

[2] This conclusion is consistent with our discussion in the Copeland Memorandum of the Attorney General's discretionary authority under 28 U.S.C. § 524. Under the analysis employed in this Memorandum and under the standards adopted in the Directive, a state or locality would still have to have "establish[ed]" that it is an "innocent owner" (with the aid of the presumption of "innocence" that is set forth in the Directive and that is consistent with the Copeland Memorandum's conclusion that the "'innocence requirement" would be "easy to satisfy in most cases") for the Attorney General or her delegees to make a discretionary payment of post-offense tax claims. Copeland Memorandum, 17 Op. O.L.C. at 113 n.13.

gence or without any intention on the part of the petitioner . . . to violate the law" or that there exist "such mitigating circumstances as to justify the remission or mitigation"); 28 U.S.C. § 524(c)(1)(E) (authority of Attorney General to make "disbursements authorized in connection with remission or mitigation procedures relating to property forfeited under any law enforced or administered by the Department of Justice").[3]

A contrary conclusion — that the entry of an order of forfeiture, by operation of the relation back doctrine, results in the taxing authorities', in effect, never having had any interest in the property, despite the evidence before the court that they had an innocently held ownership interest — would forge an extremely tight, and rather odd, link between the prior existence of a substantive interest (whether or not such interest may be asserted or protected in court proceedings) and the course of subsequent judicial proceedings. Neither the civil forfeiture statute nor the opinions in *Buena Vista* appear to require such a link.

Second, although a forfeiture order may deprive holders of the tax claims described in the Directive only of something less than the type of interest at issue in conventional proceedings for remission or mitigation of civil forfeiture (i.e., those involving petitioners who had an interest in the property prior to its use in the offense giving rise to forfeiture), the Attorney General's equitable authority to reduce the harsh impact of forfeiture still can be construed to extend sufficiently beyond ordinary remission and mitigation to include the discretionary payment of tax claims contemplated by the Directive (as well as the discretionary denial of potentially eligible requests for relief, if any, that are not covered by the Directive). Courts and Congress have stressed that the Attorney General has broad and generally unreviewable discretion in exercising his or her lawful authority in this area. *See, e.g., United States v. Reckmeyer*, 836 F.2d 200, 207 (4th Cir. 1987) (granting of a proper petition for "relief or mitigation" of forfeiture was "a matter solely within the unreviewable discretion of the Attorney General"); *United States v. $2,857.00*, 754 F.2d 208, 214 (7th Cir. 1985) (Attorney General has "virtually unreviewable discretion to ameliorate the harshness of forfeiture statutes in appropri-

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[3] This interpretation of the remedial scheme under the civil forfeiture laws also derives support from its similarity to the structure Congress contemplated in enacting the "bona fide purchaser" provision in criminal forfeiture statutes *See, e.g*, 21 U.S.C § 853(n)(6); 18 U.S.C. § 1963(*l*)(6). Under those provisions, a claimant who establishes his bona fide purchaser status in court proceedings ancillary to the forfeiture proceedings has a legally protected interest in the property. A valid court order may not forfeit that interest and the Attorney General's recognition of such an interest would not be discretionary. Such a bona fide purchaser is in the same position as a claimant in civil forfeiture proceedings who establishes his innocent owner status prior to the court's entry of an order of forfeiture *See* Copeland Memorandum, 17 Op. O.L.C. at 109-11

The legislative history of the bona fide purchaser provision indicates that Congress assumed that a claimant who "fails to obtain relief under the . . ancillary hearing provision [which enables such a claimant 'in essence . [to] challenge[] the validity' of a forfeiture order] . . . may [still] seek equitable relief from the Attorney General." S. Rep. No. 98-225, at 208-09 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3391-92. The Directive would provide equivalent relief to some claimants who failed to obtain relief in court proceedings under the innocent owner provision in the civil forfeiture statute

ate cases"); *United States v. One 1973 Buick Riviera*, 560 F.2d 897, 900 (8th Cir. 1977) ("overwhelming weight of authority" supports the view that "denial of [a] petition for remission" is "not subject to judicial review on the merits"); *United States v. One 1961 Cadillac*, 337 F.2d 730, 732-33 (6th Cir. 1964) (similar); S. Rep. No. 98-225, at 207-08 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3390, 3392 (noting that petitions for remission or mitigation of forfeiture "are most frequently filed as the result of civil forfeiture actions" and that the Attorney General's decisions with respect to such requests for "equitable relief" "[t]raditionally" have been "viewed entirely as a matter of discretion and not subject to judicial review").[4]

In the draft AG Memo, the first full paragraph on page three could be revised to reflect the advice given in this part of this Memorandum, and should be revised to make clear that payment of liens for post-offense taxes where a state or local tax lien-holder establishes its "innocent ownership" status to the court's satisfaction before the entry of a judgment of forfeiture is not (as the AG Memo's use of the phrase "is permitted to pay" appears to suggest) an exercise of the Attorney General's discretion.

II.

The draft Attorney General Memorandum concludes:

> [T]he statutory language [in 21 U.S.C. § 853(i)(1), 18 U.S.C. § 1963(g)(1) and other criminal forfeiture statutes containing, or adopting by reference, identical provisions] that permits the Attorney General to "take any other action to protect the rights of innocent persons which is in the interest of justice" provides the necessary statutory authority to make payments of state and local taxes on property forfeited under the criminal forfeiture laws *as a discretionary matter.*

AG Memo at 3. As the AG Memo correctly indicates, holders of state and local tax claims against such property for the period after the commission of the act giving rise to forfeiture have no legal right and no judicial remedy under the criminal forfeiture laws. There is no equivalent to the civil forfeiture statute's "innocent

[4] *But see also LaChance v. DEA*, 672 F Supp 76, 79-80 (E D N.Y. 1987) ("formalized invariable policy of denying petitions" and failure "to give any reason for denial" is basis for limited judicial intervention "to direct [an] agency to exercise its jurisdiction" to decide the petition), Memorandum for Leland E. Beck, Senior Counsel, Office of Policy Development, from Rosemary Hart, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re Statutory Authorization for the Proposed Regulations Governing the Remission or Mitigation of Forfeited Property* (Mar 25, 1993) (interpreting civil forfeiture statute remission and mitigation authority as not authorizing transfers to persons who had no prior interest in the forfeited property but who were victims of the offense giving rise to forfeiture).

owner" provision in the criminal forfeiture statutes, and the "bona fide purchaser" exception is unavailable to such claimants. *See* Copeland Memorandum, 17 Op. O.L.C. at 112. A permissible construction of the "rights of innocent persons" provision, however, would authorize discretionary payment of such taxes.[5]

It would be difficult to base the authority to grant such equitable and discretionary relief on the analysis offered in Part I of this Memorandum to support the post-forfeiture order payment of claims for post-offense taxes in the civil forfeiture context. Because the criminal statutes contain no innocent owner provision, any "showing" or "proof" with respect to such a tax claimant's innocent ownership (short of the "bona fide purchaser" showing which taxing authorities cannot make) would appear to be irrelevant and not to provide a basis for the Attorney General to remit or mitigate any forfeited interest. The logic of *Buena Vista* would seem to dictate that the relation back doctrine, *see, e.g.*, 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c); *cf.* 21 U.S.C. § 881(h) (civil provision, identical in relevant part), will have operated to leave a tax lien-holder as, in effect, never having held any "interest of an owner," 21 U.S.C. § 881(a)(6), (7), in the property with regard to post-offense taxes. On this reasoning, there will have been no ownership interest forfeited and, thus, nothing for the Attorney General to remit or mitigate. *Cf.* Copeland Memorandum, 17 Op. O.L.C. at 113 n.13.

The better argument derives discretionary and equitable authority of the Attorney General to lessen the impact of forfeiture on the claimants for post-offense taxes from the "rights of innocent persons" provisions cited in the AG Memo, and depends on a construction of "rights of innocent persons" that is broader than "innocent ownership." We believe that adopting such a construction would not be unlawful and would be within the Attorney General's authority to interpret and administer the criminal forfeiture statutes. *See, e.g.*, 18 U.S.C. § 1963(e)-(g); 21 U.S.C. § 853(g)-(j) (Attorney General's authority in administering criminal forfeiture laws and disposing of property seized under criminal forfeiture laws); *Chevron U.S.A., Inc.*, 467 U.S. at 843-44.

First, the statutory language is compatible with such a view. Criminal forfeiture statutes explicitly confer upon the Attorney General the authority to "take any *other* action to protect the rights of innocent persons," in addition to the authority to remit or mitigate forfeitures (and the obligation to recognize the interests of

[5] To be eligible for discretionary relief under these provisions, it would appear to be sufficient for state and local taxing authorities to be "innocent owners," within the meaning of that term under the civil forfeiture provisions — a standard that all or nearly all taxing authorities will meet, *cf.* Copeland Memorandum, 17 Op. O.L.C. at 106 ("a state or locality holding a tax lien can be an 'owner'" and "[t]he 'innocence' requirement . . . would seem to be easy to satisfy in most cases"); Directive at 1 ("indulg[ing] a presumption of innocence" of taxing authorities under the civil forfeiture statute "in the absence of exceptional circumstances") We have found nothing in the statutory language, legislative history or judicial interpretations to suggest that the word "innocent" in the criminal forfeiture statute's phrase "innocent persons" is narrower than the phrase in the civil forfeiture statute that courts and Congress have summarized as "innocent" (in the phrase "innocent owner"). *See* S. Rep. No. 98-225, at 215, *reprinted in* 1984 U.S.C.C.A.N. at 3398, *Buena Vista*, 507 U.S. 111. If "rights" is construed as described in this Memorandum, the term is broader than "ownership" or "interest of an owner."

bona fide purchasers and holders of senior vested interests). 18 U.S.C. §§ 1467(h)(1), 1963(g)(1), 2253(h)(1); 21 U.S.C. § 853(i)(1) (emphasis added). Construing the quoted language as more than surplusage requires a conclusion that the Attorney General's authority is broader than that exercised in ordinary remission and mitigation proceedings. Also, the use of the term "rights *of* innocent persons" in these provisions, but "right, title, and interest *in* property" the forfeiture of which is subject to remission and mitigation in the civil and criminal forfeiture statutes, 19 U.S.C. § 1618; 21 U.S.C. § 881(a), (h); 18 U.S.C. § 1963(a)-(c); 21 U.S.C. § 853(a)-(c) (emphasis added), and "interest *of an owner*" in the innocent owner provisions of the civil forfeiture statute, 21 U.S.C. § 881(a)(6), (7) (emphasis added), suggests a lesser claim on the property, or a looser connection between the claimant and the property, in the former context. *Cf.* Black's Law Dictionary 812, 1324 (6th ed. 1990) (defining "interest" as "[t]he most general term . . . to denote a right, claim, title, or legal share *in* something"; defining "right," in its "*narrower signification*" as "an interest or title in an object of property" and, more generally, as "[t]hat which one person ought to have or receive from another.") (emphasis added). This contrast offers some support for the view that the criminal statutes give the Attorney General discretionary authority to recognize, after forfeiture, claims that are broader than ownership interests, including claims for taxes for the period after the offense giving rise to forfeiture.

Second, the legislative history of two principal criminal forfeiture provisions, 21 U.S.C. § 853(i) and 18 U.S.C. § 1963(g) (provisions that the other criminal forfeiture statutes cited in the AG Memo incorporate by reference or replicate), suggests that the Attorney General's authority is broad enough to include payment of the taxes described in the AG Memo. The description of these provisions states that a claimant who could have raised a bona fide purchaser defense in a hearing ancillary to a criminal forfeiture proceeding, but who failed to do so, still "may seek equitable relief from the Attorney General." S. Rep. No. 98-225, at 208-09, *reprinted in* 1984 U.S.C.C.A.N. at 3391-92 (describing, somewhat loosely, this equitable relief as being available through a "remission and mitigation process"). Having foregone an available legal remedy for protecting an interest acquired after the offense that rendered the property subject to forfeiture, such a claimant would seem to be, after the final forfeiture order and the operation of the relation back doctrine, in essentially the same position as an "innocent" state or locality asserting a tax claim for the post-offense period. Given that Congress's view was that the equitable remedy of petitioning the Attorney General was clearly available to the potential bona fide purchaser claimant under existing law prior to the enactment of the bona fide purchaser defense, there would seem to be no reason to infer that Congress meant to restrict the remedy only to claimants who could have raised a successful bona fide purchaser defense to forfeiture in court proceedings, but were too slothful or too poorly advised to do so. *See id.* at 193, *reprinted in* 1984 U.S.C.C.A.N. at 3376 (under "[p]resent [f]ederal [l]aw . . . . [a] party who does not

have legal basis for defeating the forfeiture, but who has an equitable basis for relief, may petition the Attorney General.").

Third, judicial interpretations also provide some support for the position taken in the AG Memo. The most relevant opinion we have found construes 21 U.S.C. § 853(i)(1) as conferring upon the Attorney General extremely broad equitable authority to do what is "'fair and just,'" and concludes that a claimant whose claim against forfeited property arose after the offense giving rise to forfeiture, but whose interest was not that of a bona fide purchaser, could petition the Attorney General for equitable relief to "recoup some of its losses from [the] forfeited property." *United States v. Lavin*, 942 F.2d 177, 185 & n.10, 187 (3d Cir. 1991). The opinion does not state which provision in the statutory subsection is relevant. We believe that the better argument, and perhaps the only lawful conclusion, is that the authority to grant relief is that provided by the statutory mandate to "take any other action to protect the rights of innocent persons which is in the interest of justice." 21 U.S.C. § 853(i)(1); *see also United States v. Mandel*, 505 F. Supp. 189, 191-92 (D. Md. 1981) (describing predecessor to current 18 U.S.C. § 1963 as both "vest[ing] the Attorney General" with "authority to make provisions for the remission or mitigation of forfeitures" and "charg[ing] him with the obligation of protecting the rights of innocent persons"; suggesting that the latter authority is the likely basis for recognizing claim by third party that he, not defendant, owned property that court ordered forfeited), *aff'd* 705 F.2d 446 (4th Cir. 1983); S. Rep. No. 98-225, at 207 n.44, *reprinted in* 1984 U.S.C.C.A.N. at 3390 (citing *Mandel* as authority for the equitable, discretionary relief process to be retained after the enactment of current 18 U.S.C. § 1963(g)(1) and 21 U.S.C. § 853(i)(1)).

Finally, two references in the draft AG Memo to OLC's views are, at this stage, inappropriate. We believe that the draft AG Memo goes too far in concluding, at pages 3-4, that the procedure proposed in the AG Memo is "fully consistent with the letter and spirit" of the Copeland Memorandum. As this memorandum has indicated, the Copeland Memorandum did not address these issues, and a conclusion that such payments are permissible depends on an analysis that the Copeland Memorandum did not pursue or evaluate. If a statement similar to that contained in the draft AG Memo is to be retained, it should go no further than a statement that the proposed procedure is "compatible" or "not inconsistent" with the Copeland Memorandum. Also, this Office has not yet reviewed the legality of the delegation that the proposed order attached to the draft AG Memo would effect. Accordingly, the next to last paragraph of the draft AG Memo (stating that OLC has confirmed that the delegation is permissible) cannot be included at this time. Ordinarily, this Office addresses such issues at a later stage, as part of a review of a proposed Attorney General order for form and legality.

III.

For the reasons set forth above, we conclude that it would not be unlawful for the Attorney General (or those to whom her authority is properly delegated, *see* 28 U.S.C. §§ 509, 510) to pay, in an exercise of equitable discretion, the taxes on civilly forfeited property as described in the proposed Directive from the Executive Office for Asset Forfeiture, and the taxes on criminally forfeited property as described in the draft Memorandum to the Attorney General from the Office for Asset Forfeiture.

Exercise of the Attorney General's equitable discretion to pay tax claims must, of course, comply with any applicable regulations, unless and until such regulations are lawfully modified. *See, e.g.*, 28 C.F.R. §§ 9.1-9.7 (1993). *See generally United States v. Nixon*, 418 U.S. 683, 694-95 (1974); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Clarification of Prior Opinion Regarding Borrowing by Bank Examiners

18 U.S.C. § 213, which prohibits federal bank examiners from borrowing from Federal Reserve member banks or other entities subject to examination by them, does not prohibit such examiners from receiving loans or credit from affiliates of covered banks merely because such affiliates are under "common control" with the bank or because the covered bank and the affiliate have a common majority of corporate officers or directors.

An examiner would be prohibited from borrowing from such an affiliated entity, where the affiliate is serving as a conduit or "front" for the implementation of a loan that is actually extended due to the direction, instigation, or influence of the affiliated member bank or person connected therewith

December 20, 1993

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
BOARD OF GOVERNORS
FEDERAL RESERVE SYSTEM

This responds to your request that we clarify an aspect of an opinion previously issued by this Office respecting 18 U.S.C. § 213, which prohibits a bank examiner from borrowing from any Federal Reserve member bank or other covered entity that he examines, or any person connected therewith. *See Federal Reserve Board Policy on Bank Examiner Borrowing*, 6 Op. O.L.C. 509 (1982) ("1982 Opinion"). Specifically, you have asked us whether footnote 8 from that opinion should be construed to mean that 18 U.S.C. § 213 prohibits bank examiners from receiving loans or credit from affiliates of member banks that they have examined in all cases where such affiliates are under "common control" with the bank, or where the two entities have a common majority of corporate officers or directors. We conclude that such a construction is not required by the statute, except where the affiliated bank is serving as a conduit or "front" for the implementation of a loan that is actually being extended due to the direction, instigation, or influence of the member bank or person connected therewith.

I. BACKGROUND

The criminal statute giving rise to the issue presented is 18 U.S.C. § 213, which provides as follows:[1]

[1] Also pertinent is 18 U.S.C. § 212, which prohibits "officer[s], director[s] or employee[s]" of Federal Reserve member banks and certain other covered institutions (e.g., banks insured by the Federal Deposit Insurance Corporation) that are subject to examination by federal examiners from making or granting any loans or gratuities to any examiner who is authorized to examine the covered bank or institution

> Whoever, being an examiner or assistant examiner of [a federal banking agency], accepts a loan or gratuity from any bank, branch, agency, corporation, association or organization examined by him *or from any person connected herewith*, shall be fined . . . or imprisoned . . . .

(emphasis added).

In a memorandum prepared for the Federal Deposit Insurance Corporation ("FDIC") in 1980, this Office opined as follows concerning certain proposed amendments to FDIC regulations that would permit FDIC examiners to make use of a limited amount of credit extended via credit cards by banks that are affiliates of banks that they examine:

> [T]his exposition of the background of 18 U.S.C. § 213 establishes that its phrase "from any person connected therewith" includes only individuals and, insofar as the examiners of your agency are concerned, is limited to an officer, director or employee of an insured State nonmember bank. Accordingly, we see no legal objection to the FDIC's amending its regulations to allow an examiner to receive credit from a national or State member bank even though it is an affiliate of an insured State nonmember bank.

Memorandum for Hoyle L. Robinson, Executive Secretary, FDIC, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Amendments to Regulations of Federal Deposit Insurance Corporation Relating to Bank Loans to Examiners - 18 U.S.C. §§ 212-213* at 4 (July 10, 1980) ("1980 Opinion").

In response to a request made by the Federal Reserve Board in 1982, this Office issued a further opinion that a policy allowing examiners to obtain loans or credit cards from affiliates of member banks and bank holding companies they are authorized to examine would not violate 18 U.S.C. § 213. Referring back to the 1980 opinion prepared for the FDIC, the 1982 Opinion stated:

> Our review of the legislative history of § 213 indicated that Congress intended to do no more than bar a bank examiner from accepting a loan from a bank, or an *individual* connected with a bank he was responsible for examining; its prohibition was not intended to extend to loans from affiliated institutions however tenuous their relationship with the bank subject to examination. We have reexamined that position, and we believe it to be the correct interpretation of § 213.

6 Op. O.L.C. at 511.

However, the 1982 Opinion also contained the following footnote, which occasions the concern giving rise to your inquiry:

> We do not suggest that §§ 212 and 213 would permit an examiner to borrow or accept credit from an affiliate in a case where the relationship between the institution being examined and the affiliated lending institution is such as to suggest common control, or where the two entities have a common majority of officers or directors. In such a case, a loan from an affiliate might be tantamount to a loan from the bank being examined, thus giving rise to the very conflict of interest which §§ 212 and 213 were intended to prevent.

Id. at 511 n.8.

You have stated that this footnote is inconsistent with the general conclusion of the 1982 Opinion and suggested that the interpretation it expresses would restrict borrowing by Federal Reserve examiners in a manner not required by the statute itself. Pointing out that such a construction would impose unfair restrictions on covered examiners in their efforts to obtain credit card accounts, mortgages, and other commonplace forms of credit, you have asked us to clarify the uncertainty created by the language of the questioned footnote.

II. ANALYSIS

The analysis in both the 1980 and 1982 Opinions adequately establishes that (1) the phrase "from any person connected herewith" used in 18 U.S.C. § 213 is limited to *natural persons* and does not encompass corporations or other legal entities affiliated with a member bank; and (2) as a general rule, that phrase does not extend § 213's prohibition to loans extended by corporate affiliates of covered banks to examiners with authority to examine such banks.

The uncertainty created by footnote 8 in the 1982 Opinion stems from its attempt to convey that, where an examiner accepts a loan from an entity that has a very close relationship with a covered bank, there is some potential for "sham" transactions concealing the reality of a loan that was actually extended at the instigation or direction of the covered bank. As you point out, however, footnote 8 may also be read to suggest that §§ 212 and 213 implicitly prohibit examiners from borrowing or accepting credit from an affiliate of a member bank *whenever* their relationship "is such as to suggest common control, or where the two entities have a common majority of officers or directors." 6 Op. O.L.C. at 511 n.8. We do not believe that such a construction is warranted and, to the extent that footnote 8 implies such a construction, it does not reflect the legal opinion of this Office.[2]

[2] As your letter requesting this opinion points out, many "affiliates" of member banks are by definition under "common control" with such banks. *See* 12 U.S.C. § 1841(k). Therefore, an interpretation that any affiliate that is under "common control" with a member bank is *per se* subject to § 213's prohibition is difficult to reconcile with the 1982 Opinion's main conclusion that § 213 does not generally prohibit examiners of covered banks from receiving loans or credit from affiliates of those banks

To resolve any further uncertainty on this issue, it is not the opinion of this Office that examiners are prohibited from borrowing from an affiliate of a covered bank *solely because* that affiliate is under common control with the covered bank or because it shares a common majority of officers or board members with it.[3] As long as the affiliate extending credit to the examiner is not extending that credit *due to the direction, instigation, or influence* of the covered bank, the transaction is not subject to the prohibition of 18 U.S.C. §§ 212 and 213.[4] We believe that the prohibitions of §§ 212 and 213 *would apply*, however, in a case where an affiliate of a covered bank extended a loan to an examiner of that bank *on behalf of* that bank, or acted as a conduit to disguise the true source of a loan to the examiner that has been authorized or instigated by the covered bank. *See United States v. Bristol*, 473 F.2d 439, 442 (5th Cir. 1973) ("[A] construction of [§ 213] which would allow a bank officer to circumvent [§ 213's] intent simply by channeling a loan through a *controlled* shell corporation is untenable.") (emphasis added).

The key issue in these cases is whether the affiliated bank is acting as an *alter ego*, agent, or conduit for a member bank or a covered "person" in circumstances where it is actually the latter that has authorized, caused, or brought about a loan or other extension of credit to the examiner. In such instances, we believe that §§ 212 and 213 would apply to the transaction — not because the affiliate is under common control or management with the member bank, but because the transaction is in reality a loan or extension of credit initiated by the member bank rather than by the affiliate. *See United States v. Bristol*, 473 F.2d at 442. However, where the affiliate has independently authorized the loan or extension of credit to the examiner, and the transaction does not result from the direction, control, or influence of the covered bank or other covered "person," the transaction is not subject to the prohibitions of the statute even though the affiliate is under common control, or has an overlapping majority of officers or directors, with the member bank.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

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[3] *Cf. United States v. Schoenhut*, 576 F.2d 1010, 1020 (3d Cir. 1978), *cert. denied*, 439 U.S. 964 (1978), where the court held that the fact that two financial institutions had overlapping officers "is not enough to provide a basis for concluding that the corporations were identical" for purposes of establishing the coverage of conflict of interest laws respecting certain prohibited bank loans.

[4] This conclusion is fortified by the restrictive interpretation of § 213's coverage applied by courts in related contexts. *See, e.g., United States v. Napier*, 861 F.2d 547, 549 (9th Cir. 1988) ("Strict reading" applied to § 213 in holding that a state Commissioner of Financial Institutions could not be treated as a covered "examiner," notwithstanding government's argument that the commissioner was the functional equivalent of an examiner and that a narrow reading of the term would "eviscerate[]" the statute.) In so holding, the *Napier* court rejected the government's argument that the "general statutory purposes" underlying the statute justified a more expansive interpretation. *Id.* at 548-49.

Admissibility of Alien Amnesty Application Information in Prosecutions of Third Parties

The confidentiality provisions of the Immigration Reform and Control Act of 1986 generally bar federal prosecutors from introducing information from alien amnesty applications as evidence in criminal prosecutions of third parties, but the use of such information is not barred in prosecutions of third parties for crimes that facilitate, or are closely related to, the filing of a false amnesty application.

Justice Department use of amnesty application information is also subject to regulations issued by the Immigration and Naturalization Service. Those regulations limit such use against third parties to the prosecution of persons who have "created or supplied a false writing or document for use" in an amnesty application, which may include persons who take bribes to approve false amnesty applications

December 22, 1993

MEMORANDUM OPINION FOR THE INSPECTOR GENERAL
DEPARTMENT OF JUSTICE

This memorandum responds to your request for our legal opinion on whether the confidentiality provisions of 8 U.S.C. § 1255a(c)(5) bar Justice Department prosecutors from introducing evidence consisting of information submitted as part of an illegal alien's application for amnesty in a criminal prosecution of a third party ("(c)(5) information"). We conclude that (1) the introduction of such evidence is generally barred under the plain language of the statute but (2) it is not barred by the statute in the prosecution of third parties for crimes (e.g., the acceptance of a bribe by a government official for approving a false amnesty application) that facilitate or are closely related to the false amnesty application violations covered by 8 U.S.C. § 1255a(c)(6). It should also be noted that a defendant who is not himself the alien whose amnesty application file is used in violation of the statute would not likely have standing to move for suppression of (c)(5) information.

However, Justice Department use of amnesty application information is also subject to a specific regulation promulgated by the Immigration and Naturalization Service ("INS"), and that regulation limits use against third parties to the prosecution of persons who have "created or supplied a false writing or document for use in [an amnesty application]." 8 C.F.R. § 245a.2(t)(3), (4) (1993). We believe that language would generally allow use of (c)(5) information to prosecute INS employees who take bribes to approve false amnesty applications, based on the reasoning that such an employee participates in the creation of falsified documents used in an amnesty application.

I. BACKGROUND

The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"), established procedures whereby certain illegal aliens could apply for amnesty to remain in the United States and have their status adjusted to that of temporary resident alien. 8 U.S.C. § 1255a. In order to alleviate the concerns of illegal aliens that information disclosed in their applications would be used as a basis to prosecute or deport them, IRCA included a confidentiality provision strictly limiting the Justice Department's access to and use of information submitted in alien amnesty applications. 8 U.S.C. § 1255a(c)(5). That provision's prohibition against the Justice Department's use of amnesty application information contains several exceptions. For purposes of this opinion, the relevant exception allows Department officials to use such information "for enforcement of paragraph (6)," which is a reference to 8 U.S.C. § 1255a(c)(6) ("paragraph (6)"). Paragraph (6) provides criminal penalties for filing false or fraudulent amnesty applications, as follows:

> Whoever files an application for adjustment of status under this section and knowingly and willfully falsifies, misrepresents, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

Although the paragraph (6) exception from IRCA's confidentiality restriction clearly allows amnesty application information to be used in cases brought under paragraph (6) itself against aliens who file false applications, the permissibility of using such information in prosecuting *third parties* (e.g., an INS employee or broker who facilitates a falsified amnesty application) under *other* federal statutes (e.g., bribery or fraud statutes, or the aiding and abetting statute) presents a more difficult question. As you note in your request for our opinion, the answer to that question will affect the ability of the Inspector General's Office to investigate INS employees who accept bribes for approving false legalization applications or middlemen who knowingly facilitate them.

II. ANALYSIS

1. *Textual Interpretation*

Since the question presented here is primarily a matter of statutory interpretation, the Supreme Court's statement in *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) sets the framework for analysis:

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). In such cases, the intention of the drafters, rather than the strict language, controls. *Ibid.*

Accord INS v. Cardozo-Fonseca, 480 U.S. 421, 432 n. 12 (1987) ("plain language" is generally dispositive and resort to legislative history is warranted only to determine if "there is 'clearly expressed legislative intention' contrary to that language").

IRCA's restriction on the Justice Department's use of information submitted in an illegal alien amnesty application is set forth in 8 U.S.C. § 1255a(c)(5) ("subsection (c)(5)"), which provides in pertinent part:

> Neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may —
>
> (A) use the information furnished pursuant to an application filed under this section for any purpose other than to make a determination on the application or *for enforcement of paragraph (6)* or for the preparation of reports to Congress under section 404 of the Immigration Reform and Control Act of 1986.[1]

(Emphasis added.)

The language of the confidentiality provision is relatively straightforward, establishing a flat prohibition against the use of application information by Justice Department personnel except in cases covered by the enumerated exceptions. However, as we discuss below in Part II.4, one federal appellate decision has loosely interpreted the statute to permit disclosure of the application information for general law enforcement purposes that clearly do not fall within the paragraph (6) exception.[2] We do not believe that the opinion in question can be reconciled with the plain language of the statute under the principles of statutory interpretation established by the above-noted line of Supreme Court cases.

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[1] The section goes on to prohibit the Department and its officials from "mak[ing] any publication whereby the information furnished . . . can be identified" and from permitting anyone other than the designated officials "to examine individual applications." 8 U.S.C. § 1255a(c)(5)(B), (C). Violations of the confidentiality restrictions are made punishable by fines "in accordance with Title 18" or imprisonment of not more than five years, or both. *Id.* § 1255a(c)(5).

[2] *United States v. Hernandez*, 913 F.2d 1506, 1512 (10th Cir. 1990), *cert. denied*, 499 U.S. 908 (1991) (holding that IRCA's confidentiality restrictions "only prohibit disclosures which aid in the deportation of illegal aliens").

Specifically, subsection (c)(5) unambiguously prohibits the use of amnesty application information in a criminal prosecution brought by Justice Department attorneys unless that prosecution falls within the single exception provided by the statute for law enforcement purposes — "enforcement of paragraph (6)." The inclusion of this discrete exception indicates that Congress specifically contemplated the need to allow the Department's use of amnesty application information in the law enforcement context and chose to permit such use only for the enforcement purposes specified in the text — i.e., enforcement of the false application provision. In this regard, the paragraph (6) exception falls squarely within the canon of statutory construction, "inclusio unius est exclusio alterius." *See, e.g., TVA v. Hill*, 437 U.S. 153, 188 (1978) (canon applied to reject claim that enumerated exceptions to Endangered Species Act provisions were not exclusive). The inclusion of this specific exception, together with the failure to include a broader exception for general law enforcement uses, removes any textual ambiguity from subsection (c)(5) as to whether "enforcement of paragraph (6)" provides the sole basis for disclosures of (c)(5) material in the law enforcement context.

2. *Legislative History*

Although the plain language of the provision would bar Department of Justice officials from disclosing (c)(5) information in matters not covered by the paragraph (6) exception, a more permissive interpretation might be justified if IRCA's confidentiality provision presented the "rare case" in which the plain meaning of the text produces a result demonstrably at odds with the legislative intent. *See Griffin*, 458 U.S. at 571. However, IRCA's legislative history does not reveal a legislative intent that is incompatible with a "plain meaning" interpretation of subsection (c)(5).

The Senate version of IRCA was passed in lieu of the House bill after the Senate language was amended to incorporate much of the text of the House bill. Consequently, the Report of the House Judiciary Committee has been viewed as the primary source of legislative history on IRCA. *See* H.R. Rep. No. 99-682, pt. 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649 ("House Report").

The House Report provides little specific guidance on the confidentiality provisions of 8 U.S.C. § 1255a(c)(5). Its most pertinent and prominent passage in that regard[3] followed a discussion of the bill's provision authorizing certain designated intermediary organizations to receive amnesty applications and forward them for processing when authorized to do so by the applicant. The Report then states:

> The files and records kept by the organizations are confidential, and not accessible to the Attorney General or any other governmental

[3] The referenced passage from the House Report has been the single passage of IRCA s legislative history cited in each of the opinions we have identified discussing the confidentiality provision *See United States v Hernandez*. 913 F 2d at 1512, *id.* at 1514-15 (McKay, J , dissenting), *Zambrano v INS*, 972 F 2d 1122, 1125 (9th Cir. 1992), *vacated*, 509 U.S. 918 (1993).

> entity. The applicant must consent to the application being forwarded for official processing. The confidentiality of the records is meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS.

Id. at 73, *reprinted in* 1986 U.S.C.C.A.N. at 5677.

The Report's subsequent summary of the confidentiality provision in the section-by-section analysis is even less instructive, stating, "[new Section 245A(c)] [p]rovides for the confidential treatment of records and files relating to . . . [amnesty] application[s] and establishes a penalty for permitting unlawful access to such information. Establishes a criminal penalty for fraudulent application." *Id.* at 95, *reprinted in* 1986 U.S.C.C.A.N. at 5699.

After the Conference Committee produced a compromise bill generally adopting the House version, a "Summary of Conference Compromise" that was submitted just before the House vote on the Conference Report described the (c)(5) confidentiality provision as follows: "Ensures confidentiality of records by prohibiting use of information contained in an application for any purpose other than determining the merits of the applications or whether fraud is involved." 132 Cong. Rec. 31,632 (1986).

In sum, we find nothing in the House Report or other pertinent legislative history demonstrating a congressional intent "demonstrably at odds," *see Ron Pair Enterprises*, 489 U.S. at 242, with the plain meaning of 8 U.S.C. § 1255a(c)(5). IRCA's legislative history shows that Congress was preoccupied with the broader provisions of the bill, such as employer sanctions and the question of whether alien amnesty should be authorized at all. If anything, the most pertinent portion of the legislative history shows that Congress intended the confidentiality provision to provide a strong assurance to illegal aliens that their amnesty applications would not be used against *them*. An interpretation of the statute that does not permit use of application information for all general law enforcement purposes can hardly be viewed as inconsistent with that intent.

3. *"Enforcement of Paragraph (6)"*

Although it is clear that IRCA does not allow Justice Department personnel to use amnesty application information for law enforcement purposes other than "enforcement of paragraph (6)," determining the intended scope of that exception presents a more difficult question. The question presented is whether "enforcement of paragraph (6)" should be limited solely to actual prosecutions brought under *that statutory provision alone*, or whether it can be more broadly interpreted to include investigations and prosecutions of other crimes that are substantially related to, or serve to facilitate, the false application violations covered

by paragraph (6). We believe that the broader interpretation more accurately reflects the meaning of the phrase "enforcement of paragraph (6)" and the overall scheme of the statute.

The concept of "enforcement" is a broad one, and a given statute may be "enforced" by means other than criminal prosecutions brought directly under it. *See* 2 Kenneth C. Davis, *Administrative Law Treatise* § 9:1 at 217 (2d ed. 1979); *SEC v. Pacific Bell*, 704 F. Supp. 11. 14 (D.D.C. 1989) (SEC is the "law enforcement agency" with respect to federal securities laws although it lacks the power to prosecute criminal violations of those laws); *Black's Law Dictionary* 528 (6th ed. 1990) (defining "enforcement" as "the carrying out of a mandate or command"). *Pettigrew v. United States*, 97 U.S. 385 (1878), for example, concerned an action brought by the government to recover the proceeds from the defendants' sale of tobacco that had been seized under the federal revenue laws and deposited with them. Under then-existing jurisdictional statutes, the Supreme Court would have lacked jurisdiction over the defendants' writ of error unless the action being appealed was one brought to "enforce a revenue law of the United States." *Id.* at 386. The Court's jurisdiction was therefore challenged on the grounds that, although the underlying seizure was pursuant to a revenue statute, the actual case was an action to enforce a common law bailment. The Court sustained its jurisdiction, however, reasoning that the purpose of the action was to enforce "the right which the revenue law vests in the United States to this property." *Id.* The Court concluded that "[i]t would be a very narrow and technical definition of the phrase 'enforcement of any revenue law' which did not recognize this action as one brought for that purpose." *Id.*

We believe that it would be "very narrow" as well as overly-technical to construe the expression "enforcement of paragraph (6)" to encompass only the prosecution of cases under the provisions of paragraph (6) itself. A more reasonable interpretation of the expression recognizes that the government enforces the mandate of paragraph (6) — the prevention and punishment of falsified or fraudulent amnesty applications — through other law enforcement activities as well.[4] This mandate may be "enforced" by a variety of enforcement activities, including the investigation and prosecution of other federal crimes when they involve amnesty application fraud: aiding and abetting such false applications, 18 U.S.C. § 2; making or accepting bribes to facilitate the success of false applications, 18 U.S.C. § 201; and mail fraud, 18 U.S.C. § 1341; wire fraud, 18 U.S.C. § 1343, or false statement to government officials, 18 U.S.C. § 1001, that facilitate or are closely associated with paragraph (6) violations.

[4] A contrary conclusion might be warranted if, for example, the exception to the confidentiality requirement in § 1255a(c)(5)(A) permitted the use of application information only "for the prosecution of violations of paragraph (6)" — language that would explicitly indicate a congressional intent to limit the exception to those cases specifically brought under paragraph (6) itself

If the more restrictive interpretation were adopted, Department officials could not use such covered information for a wide-ranging investigation or prosecution of fraudulent amnesty application schemes if they were not planning a prosecution to be brought specifically under 8 U.S.C. § 1255a(c)(6). For example, the investigation of a false amnesty application scheme might have produced evidence sufficient to prosecute an INS employee or broker who took or conveyed bribes on behalf of an illegal alien under circumstances where, for one reason or another, a paragraph (6) prosecution *of the alien himself* is unworkable (e.g., he is outside U.S. jurisdiction, deceased, or simply did not understand that he was filing false information). Even though the resultant prosecution of the employee or broker would not include a charge based on paragraph (6) as such, it would exalt form over substance to assert that such a prosecution did not contribute to the "enforcement of paragraph (6)."

We think instead that Congress intended the "enforcement of paragraph (6)" proviso to allow the use of the covered information in any investigation or prosecution aimed at criminal violations that facilitate or are significantly related to false amnesty application filings.[5] Paragraph (6)'s broad prohibition of false amnesty application filings itself evidences this intent; the prohibition cannot be fully enforced unless those who facilitate the false filings can be prosecuted under other statutes with the best available evidence.

In this regard, we doubt that a false application "facilitator" would have standing to move for suppression of evidence consisting of information from the alien amnesty application of another person. Unlike the federal wiretap statute, for example, 18 U.S.C. § 2518(10)(a)(iii), IRCA's confidentiality provision does not authorize "aggrieved persons" to move for suppression of evidence based on the improper use of (c)(5) information. Under those circumstances, the same principles that limit standing to assert Fourth Amendment rights in a motion to suppress should apply to the assertion of statutory rights such as those established by IRCA's confidentiality provision. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 133-38 (1978); *Alderman v. United States*, 394 U.S. 165, 171-72 (1969) ("suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence").

Alderman's requirements for Fourth Amendment standing have been held applicable to motions to suppress evidence based upon statutory rights as well. *United States v. Gallo*, 863 F.2d 185, 192 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989). Similarly, in *Wilkinson v. FBI*, 99 F.R.D. 148 (C.D. Cal. 1983), the court

[5] This conclusion is not contrary to the advice contained in the letter sent by this Office to the U.S. Attorney for the Southern District of New York referred to in your request for this opinion. Letter for Mary Jo White, U.S. Attorney, Southern District of New York, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Aug. 12, 1993). That letter observed that the U.S. Attorney's intention to redact information reflecting (c)(5) information from documents to be introduced in the trial in question was "reasonable." The letter did not purport to offer an opinion that such redaction was legally required.

held that a person who was not himself identified in certain government records did not have standing to assert a Privacy Act violation based on unauthorized disclosure of those records. As the court stated: "This statute protects only those persons who are wrongfully identified in government records and there is no actionable 'derivative' harm claimed under 5 U.S.C. § 552a." *Id.* at 154. In light of these precedents, it is doubtful that defendants other than the actual aliens whose amnesty applications are used in violation of the IRCA's confidentiality provision would have standing to move for suppression of evidence introduced in violation of that provision.

4. *Judicial Opinions*

Although we have concluded that 8 U.S.C. § 1255a(c)(5) would permit the use of application information in prosecutions of crimes significantly related to false application violations, we note that the Tenth Circuit's opinion in *United States v. Hernandez*, *see supra* note 2, would permit even wider use of such information. Based on the principles of statutory interpretation discussed above, we do not find that opinion persuasive and would not recommend that Department prosecutors look to it as a sound guide for the use of (c)(5) information.

In *Hernandez*, a divided Tenth Circuit panel held that subsection (c)(5) did not bar Justice Department prosecutors from introducing evidence that the defendant had applied for amnesty under IRCA in order to prove charges that the defendant had illegally received firearms while an illegal alien and had made false statements in connection with the acquisition of firearms. In so holding, the court first rejected the lower court's ruling that the name of a particular applicant for amnesty did not constitute "'information' subject to the confidentiality requirement." 913 F.2d at 1511. After establishing that an applicant's name is subject to the confidentiality provisions of subsection (c)(5), the court held that in enacting subsection (c)(5), "Congress sought only to prohibit disclosure of information to immigration authorities in the context of deportation proceedings." *Id.* The court went on to conclude:

> However, this concern is not implicated when the application is disclosed to a United States Attorney in a collateral criminal prosecution in which deportation is not at issue. We therefore conclude that . . . § 1255a(c)(4) & (5) only prohibit disclosures which aid in the deportation of illegal aliens; Congress did not intend to inhibit prosecutions for violations arising under the Criminal Code.

Id. at 1512.

Judge McKay dissented sharply from this conclusion. His dissent stated:

> I believe the court's opinion conflicts with the clear, unambiguous language of the statute and, in addition, creates an unwarranted exception which does not enhance the statute but rather flies in the face of its purposes. The confidentiality provision could hardly be more sweeping. . . . I simply cannot torture either ambiguity or an exception out of this provision.
>
> I have never pretended to be one who would not read expansively a statute or precedent for either an exception or extension providing it was warranted and consistent with the purposes of the statute. What has been done here not only is inconsistent with the purposes of the statute but also is flatly contradictory to its purposes. One can read nothing else in this statute except that it was intended to convey confidence that one coming forward under the statute could do so in complete confidence that information included in the application would be used only for the purposes for which it was filled out.

Id. at 1514 (McKay, J., dissenting).

As pointed out in the materials accompanying your request for this opinion, the Solicitor General conceded that *Hernandez* was wrongly decided. Brief for the United States in Opposition to Petition for Writ of Certiorari at 7-9, *Hernandez v. United States* (1990) (No. 90-6499). Referring to the confidentiality provision of 8 U.S.C. § 1255a(c)(5), the Solicitor General's brief stated, "we believe that this language prohibits the use of amnesty application information except for the purposes specifically identified in the statute." *Id.* at 9. Aside from asserting that the *Hernandez* court's interpretation of the Act's confidentiality provisions was "incorrect," the Brief stressed that "[i]n this case, the United States Attorney did not argue for the construction of the statute adopted by the court of appeals and, to our knowledge, the United States has not urged that construction in any context." *Id.* at 9 n.6.

We agree with the Solicitor General's contention that *Hernandez* was wrongly decided. We do not believe that the text of the statute permits an interpretation that its confidentiality restrictions are confined to use of the information against the applicant alien in deportation proceedings. The statute explicitly sets forth the particular exceptions that Congress contemplated and chose to permit. While Congress could easily have adopted a broader exception allowing use of amnesty information "for criminal law enforcement purposes," it chose instead to limit the exception to "enforcement of paragraph (6)." Although a fair construction of that exception allows introduction of (c)(5) information in a variety of prosecutions

reasonably related to false application filings, it does not permit such use in any and all prosecutions as long as they are outside the deportation context.

A final noteworthy opinion construing IRCA's confidentiality provision is *Zambrano v. INS*, *see supra* note 3, which was vacated by the Supreme Court on grounds other than those in issue here. Although the vacatur of *Zambrano* deprives it of precedental authority, its analysis raises a significant issue warranting consideration in this context.

In *Zambrano*, the court upheld the district court's injunction ordering the INS to provide the plaintiffs with a list of aliens whose amnesty applications were denied based on allegedly invalid INS regulations. The names were sought by illegal aliens in the context of a civil action asserting that these INS regulations were unduly restrictive.

In holding that the (c)(5) confidentiality provision did not bar "court ordered discovery" of the applicant names, the court relied on the Supreme Court's opinion in *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961). In *St. Regis*, the Court held that a confidentiality provision in the Census Act, containing language closely similar to that of (c)(5), applied only to Department of Commerce officials and did not "grant copies of the [covered Census materials] not in the hands of the Census Bureau an immunity from legal process." *Id.* at 218. Accordingly, the Court held that the Federal Trade Commission ("FTC") was entitled to obtain the St. Regis Company's *own* copies of the reports it had submitted to the Census Bureau pursuant to FTC reporting requirements. The Court further stated:

> Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result. That this statute does not do. Congress did not prohibit the use of the reports *per se* but merely restricted their use while in the hands of those persons receiving them, *i.e.*, the government officials.

Id.

Neither *St. Regis* nor *Zambrano* contradicts our conclusion that subsection (c)(5) prohibits Justice Department use of amnesty application information in general criminal prosecutions while allowing such use (subject to the limitations of the INS regulation) in prosecuting crimes significantly related to amnesty application fraud. The *St. Regis* holding is confined to disclosure of information in the hands of third parties who are not subject to statutory disclosure restrictions that, as here, apply only to specific government officials. *Zambrano* — setting aside its vacated status — holds that an otherwise covered agency may disclose amnesty application information under the specific compulsion of judicial process. These opinions did not address the distinct issues raised when Justice Department officials, acting on

their own initiative, seek to introduce such information as evidence in certain criminal prosecutions related to false application fraud.

5. *The INS Regulation*

Under authority delegated by the Attorney General, *see* 8 U.S.C. § 1103, the INS has promulgated an interpretive regulation governing access to and use of (c)(5) material. 8 C.F.R. § 245a.2(t) (1993). This regulation is binding on other components of the Justice Department. It prohibits the use of (c)(5) information for any purpose "except: (i) to make a determination on the application; or, (ii) for the enforcement of the provisions encompassed in section 245A(c)(6) of the Act, except as provided in paragraph (t)(4) of this section." *Id.* § 245a.2(t)(3).

We interpret the INS regulation to mean that (c)(5) information may only be used in prosecutions of aliens under subsection (c)(6) itself, except in those cases described in paragraph (t)(4) of the regulation. That paragraph authorizes INS to refer cases of amnesty application falsification or fraud to the U.S. Attorney "for prosecution of the alien *or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.*" 8 C.F.R. § 245a.2(t)(4) (emphasis added).

Although we believe that the statute itself would allow use of (c)(5) material in a broader range of situations than those authorized by the regulation, *see supra* Part II.3, the permissible uses set forth in the regulation provide authoritative guidance for Justice Department components unless revoked or amended. However, the government's use of (c)(5) information in violation of the INS regulation would not necessarily be subject to judicial suppression or exclusion. *United States v. Caceres*, 440 U.S. 741 (1979). As this Office has previously construed *Caceres*, in the absence of a statutory or constitutional violation, bad faith, or an element of justifiable reliance on an agency's adherence to a regulation by the complaining party, a court will not exclude evidence in a criminal case solely on the ground that the evidence was obtained or used in violation of agency regulations.[6]

It is not clear whether the regulation's provision for the use of (c)(5) material in third party cases would authorize use in the class of cases stressed in your request for opinion — i.e., acceptance of bribes by INS employees in return for approving false legalization applications.[7] As a general proposition, we believe that it would. If an INS employee makes any entries, marks of approval, or verifications on an

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[6] *See* Memorandum for John M. Harmon, Assistant Attorney General, Office of Legal Counsel, from Cass R. Sunstein, Attorney-Adviser, Office of Legal Counsel, *Re: Binding Effect of Department or Agency Guidelines* (Dec. 19, 1980).

[7] We think the regulation would generally allow use of (c)(5) information in the other class of cases highlighted in your request, i.e., prosecution of "middlemen" who submit false legalization applications on behalf of aliens. Such middlemen would likely be involved in the creation or supplying of false documents used in the amnesty application, especially since participation in the submission of a false application itself should satisfy that criteria.

amnesty application that he knows to be false or fraudulent, we believe he could be treated as supplying or creating a false writing or document within the meaning of paragraph (t)(4). We also note that the INS regulation does not limit the categories of crimes for which (c)(5) information can be used by federal prosecutors. We therefore believe that the INS regulation would allow (c)(5) information to be introduced in the prosecution of an INS employee for taking an amnesty-related bribe as long as the bribe-taker in some way participated in the creation, supply, or submission of falsified documents (including the amnesty application itself) used in connection with an amnesty application.

Conclusion

Although 8 U.S.C. § 1255a(c)(5) generally prohibits the use of information from alien amnesty applications by federal prosecutors in criminal prosecutions other than prosecutions for filing false amnesty applications, we believe that the statute also permits the use of such information in prosecuting third parties for crimes that facilitate or are closely related to false amnesty application crimes.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Reconsideration of Prior Opinion Concerning Land-Grant Colleges

After reconsideration of a prior opinion, we adhere to the conclusion that the State of West Virginia may validly designate West Virginia State College as the beneficiary of appropriated funds under the Second Morrill Act of 1890.

Reversing our prior conclusion, we find that the State's designation of the College as a Second Morrill Act beneficiary does not make that institution eligible for funds appropriated under certain statutes administered by the Department of Agriculture.

December 23, 1993

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF AGRICULTURE

This responds to your request that this Office reconsider our opinion that West Virginia may designate West Virginia State College ("State College") as the beneficiary of appropriated funds under the Second Morrill Act, ch. 841, 26 Stat. 417 (1890) (codified as amended at 7 U.S.C. §§ 321-326, 328) ("Second Morrill Act"), and that, upon such designation, State College would become eligible to receive appropriated funds for agricultural research and extension under 7 U.S.C. §§ 3221, 3222, and 3223.[1]

After reviewing the matter once more, we hereby withdraw our original opinion in favor of the revised views expressed in this memorandum. As explained below, we adhere to our earlier conclusion that West Virginia may validly designate State College as the beneficiary of appropriated funds under the Second Morrill Act. We reverse, however, our original conclusion that West Virginia's designation of State College as a Second Morrill Act beneficiary made that school eligible for funds appropriated pursuant to 7 U.S.C. §§ 3221, 3222, 3223 and similar statutes. (Following the usage of Agriculture, we shall refer to these statutes collectively as the "1890 derivative statutes") Rather, we conclude that State College is not eligible for funds under the 1890 derivative statutes.

I.
AN OVERVIEW OF THE LEGAL HISTORY OF THE LAND-GRANT COLLEGE SYSTEM

A knowledge of the legal history of the land-grant college system is essential to interpreting the Second Morrill Act and the 1890 derivative statutes. In Subpart A below, we discuss the following four cornerstones of the statutory structure:

[1] *See* Letter for Alan Charles Raul, General Counsel, Department of Agriculture, from Principal Deputy Assistant Attorney General Douglas R. Cox, Office of Legal Counsel (Aug 21, 1992), Letter for Douglas R Cox, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from James Michael Kelly, Associate General Counsel, Department of Agriculture (Oct. 23, 1992) ("Request for Reconsideration"). Hereinafter, references to "Agriculture" mean the Department of Agriculture

Table 1

Statute	Enactment	Main Object of the Legislation
First Morrill Act	1862	Grants states public lands to sell for endowment of agricultural & mechanical colleges
Hatch Act	1887	Authorizes funds for agricultural research at experiment stations established at land-grant colleges or independently by a state
Second Morrill Act	1890	Authorizes supplemental operating funds for land-grant colleges
Smith-Lever Act	1914	Authorizes funds for agricultural extension at land-grant colleges

In Subpart B below, we discuss the evolution of the land-grant college system in West Virginia and elsewhere prior to the enactment of the 1890 derivative statutes. In Subpart C below, we discuss the 1890 derivative statutes.

A.

The First Morrill Act. The land-grant college system began in 1862 with the First Morrill Act, ch. 130, 12 Stat. 503 (1862) ("First Morrill Act").[2] That statute provided the states with grants of public land or equivalent land scrip. *Id.* § 1, 12 Stat. at 503. The states that chose to "take and claim the benefit" of the First Morrill Act were required to invest the funds derived from the sale of the land or land scrip in such fashion that the principal would "remain forever undiminished." *Id.* § 4, 12 Stat. at 504. The states were further required to devote the interest generated by such funds exclusively to the "endowment, support, and maintenance of at least one college where the leading object shall be . . . to teach such branches of

[2] For accounts of the history of the college land-grant system, *see* Joseph B Edmond, *The Magnificent Charter The Origin and Role of the Morrill Land-Grant Colleges and Universities* (1978); Allan Nevins, *The State Universities and Democracy* (1962), Edward D Eddy, *Colleges for Our Land and Time: The Land-Grant Idea in American Education* (1957), and Earle D. Ross, *Democracy's College: The Land-Grant Movement in the Formative Stage* (1942) For a recent study of the origins of the college land-grant system, *see* Roger L Williams, *The Origins of Federal Support for Higher Education George W Atherton and the Land-Grant College Movement* (1991), *see also Knight v Alabama*, 787 F Supp. 1030, 1040-53, 1167-72 (N.D. Ala 1991) (outlining origins and development of college land-grant system with special reference to Alabama), *aff'd in part, rev'd in part, & vacated in part*, 14 F 3d 1534 (11th Cir 1994), *Avers v Allain*, 674 F Supp 1523, 1543-50 (N D. Miss 1987) (providing less detailed history of land-grant system with special reference to Mississippi), *aff'd*, 914 F 2d 676 (5th Cir 1990) (en banc), *vacated sub nom. United States v Fordice*, 505 U S 717 (1992)

learning as are related to agriculture and the mechanic arts." *Id.* The states were required to express acceptance of the land grant (or land scrip) through their legislatures.[3] Once a state had accepted, it would still lose its benefit unless it provided "within five years . . . not less than one college" of the prescribed kind. *Id.* § 5, 12 Stat. at 504.

The Hatch Act. The Act of Mar. 2, 1887, ch. 314, 24 Stat. 440 (codified as amended at 7 U.S.C. §§ 361a-390d) authorized appropriations for agricultural research at experiment stations under the direction either of a college "established, or which may hereafter be established, in accordance with the provisions of [the First Morrill Act]" or an independent station established by a state. *See id.* §§ 1, 2, 8, 24 Stat. at 440-42. Unlike the First Morrill Act, the Hatch Act provided for payments by the federal government directly to the beneficiary institutions, although the appropriations were still said to be "to each State." *Id.* § 5, 24 Stat. at 441. In states having two colleges established under the First Morrill Act, the funds were to be divided equally unless the state's legislature directed otherwise. *See id.* § 1, 24 Stat. at 440.

The Second Morrill Act. The Second Morrill Act provided an annual appropriation of funds "to each State . . . for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts now established, or which may be hereafter established, in accordance with [the provisions of the First Morrill Act]." § 1, 26 Stat. at 417-18. The funds so appropriated were to be paid to the state treasurer "designated by the laws of such State . . . to receive the same" and then "immediately [paid] over . . . to the treasurers of the respective colleges . . . entitled to receive the same." *Id.* § 2, 26 Stat. at 418. The use of the funds was restricted to "instruction in agriculture, the mechanic arts, the English language and the various branches of mathematical, physical, natural and economic science, with special reference to their applications in the industries of life, and to the facilities for such instruction." *Id.* § 1, 26 Stat. at 418.

The Second Morrill Act also forbade payment of funds appropriated under the Act to colleges "where a distinction of race or color is made in the admission of students." *Id.* This prohibition, however, was qualified by a proviso deeming the establishment of a separate college for each race to be sufficient compliance if the funds were divided "equitably" between the two schools. *Id.* A second proviso described the mechanics of "separate but equal" compliance in greater detail:

> That in any State in which there has been one college established in pursuance of the [First Morrill Act], and also in which an educational institution of like character has been established, or may be hereafter established, and is now aided by such State from its own

[3] The deadline for acceptance was two years from the date of the First Morrill Act's enactment. *Id.* § 5, 12 Stat. at 504. This deadline was extended to the later of July 23, 1869, or three years following a state's admission to the Union. Act of July 23, 1866, ch. 209, 14 Stat. 208.

> revenue, for the education of colored students in agriculture and the mechanic arts . . . or whether or not it has received money heretofore under the act to which this act is an amendment, the legislature of such State may propose and report to the Secretary of the Interior a just and equitable division of the fund to be received under this act between one college for white students and one institution for colored students . . . which shall be divided into two parts and paid accordingly, and thereupon such institution for colored students shall be entitled to the benefits of this act and subject to its provisions, as much as it would have been if it had been included under the act of eighteen hundred and sixty-two, and the fulfillment of the foregoing provisions shall be taken as a compliance with the provision in reference to separate colleges for white and colored students.

Id.

The Smith-Lever Act. The Act of May 8, 1914, ch. 79, 38 Stat. 372 (codified as amended at 7 U.S.C. §§ 341-349) established and funded agricultural extension services "in connection with the college or colleges in each State now receiving, or which may hereafter receive, the benefits of the [First Morrill Act] . . . and the [Second Morrill Act]." *Id.* § 1, 38 Stat. at 372-73. As with the Second Morrill Act, the appropriations were payable to the States for disbursement. *Id.* § 4, 38 Stat. at 374. States having more than one eligible college were permitted to divide the appropriation as the legislature saw fit. *Id.* § 1, 38 Stat. at 373.

B.

In 1863, the West Virginia Legislature assented to the provisions of the First Morrill Act. 1863 W. Va. Acts ch. 56. After passage of the Second Morrill Act, the West Virginia Legislature assented to its terms, designated West Virginia University as the beneficiary of the funds available under the First Morrill Act, and established State College as the beneficiary of a portion of the funds for the instruction of "colored" students. 1891 W. Va. Acts ch. 65, § 1.[4] West Virginia was among a group of seventeen states that ultimately complied with the Second Morrill Act's eligibility requirements by establishing a racially segregated land-grant college for black students.[5] The class of institutions thus established or designated by these seventeen states are commonly known as the 1890 colleges. The colleges in these same states that restricted enrollment to white students, as well as the

[4] State College was chartered as "The West Virginia Colored Institute." American Universities and Colleges 1822 (14th ed. 1992) In 1915, its name was changed to "The West Virginia Collegiate Institute." *Id* at 1823. In 1929, State College was given its present name. *Id*

[5] The other sixteen states were Alabama, Georgia, Florida, North Carolina, South Carolina, Virginia, Kentucky, Tennessee, Mississippi, Louisiana, Arkansas, Oklahoma, Texas, Missouri, Maryland, and Delaware *See Knight*, 787 F. Supp at 1168, Eddy, *supra* note 2, at 257-59.

non-segregated land-grant colleges in all other states, are commonly known as the 1862 colleges. *See Knight*, 787 F. Supp. at 1145 n.44, 1167-68.

In most states, there is only a single land-grant college, which receives all of the funds distributed to the state under the four statutes discussed in the preceding subpart. Even in states having both an 1862 and an 1890 college, the experiment station and extension service funded under the Hatch and Smith-Lever Acts, respectively, are almost uniformly located at the 1862 college, which consequently receives all of the appropriations provided pursuant to those two Acts. *See id.* at 1167-68.[6] Furthermore, according to Agriculture, no 1890 college receives First Morrill Act funds.[7] Consequently, with respect to the four statutes outlined above, the only funds that the 1890 colleges receive are a share of the Second Morrill Act appropriation.[8] Thus, except as altered by the 1890 derivative statutes, *see infra* Part I.C, the pattern of unequal distribution of federal funds (and of state funds as well) has remained little changed from the inception of the 1890 colleges.[9] In the mid-1950s, the Supreme Court held that the system of racially "separate but equal" state education (including higher education) was unconstitutional.[10] The end of *de jure* racial segregation raised the question whether there was a necessity for the continued participation of the 1890 colleges in the land-grant system. *See* Eddy, *supra* note 2, at 265-66 (1957). Thus, West Virginia complied with the Supreme Court's decisions by integrating both its 1862 college, West Virginia University, and its 1890 college, State College, and by consolidating the land-grant function in West Virginia University. State College was removed from the land-grant system. *See* 1957 W. Va. Acts ch. 72, John C. Harlan, *History of West Virginia State College 1891-1965*, at 101-04 (1968). The other sixteen states, however, did not fol-

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[6] The exception is the State of Arkansas, whose experiment station is independent of both its 1862 and 1890 colleges. *See id* at 1168

[7] We understand that neither Agriculture nor the Department of Education (which administers the First Morrill Act) has records from which to ascertain the states' distribution of First Morrill Act funds. But Agriculture has indicated to us that it has no reason to believe that any 1890 college receives such funds

[8] Agriculture has provided us with the distribution of Second Morrill Act funds by states in fiscal year 1991 The grant to each state was $50,000, and for those states having an 1890 college, the portion of the grant that the 1890 college received ranged from a low of 6% ($3,125) in Missouri to a high of 50% ($25,000) in Florida and South Carolina The remainder of the Second Morrill Act appropriations in such states was given to that state's 1862 college All other states had only an 1862 college, which received the entire Second Morrill Act appropriation

[9] *See, e g , Knight*, 787 F. Supp at 1040-53, 1167-72; Eddy, *supra* note 2, at 257-66, Jean Preer, *"Just and Equitable Division" Jim Crow and the 1890 Land-Grant College Act*, 22 Prologue 323, 330-32, 334-36 (1990), Edmond, *supra* note 2, at 64, Williams, *supra* note 2, at 155-56, John R Wennersten, *The Travail of the Black Land-Grant Schools in the South, 1890-1917*, 65 Agric Hist 54, 62 (1991)

[10] *See, e g., Brown v Board of Education*, 347 U.S. 483 (1954); *see also Lucy v. Adams*, 350 U S 1 (1955) Prior to *Brown*, in cases all involving "the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications " *Brown*, 347 U.S at 491-92 (citing *Missouri ex rel Gaines v Canada*, 305 U.S. 337 (1938); *Sipuel v Board of Regents*, 332 U S 631 (1948), *Sweatt v Painter*, 339 U S. 629 (1950); *McLaurin v Oklahoma State Regents*. 339 U S. 637 (1950)) These cases, however, did not reexamine the doctrine of "separate but equal" that had been set forth in *Plessy v Ferguson*, 163 U S. 537 (1896) *Brown*, 347 U S at 492 It was in *Brown* that the Supreme Court held, for the first time, "that in the field of public education the doctrine of 'separate but equal' has no place." *Id* at 495.

low West Virginia's approach. Although they formally ended discrimination on the basis of race or color in their land-grant college system, they nonetheless retained a dual system of historically white 1862 colleges and historically black 1890 colleges. *See Knight*, 787 F. Supp. at 1167-68. Furthermore, as indicated above, these states all continued their historical practice of allocating almost all land-grant funding to their 1862 college rather than to their 1890 college.[11]

C.

Beginning in the 1970s, Congress enacted a series of statutes — the 1890 derivative statutes — that in terms authorized appropriations to be distributed directly by Agriculture to colleges eligible to receive funds under the Second Morrill Act. These were:

> * Agriculture Environmental and Consumer Protection Appropriation Act, 1972, Pub. L. No. 92-73, 85 Stat. 183, 186 (1971) (appropriating "payments for extension work by the colleges receiving the benefits of the second Morrill Act");
>
> * National Agricultural Research, Extension, and Teaching Policy Act of 1977 ("NARET"), Pub. L. No. 95-113, § 1444, 91 Stat. 913, 1007 (codified as amended at 7 U.S.C. § 3221) (authorizing appropriation of payments for "extension at colleges eligible to receive funds under the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328)");
>
> * NARET § 1445, 91 Stat. at 1009 (codified as amended at 7 U.S.C. § 3222) (authorizing appropriation of payments for "agricultural research at colleges eligible to receive funds under the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328)");
>
> * Agriculture and Food Act of 1981, Pub L. No. 97-98, § 1433, 95 Stat. 1213, 1312 (codified as amended at 7 U.S.C. § 3223) (authorization, now expired, for grants for upgrading research equipment and facilities at the "institutions eligible to receive funds under the Act of August 30, 1890 (7 U.S.C. 321 et seq.)");
>
> * Food Security Act of 1985, Pub. L. No. 99-198, § 1416, 99 Stat. 1354, 1549 (codified as amended at 7 U.S.C. § 3224) (authorization, now expired, for grants for upgrading extension fa-

[11] An issue in *Knight* was whether Alabama's continued practice of favoring its 1862 land-grant college in the distribution of federal funds was a vestige of *de jure* racial segregation. The court concluded that it was not *Id.* at 1168, 1171-72

cilities at "institutions eligible to receive funds under the Act of August 30, 1890 (26 Stat. 417, chapter 841; 7 U.S.C. 321 et seq.)");

* Food, Agriculture, Conservation, and Trade Act of 1990 ("FACT Act"), Pub. L. No. 101-624, § 1612(a), 104 Stat. 3359, 3721 (codified as amended at 7 U.S.C. § 3222a) (authorizing grants for agricultural research "at colleges eligible to receive funds under the Act of August 30, 1890 (7 U.S.C. 321 et seq.)");

* FACT Act § 1612(b), 104 Stat. at 3722 (codified as amended at 7 U.S.C. § 3222b) (authorizing grants to upgrade agricultural and food sciences facilities and equipment "to assist the institutions eligible to receive funds under the Act of August 30, 1890");

* FACT Act § 1612(c), 104 Stat. at 3723 (codified as amended at 7 U.S.C. § 3222c) (authorizing grants for national research and training centennial centers at colleges "eligible to receive funds under the Act of August 30, 1890 (7 U.S.C. 321 et seq.)").

Agriculture has construed these statutes as authorizing funding for the sole benefit of the 1890 colleges and has distributed the funds accordingly.

The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-111, 107 Stat. 1046, ("FY 94 Appropriation"), appropriates for fiscal year 1994 the funds authorized by the 1890 derivative statutes. This law makes the following appropriations pursuant to the authorization statutes under consideration:

Table 2

Dollar Amount	Authorization Statute	Description of Recipients in FY 94 Appropriation
$28,157,000	NARET § 1445 (7 U.S.C. § 3222)	*"for payments to the 1890 land-grant colleges"*
$7,901,000	FACT Act § 1612(b) (7 U.S.C. § 3222b)	*"payments to upgrade 1890 land-grant college research and extension facilities"*
$25,472,000	NARET § 1444 (7 U.S.C. § 3221)	*"payments for extension work by the colleges receiving the benefits of the second Morrill Act"*

See FY 94 Appropriation, 107 Stat. at 1051, 1053.

The first two appropriations listed in Table 2 limit the beneficiaries to the 1890 colleges. Because the FY 94 Appropriation is Congress's most recent enactment, its express narrowing of the beneficiary class supersedes any arguably broader language in the 1890 derivative statutes that authorized the appropriations. *See* General Accounting Office, *Principles of Federal Appropriations Law* 2-35 (2d ed. 1991) (a statutory authorization of appropriations is a directive from Congress to itself that Congress is free to alter in subsequent legislation actually appropriating the funds in question). Hence, none of the 1862 colleges could be eligible for those funds, regardless of our interpretation of the authorization contained in the 1890 derivative statutes.[12]

II. ISSUES FOR RECONSIDERATION

In 1991, West Virginia enacted a law renewing its assent to the provisions of the Second Morrill Act and designating State College as the sole beneficiary of federal appropriations available under that Act. 1991 W. Va. Acts ch. 60.[13] As discussed above, State College was formerly an 1890 college. Its status as a land-grant college was withdrawn in 1957 as part of West Virginia's effort to desegregate its higher education system. Thus, the enactment in 1991 represents an attempt to restore State College's status after a hiatus of thirty-four years.

By current standards, the annual appropriation of $50,000 available to each state under the Second Morrill Act is not substantial. Request for Reconsideration, App. at 8-34. Significantly more funding is available, however, under the 1890 derivative statutes. West Virginia seeks funding for State College under both the Second Morrill Act and the 1890 derivative statutes.[14]

Agriculture contends that State College is not eligible for funding under either the Second Morrill Act or the 1890 derivative statutes.[15] Agriculture maintains that an institution may not receive Second Morrill Act appropriations unless it also receives funds under the First Morrill Act. Because West Virginia has not designated State College to receive funds under the First Morrill Act, (and State College does not in fact receive funds under that Act), Agriculture concludes that State College may not be designated to receive appropriations under the Second Morrill Act.

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[12] The authorizations for appropriations contained in 7 U S C. §§ 3223 and 3224 have expired, and those contained in 7 U S C §§ 3222a and 3222c were not funded in the FY 94 Appropriation

[13] We express no opinion whether this statute was valid under the laws of West Virginia Agriculture has not questioned its validity on this ground

[14] Letter for Edward Madigan, Secretary of Agriculture, Department of Agriculture, from Gaston Caperton, Governor of West Virginia at 1, 2 (Mar 28, 1991)

[15] The recounting of Agriculture's position that follows is drawn from the Request for Reconsideration and from the Memorandum for Orville G Bentley, Assistant Secretary for Science and Education, Department of Agriculture, from A James Barnes, General Counsel, Department of Agriculture (Mar 11, 1983)

Agriculture acknowledges that State College was founded as an 1890 college, which the racial segregation proviso to the Second Morrill Act exempts from any requirement of receipt of First Morrill Act funds. Nevertheless, Agriculture maintains that because State College was withdrawn from the land-grant system, the only way to restore it is by the usual route requiring receipt of benefits under the First Morrill Act. Agriculture argues that the exception to that requirement — the racial segregation proviso — is unconstitutional, and hence, no longer available to West Virginia.[16]

Concerning State College's eligibility for funding under the 1890 derivative statutes, Agriculture contends that if State College fails to qualify for appropriations under the Second Morrill Act, it may not take advantage of the 1890 derivative statutes, which condition funding upon an institution's eligibility for appropriations under the Second Morrill Act. In addition, Agriculture denies that State College could qualify for funding under the 1890 derivative statutes even if it were eligible to receive appropriations under the Second Morrill Act. It notes that the class of colleges eligible for Second Morrill Act appropriations includes all the 1862 colleges that receive appropriations under the First and Second Morrill Acts. But, Agriculture contends, Congress did not intend to benefit every such school. Rather, Congress intended to benefit only a specific group of sixteen historically black colleges in the land-grant system at the time that the 1890 derivative statutes were enacted (and also the historically black Tuskegee University, which is not a land-grant college). Agriculture invokes legislative history on this point, which it urges must guide the interpretation of the statutory language. Thus, in Agriculture's view, even assuming that State College could now be designated to receive First Morrill Act funds, it nevertheless could not qualify for funding under the 1890 derivative statutes, because it is not among the schools that Congress intended to benefit.

This Office's original opinion (superseded by this one) agreed with West Virginia. We concluded that a state may designate an institution for Second Morrill Act appropriations without designating it for First Morrill Act funds if the school meets the educational requirements of the First Morrill Act and the nondiscrimination requirement of the Second Morrill Act. We further concluded that the plain language of the 1890 derivative statutes could not be restricted by the

[16] The proviso is indeed unconstitutional *See supra* note 10 and accompanying text In reading the proviso out of the Second Morrill Act, Agriculture implicitly assumes that it is severable from the remainder of that Act We agree with that proposition as well *See Alaska Airlines, Inc. v. Brock*, 480 U S. 678, 684 (1987) (standard for determining severability)

Subsequent to our original opinion, the American Law Division of the Congressional Research Service ("ALD") has advised that "redesignation" of State College remains possible today under the Second Morrill Act, notwithstanding the unconstitutionality of the racial segregation proviso *See* Memorandum from American Law Division, Congressional Research Service, Library of Congress, *Re: Validity of the Second Morrill Act in Light of Brown v Board of Education* at 3 (Sept. 20, 1991). The ALD opinion does not, however, address the question whether an institution must receive First Morrill Act funds in order to qualify for Second Morrill Act funds, nor does it construe the 1890 derivative statutes

legislative history, and, thus, that West Virginia could qualify for such appropriations after having been designated to receive Second Morrill Act funds.

Agriculture has now asked that we reconsider both of these conclusions. It advances certain textual arguments concerning the Second Morrill Act to bolster its reading of that Act. With respect to the 1890 derivative statutes, Agriculture insists that we must avoid a result that is both absurd in itself and at odds with clear legislative history. Agriculture emphasizes that a decision that State College may share in funding under the 1890 derivative statutes carries potentially broad implications. The language of these statutes seemingly encompasses *all* schools eligible to receive Second Morrill Act appropriations, including the 1862 institutions. Thus, says Agriculture, "[i]f your opinion were adopted, a minimum of 74 institutions [i.e., all land-grant colleges and Tuskegee University] would become eligible for the [funding] that is now distributed among 17 institutions [i.e., only the 1890 colleges and Tuskegee University]." Request for Reconsideration at 7 Obviously, this outcome would considerably lessen the share of funds given to the 1890 colleges. According to Agriculture, this outcome is absurd because the very purpose of the 1890 derivative statutes, as shown by the legislative history, was to remedy a historical inequity: the states that had maintained racially segregated systems had given almost all land-grant funding to their 1862 colleges while excluding the 1890 colleges from the federal bounty. Consequently, Agriculture concludes that the 1890 derivative statutes must be read to authorize appropriations only for the benefit of the 1890 colleges.

III.
STATE COLLEGE'S ELIGIBILITY FOR FUNDS UNDER THE 1890 DERIVATIVE STATUTES

On reconsideration, we conclude that the 1890 derivative statutes provide appropriations only for the benefit of the 1890 colleges. Furthermore, we find that State College is not among the intended beneficiaries. Because we think that State College's eligibility for appropriations under the Second Morrill Act does not control its eligibility for appropriations under the 1890 derivative statutes, we leave consideration of the Second Morrill Act to Part IV, *infra*.

A.

Our analysis of the 1890 derivative statutes is guided by a longstanding rule of construction very recently reiterated by a unanimous Supreme Court:

> Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and

> policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849) (quoted in more than a dozen cases, most recently *Dole v. Steelworkers*, 494 U.S. 26, 35 (1990)); *see also King v. St. Vincent's Hospital*, 502 U.S. 215,221 (1991). . . . Statutory construction "is a holistic endeavor," *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988), and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.

National Bank of Or. v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 455 (1993). All aspects of a statute, including its title, may be consulted in order to determine the congressional intent. *See id.* (consulting title).

It is undisputed that, from the time of the Second Morrill Act's enactment in 1890 to this day, the colleges eligible to receive funds under that Act have included both the 1862 colleges and the 1890 colleges. Indeed, as indicated above, the Second Morrill Act was passed in large part for the specific benefit of the 1862 colleges. On their face, however, the 1890 derivative statutes fail to distinguish between the class of colleges eligible for Second Morrill Act funds, including both the 1862 colleges and the 1890 colleges, and the more restricted class of 1890 colleges. For example, although NARET § 1444 is entitled "Extension at 1890 Land-Grant Colleges," 91 Stat. at 1007, the body of § 1444 creates a permanent authorization for Congress "to . . . appropriate[] annually such sums as Congress may determine necessary to support continuing agricultural and forestry extension at *colleges eligible to receive funds under the [the Second Morrill Act]*." *Id.* (emphasis added). Similarly, NARET § 1445 is entitled "Agricultural Research at 1890 Land-Grant Colleges;" the substantive text of § 1445, however, authorizes annual appropriations of "such sums as Congress may determine necessary to support continuing agricultural research at colleges *eligible to receive funds under the [Second Morrill Act]*." 91 Stat. at 1009 (emphasis added). Thus, were we to consider the substantive provisions of the 1890 derivative statutes alone, without reference to the titles, the legislative history, the other portions of the statutory text, or the structure and purpose of the overall statutory scheme for the land-grant colleges, we would be forced to conclude that those provisions benefited 1862 and 1890 colleges alike.

Such a conclusion would, however, be at odds with the unmistakable purpose of the 1890 derivative statutes. That purpose is to rectify the historical imbalance of funding between the 1862 and 1890 colleges — an imbalance that originated in racial segregation. The House Report concerning § 1444 of NARET described its purpose as follows:

> The committee intends that the 1890 land-grant colleges . . . become partners in the Department's agricultural research effort in the

> food and agricultural sciences. . . . [T]he research capacity in the food and agricultural sciences at the 1890's . . . is not as great as the agricultural research capacity of many of the 1862 schools. However, it must be emphasized that very few of the 1890 schools . . . receive any state funding, and Federal funding for agricultural research, which has not been on a permanent basis but rather on a grants basis, has only been available to the 1890's . . . since 1967. Permanent funding for agricultural research has been available to the state agricultural experiment stations of the 1862 institutions since 1887.

H.R. Rep. No. 95-348, at 122 (1977) ("House Report").

During hearings concerning § 1433 of the Agriculture and Food Act of 1981, the need for the bill was put as follows:

> This Congress has been supporting agricultural research for a long time. As far back as 1862, Congress set up the land grant college system. Over the years, the institutions created under the 1862 Act have been helped to build research programs which are the envy of the world.
>
> Later, in 1890, Congress passed a second Morrill Act which was designed specifically to support black land grant institutions. . . .
>
> These institutions, which were originally created under the old separate-but-equal doctrine, have had to make do with inadequate state funding and little or no federal funding in the past for research, teaching and extension. Their achievements with limited resources have been tremendous, but . . . there is a limit to the number of bricks a man can make without straw. The 17 institutions we are dealing with need help now to bring their food and agricultural research facilities up to acceptable levels.
>
> The 1890 colleges need, simply, to catch up. That is what H.R. 1309 is designed to help them do.

1890 Land-Grant Colleges Facilities: Hearings on H.R. 1309 Before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture, 97th Cong. 8-9 (1981) ("House Hearing") (prepared statement of Rep. de la Garza); *see also id.* at 13-17 (prepared statement of Rep. Ford) (contrasting historically "meager funding" by the states and the federal government for the 1890 colleges with the "royal treatment" provided for the 1862 colleges, and asserting that H.R. 1309 would provide "'catch-up'" funds to the 1890 colleges "for years of past neglect").

In drafting the 1890 derivative statutes to benefit the 1890 colleges, however, Congress conflated two distinct classes: colleges eligible to receive Second Morrill Act funds, and the 1890 colleges. Thus, with respect to NARET §§ 1444 and 1445, both the Conference and the House Reports use the description "colleges eligible to receive funds under the [Second Morrill Act]" interchangeably with "1890 institutions." *See, e.g.*, S. Conf. Rep. No. 95-418, at 225-28 (1977) ("Conference Report"); House Report at 123-24. In fact, of course, the terms are not interchangeable, because all of the 1862 colleges, as well as the 1890 colleges, receive Second Morrill Act funds. Congress also understood the class of 1890 colleges to consist wholly of sixteen identified, historically black schools. *See, e.g.*, H.R. Rep. No. 97-151, at 3 (1981) (enumerating the sixteen 1890 colleges).[17]

It appears that Congress intended to fund only the sixteen identified 1890 colleges, and mistakenly assumed that only they were eligible for Second Morrill Act funds. The Conference and House Reports specifically contrast the 1890 colleges with the 1862 colleges, thus showing that Congress understood the distinction between the two classes, even though it supposed that only the former class was eligible for Second Morrill Act appropriations. *See* Conference Report at 225-27; House Report at 122. Thus, the legislative history suggests that NARET §§ 1444 and 1445 were intended to authorize appropriations only for the 1890 colleges.[18]

References to unenacted materials evidencing Congress's intent would not alone be sufficient to control the enacted language of NARET §§ 1444 and 1445, even if those materials demonstrated that the statutory language Congress adopted derived from a mistake of fact or law. *See INS v. Chadha*, 462 U.S. 919, 944-51 (1983) (holding that passage by House and Senate and presentment to President are pre-

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[17] In addition to the sixteen 1890 colleges, Congress explicitly named Tuskegee University -- which does not receive Second Morrill Act funds -- as a beneficiary in each of the 1890 derivative statutes, bringing the total number of beneficiaries to seventeen schools. Like the other sixteen colleges, Tuskegee University is a historically black institution *See Knight*, 787 F Supp at 1086-89, 1093

[18] Congress's assumption, that only the 1890 colleges receive the benefits of the Second Morrill Act, is widely shared. *See Knight*, 787 F. Supp at 1145 (finding based on expert testimony that "[t]here is a popular misconception that the 1890 land grant colleges . got all the money authorized by [the Second Morrill Act]"). Indeed, both the judiciary and the executive branch have made the same mistake *See Avers v. Allain*, 674 F Supp 1523, 1543 (N D. Miss. 1987) (court erroneously describes Mississippi's 1890 institution as "*the* land-grant institution designated by the state to receive funds pursuant to the second Morrill Act"), *aff'd*, 914 F.2d 676 (5th Cir 1990) (en banc), *vacated sub nom , United States v. Fordice*, 505 U S 717 (1992) (emphasis added); Conference Report at 227 (reproducing letter from the Secretary of Agriculture that comments on House draft of the provisions that ultimately became §§ 1444 and 1445 and shows that he shared the assumption of the drafters that the class of beneficiaries would be exclusively the 1890 colleges, notwithstanding that the text of the draft bill defined the eligible class as those colleges eligible to receive Second Morrill Act funds)

The source of confusion may be that the historically black land-grant colleges are the only land-grant institutions established under the Second Morrill Act, and they are called the "1890 colleges," which heightens the impression that they were the principal beneficiaries of the Second Morrill Act *See, e g*, House Hearing at 8-9 (prepared statement of Rep. de la Garza) ("[I]n 1890, Congress passed a second Morrill Act *which was designed specifically to support black land grant institutions.*") (emphasis added); Preer, *supra* note 9, at 323 ("It is ironic . . that the Second Morrill Act, finally passed in 1890 and still in effect a century later, is now known for its incidental beneficiaries, black land-grant colleges. . . These colleges are what we now call the '1890 colleges '") (footnote omitted)

requisites of valid legislation); *Gray v. United States*, 76 F. Supp. 102, 104 (Ct. Cl. 1948) (holding that courts "have no power to, in effect, reform statutes because Congress, in writing them, labored under a misapprehension as to facts or law"). Our obligation, however, is to give meaning and effect to the entirety of the relevant statutory texts, and we can do so here only if we assume that the 1890 derivative statutes were designed for the sole benefit of the 1890 colleges. An interpretation of NARET §§ 1444 and 1445 that takes those provisions to refer only to the 1890 colleges is the only reading of the statute that can account for the "full text, language[,] . . . structure, and subject matter." *National Bank of Or.*, 508 U.S. at 455.

As detailed below, this understanding of the 1890 derivative statutes helps explain certain provisions in those enactments that otherwise would remain anomalous. Although these anomalies do not necessarily rise to the level of intrinsic textual ambiguity, nor do they create patently absurd results, our ability to explain them provides some assurance that our use of legislative history has contributed to a proper understanding of the text.[19]

The first anomaly has to do with the computation of funding authorized by NARET §§ 1444(a) and 1445(a). In § 1444(a), it is keyed to a percentage of the amount of funds appropriated for extension work under the Smith-Lever Act. *See* 91 Stat. at 1007. Likewise, in § 1445(a), research funds are authorized in an amount based upon a percentage of the level of funds appropriated for agricultural research under the Hatch Act. *See id.* at 1009. As noted above, however, every state has given its Smith-Lever and Hatch Act funds exclusively to its 1862 college and experiment stations controlled exclusively by those schools (except Arkansas, which has an independent experiment station). If §§ 1444 and 1445 are designed to rectify the states' historic discrimination between the 1862 and 1890 colleges, these funding mechanisms would have a discernible purpose. But if §§ 1444 and 1445 are read to benefit the 1862 colleges as well as the 1890 colleges, then Congress would have created a (much smaller) duplicate mechanism to fund research and extension at colleges already receiving appropriations for these purposes under the Smith-Lever Act and the Hatch Act. It also seems unlikely that when Congress provided "catch up" funds for the 1890 colleges, it did so by appropriating still more funds for the 1862 colleges already acknowledged to be receiving the lion's share of state and federal land-grant funding. It is more consonant with the statu-

[19] *See Reich v. Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993). There, the court suggested that one may "seek meaning beneath the semantic level not only when there is an 'intrinsic' ambiguity . . . but also when there is an 'extrinsic' one, that is, when doubt that the literal meaning is the correct one arises only when one knows something about the concrete activities . . . intended to [be] regulate[d]." *Id.* at 494. Thus, "A literal reading of the Fair Labor Standards Act would create a senseless distinction between Indian police and all other public police. Nothing in the Act alerts the reader to the problem; you have to know that there are Indian police to recognize it. But once it is recognized, the Act, viewed as a purposive, rational document, becomes ambiguous, creating room for interpretation. We cannot think of any reason other than oversight why Congress failed to extend the law enforcement exemption to Indian police . . . [and] no reason has been suggested to us." *Id.*

tory purpose to read the 1890 derivative statutes as appropriating funds solely for the 1890 colleges.

A second anomaly occurs in NARET § 1444(c), which contains presuppositions that make sense only if § 1444 is read to apply solely to the 1890 colleges. Subsection (c) provides: "The State director of the cooperative extension service and the administrative head for extension at the eligible institution in each State where an eligible institution is located shall jointly develop, by mutual agreement, a comprehensive program of extension for such State." 91 Stat. at 1008. As mentioned, every state has an extension service created under the Smith-Lever Act and attached to that state's 1862 college. This subsection, however, contemplates that *not* every state has an eligible institution (making it necessary to include the phrase "where an eligible institution is located"). It also presupposes a distinction between the statewide extension program and the extension program at an eligible institution, whose administrative heads are instructed to work "jointly." These presumptions do not make sense if § 1444 is read to include the 1862 colleges, which have extension programs. They make sense, however, if § 1444 is read to establish a new extension program for the exclusive benefit of the 1890 colleges, which are found only in sixteen states and do not have an extension program under the Smith-Lever Act. Indeed, the Conference Report confirms that the purpose of subsection (c) is to coordinate the extension program newly created under § 1444 at each 1890 college with the existing extension program at the 1862 college located in the same state. Conference Report at 226-27; *see also* House Report at 122 ("[T]he committee wishes to stress its desire that the agricultural research conducted at the 1890's . . . and the involved 1862 institutions not be duplicative.").

A third anomaly appears in § 1433(a) of the Agriculture and Food Act of 1981, which is opaque unless read to benefit only the 1890 colleges. It states:

> It is hereby declared to be the intent of Congress to assist the institutions eligible to receive funds under the [Second Morrill Act] . . . in the acquisition and improvement of research facilities and equipment so that eligible institutions may participate fully with the State agricultural experiment stations in a balanced attack on the research needs of the people of their States.

95 Stat. at 1312. As has been indicated, no state has more than one agricultural experiment station, and all (but one) of these are under the control of an 1862 college that receives Second Morrill Act benefits. Section 1433(a) cannot refer to both the 1862 and 1890 colleges because that would mean that the 1862 colleges in states without 1890 colleges are to "participate fully" *with themselves* in performing agricultural research. Thus, the text makes sense only if the eligible institutions are understood as a class separate from the existing state agricultural experiment stations. Properly construed, the section reflects once again the congressional pur-

pose of providing additional funding to the 1890 colleges to restore "balance[]" in the allocation of federal funds between the 1862 and 1890 colleges, thus rectifying a perceived imbalance that had prevented the 1890 colleges from "participat[ing] fully" in agricultural research.

The very same analysis applies to the language of § 1416(a) of the Food Security Act of 1985, 99 Stat. at 1549, setting forth a declaration of congressional intent in authorizing grants to upgrade cooperative extension facilities. The title of § 1416, moreover, is "Grants to upgrade 1890 land-grant college extension facilities." *Id.*

In sum, a number of anomalies disappear when the 1890 derivative statutes are read as benefiting solely the 1890 colleges. There are, moreover, aspects of the 1890 derivative statutes that affirmatively support such a reading. First, it is significant that all of the 1890 derivative statutes allocate funds not to the states, as is true of the earlier land-grant statutes, but directly to the eligible institutions.[20] The legislative history indicates that Congress understood this structure as a departure from prior practice with respect to the 1862 colleges. *See* Conference Report at 226 (rejecting a Senate bill provision that would have provided that the states "act as intermediaries with respect to the extension programs between the 1890 institutions and the Secretary of Agriculture in the same manner as currently exists for 1862 institutions" in favor of a House amendment that provided for a direct relationship between the 1890 institutions and the Secretary). This difference in structure is consistent with the expressed purpose of the 1890 derivative statutes to rectify an imbalance of funding brought about largely by the discriminatory action of the states in their allocation of federal (and state) funds.

Second, as noted above, the titles of most of the 1890 derivative statutes expressly refer to funding for the 1890 colleges. *See, e.g.*, NARET § 1444, 91 Stat. at 1007 ("Extension at 1890 land-grant colleges"); FACT Act § 1612(b), 104 Stat. at 3722 ("Grants to upgrade agricultural and food sciences facilities at 1890 land-grant colleges"). The titles provide strong textual evidence that the 1890 derivative statutes are designed to benefit only the 1890 colleges.

Finally, the sums appropriated pursuant to the 1890 derivative statutes are much smaller than those appropriated pursuant to the earlier land-grant statutes. For example, the FY 94 Appropriation provides the 1862 colleges and experiment stations with $272,582,000 in Smith-Lever Act funding for extension work and $171,304,000 in Hatch Act funding for research. In contrast, it provides only $25,472,000 for extension work pursuant to NARET § 1444 and $28,157,000 for research pursuant to NARET § 1445. *See* 107 Stat. at 1051, 1053. In each case, if the NARET funds were divided over seventy-four schools (the combined total of the 1862 and 1890 colleges and Tuskegee University), no school would derive

[20] Although the Hatch Act provides for disbursement of funds by the federal government directly to the beneficiaries, the states effectively each choose the beneficiary, and the appropriation is said to be "to each State." 24 Stat. at 441

much benefit from its share of funds and the amount received by an 1862 college would be minuscule relative to the funds that each such college will receive for essentially the same purposes pursuant to the Smith-Lever and Hatch Acts. These circumstances suggest that the congressional intent was not to divide the 1890 derivative funds among all the land-grant colleges, but only among the 1890 colleges. *See Rose v. Rose*, 481 U.S. 619, 630-31 (1987) (employing division of appropriations among beneficiaries to determine meaning of statute).

Our examination of the FACT Act § 1612, 104 Stat. at 3721, as well as its legislative history, confirms that Congress continued to equate the colleges eligible to receive benefits under the Second Morrill Act with the 1890 colleges. *See, e.g.*, H.R. Conf. Rep. No. 101-916, at 1047-48 (1990). The same is true of the FY 94 Appropriation, 107 Stat. at 1051-53, and its legislative history. *See, e.g.*, H.R. Rep. No. 103-153, at 29, 40 (1993); S. Rep. No. 103-102, at 29, 40-1 (1993). Thus, the class of intended beneficiaries has not changed.

B.

Having concluded that Congress intended the phrase "eligible to receive funds [under the Second Morrill Act]" to refer solely to the 1890 colleges, we must determine whether State College falls within this class. Congress understood this class to encompass a specific list of sixteen identified schools (to which was added the Tuskegee Institute). *See, e.g.*, H.R. Rep. No. 97-151, at 3 (1981) (listing the 1890 colleges). Because State College was not among the identified schools, it would seem that it may not share in 1890 derivative funding.

Congress's list of 1890 colleges, moreover, likely was drawn from the general understanding of the term "1890 college" as a category encompassing historically black land-grant colleges with a common genesis in the Second Morrill Act. Originally, State College was commonly understood to be among this group. Because State College was withdrawn from the land-grant system, however, it lost its standing as an 1890 college. Thus, when the 1890 derivative statutes were passed, this term was no longer commonly understood to include State College.[21] State College, therefore, was not (and could not have been) among the intended beneficiaries of those statutes.

It might be argued nonetheless that West Virginia's putative restoration of State College to the land-grant system also restored it to the category of 1890 colleges.[22] West Virginia took this action in 1991, prior to the 1993 enactment of the FY 94

[21] *Compare, e.g.*, Eddy, *supra* note 2, at 258-59 (1957) (State College included among the 1890 colleges) *with, e.g.*, Edmond, *supra* note 2, at 63 (1978) (State College absent from list of the 1890 colleges otherwise drawn from Eddy's book).

[22] This may be the basis of West Virginia Governor Caperton's suggestion that West Virginia's "redesignation" of State College under the Second Morrill Act makes it eligible for 1890 derivative funding. *See* Letter for Edward Madigan, Secretary of Agriculture, Department of Agriculture, from Gaston Caperton, Governor of West Virginia at 2 (Aug. 9, 1991).

Appropriation. Therefore, we cannot *a priori* exclude the possibility that, at the time the FY 94 Appropriation was enacted, either Congress believed that State College was once again an 1890 college or, in a more general sense, that "1890 college" as a term of art once again included State College. The Appropriation's legislative history, however, does not offer any discussion as to what schools Congress thought were among the 1890 colleges.[23] Furthermore, the general usage does not appear to have changed.[24] In light of the previous congressional belief (as well as the general understanding among those using the term) that State College was not one of the 1890 colleges, this silence is tantamount to not recognizing State College's restoration as an 1890 college.[25] Consequently, we conclude that the reference to 1890 colleges in the FY 94 Appropriation does not include State College. Accordingly, State College may not share in the funds appropriated in the FY 94 Appropriation pursuant to the authorizations contained in the 1890 derivative statutes.

IV.
STATE COLLEGE'S ELIGIBILITY FOR FUNDS UNDER THE SECOND MORRILL ACT

We turn now to the question posed by Agriculture's Request for Reconsideration whether a land-grant college may receive Second Morrill Act appropriations if it does not receive funds under the First Morrill Act.

The Second Morrill Act provides an annual appropriation of funds "to each State . . . for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts now established, or which may be hereafter established, in accordance with [the provisions of the First Morrill Act]." *Id.* § 1, 26 Stat. at 417-18. Agriculture construes this general language to condition the eligibility of a college to receive funds under the Second Morrill Act upon its designation as a recipient of First Morrill Act funds. In our original opinion, we reached the opposite conclusion, construing this language to impose only a requirement that a college conform to the educational requirements of the First Morrill Act (and the non-discrimination requirement in the Second Morrill Act).

In light of our conclusions in Part III, *supra*, this issue does not have any bearing on the question of whether State College (or any college) may qualify for

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[23] *See, e g*, H R Rep No. 103-153, at 29, 40, S Rep. No. 103-102, at 29, 40 Nor is there such a discussion in the legislative history accompanying Agriculture's appropriation bill for fiscal year 1993. *See, e g*, H R Rep No 102-617, at 41 (1992), S Rep No 102-334, at 40 (1992).

[24] *See, e g*, *Knight v. Alabama*, 787 F Supp at 1168 (West Virginia absent from list of states having 1890 institutions), *A Century of Service Land-Grant Colleges and Universities, 1890-1990* xx, 15 (Ralph D Cristy & Lionel Williamson eds, 1992) (notes that West Virginia founded State College as a black land-grant college but later rescinded land-grant status; omits State College from list of 1890 colleges).

[25] *See Walton v. United Consumers Club, Inc*, 786 F 2d 303, 310 (7th Cir 1986) ("[B]ecause the purpose of language is to use *shared* understandings, meanings held by both writer and reader, a court may not assume that Congress picked an unusual meaning unless some evidence supports that interpretation.").

funding under the 1890 derivative statutes. Moreover, we note that there are no restrictions on the division of funds between schools eligible for First Morrill Act funds. *See infra* note 27 and accompanying text. Therefore, as Agriculture has acknowledged, West Virginia "could meet the threshold of 1862 designation by giving State College one dollar of 1862 monies per year." Request for Reconsideration at 10. Furthermore, as indicated earlier, the annual appropriation for each state under the Second Morrill Act is not large by today's standards. These considerations substantially reduce the practical importance of any decision on this issue. Nonetheless, since State College's eligibility for Second Morrill Act funding remains in dispute, we will reconsider the issue. We conclude that, although the question is a close one, the balance of the evidence favors our original view.

The legislative history of the Second Morrill Act suggests that Congress believed that the appropriated funds would in fact be used to supplement the funds available to the land-grant colleges and departments that had been established by the states pursuant to the First Morrill Act.[26] Furthermore, the development of the land-grant system has indeed followed this course. Except for the 1890 colleges, only colleges receiving the benefits of the First Morrill Act have been designated by their respective states to receive appropriations under the Second Morrill Act. Nonetheless, in our original opinion, we took the view that the statutory language did not specifically mandate that the states allocate Second Morrill Act funds only to colleges already endowed with First Morrill Act funds if a state (such as West Virginia) wished to do otherwise.

In support of our original construction of the Second Morrill Act, these kinds of considerations may be cited: the statutory scheme, the contrast with the language of a similar statute, the longstanding practice of those administering the Act, and judicial construction of it. First, the existence of such a specific limitation seems at odds with the statutory scheme, which vests the states with very broad power to allocate Second Morrill Act appropriations to institutions of their choosing. Thus, the Supreme Court in *Wyoming ex rel. Wyoming Agric. College v. Irvine*, 206 U.S. 278, 284 (1907), summarized the plenary nature of the states' power over First and Second Morrill Act funds as follows: "the fund and its interest [under the First Morrill Act] and the annual appropriations [under the Second Morrill Act] are the property of the State and not of any institution within it."[27] This statutory scheme renders the proposed limitation virtually superfluous because, as Agriculture con-

[26] *See, e.g.*, S. Rep. No. 51-1028, at 1-2 (1890); H.R. Rep. No. 51-2697, at 1, 2, 4-6 (1890).

[27] A state may select one or more schools as beneficiaries of First and Second Morrill Act funds, allocate the funds as it chooses among qualified beneficiaries, and withdraw the designation of a previously selected school. *See, e.g., State ex rel. Moodie v. Bryan*, 39 So. 929, 951 (Fla. 1905) (holding that state has full power over disposition of appropriation and may withdraw it from an institution already receiving a share), *Massachusetts Agric. College v. Marden*, 30 N.E. 555, 557 (Mass. 1892) (holding that states may divide the Second Morrill Act appropriation among schools, they are not restricted in the number of beneficiaries except in states practicing racial segregation, which are required to have no more than one school for each race).

cedes, a state may qualify a school for Second Morrill Act appropriations by allocating to it but one dollar of First Morrill Act funds.[28]

A second consideration is the difference in language between the Second Morrill Act and the Smith-Lever Act of 1914. The Smith-Lever Act follows the structure of the Second Morrill Act in giving appropriated funds to the states. 38 Stat. at 373. It expressly provides, however, that the states must allocate the appropriated funds for extension work at "the college or colleges in each State now receiving, or which may hereafter receive, the benefits of the [First Morrill Act] . . . and of the [Second Morrill Act]." *Id.* Thus, Congress knew how to impose this type of requirement in clear language when it wished to do so. The contrasting absence of an explicit requirement in the Second Morrill Act tends to show that none was intended.

A third consideration is that Agriculture to this day has permitted the states to continue giving Second Morrill Act appropriations to the 1890 colleges without requiring that they receive First Morrill Act funds, notwithstanding the invalidity of the racial segregation proviso. *See supra* note 10 and accompanying text. Without the benefit of the exemption contained in that proviso, however, all of the 1890 colleges should have been subject to what Agriculture takes to be the requirement that they receive First Morrill Act funds, to the same extent as if they were 1862 colleges. Thus, Agriculture's administration of the Second Morrill Act does not support its position with respect to State College.

Finally, the judicial decisions construing the Second Morrill Act support our construction of the Act, although we agree with Agriculture that they are not dispositive of the precise question at issue. The cases concerning requirements for receipt of First and Second Morrill Act funds have focused on the type of education to be provided by a college in order to be eligible for such funds. *See Marden*, 30 N.E at 556-57 (holding that a college may receive First and Second Morrill Act funds if it is of the type specified in the First Morrill Act); *In re Agric. Funds*, 21 A. 916, 917 (R.I. 1890) (holding that the failure of Rhode Island's agricultural school to teach the mechanic arts disqualified it from Second Morrill Act funds that were intended "'for the benefit of agriculture *and* the mechanic arts.'") (emphasis added) (quoting the First Morrill Act, § 4, 12 Stat. at 504); *State ex rel. Wyoming Agric. College v. Irvine*, 84 P. 90, 100 (Wyo. 1906) (summarizing *In re Agric. Funds* as a decision that "held . . . that a mere agricultural school was not within the contemplation of the [First and Second Morrill Acts]"), *aff'd.* 206 U.S. 278 (1907). These decisions do not say that receipt of First Morrill Act funds is a prerequisite for eligibility for Second Morrill Act appropriations. On the other hand, neither *Marden* nor *In re Agric. Funds* holds squarely that a college may

[28] Moreover, Congress's evident purpose in the First and Second Morrill Acts was to promote a certain type of educational institution -- i.e., "colleges devoted to agriculture and the mechanic arts." Agriculture's requirement -- that a school receive First Morrill Act funds -- does not advance this purpose to any greater degree than our construction, which requires that any school eligible to receive Second Morrill Act funds also conform to the educational requirements imposed by the First and Second Morrill Acts

receive Second Morrill Act funds even if it does not receive First Morrill Act funds. In *Marden*, Massachusetts Institute of Technology in fact was receiving both. In *In re Agric. Funds*, the court denied the state agricultural college eligibility for Second Morrill Act funds.[29]

Agriculture nonetheless contends that the statute does require that any college receiving Second Morrill Act appropriations have been designated for First Morrill Act funds. Agriculture infers this requirement primarily from the recitation that the Second Morrill Act's appropriations are "for the more complete endowment and maintenance" of the land-grant colleges. The suggestion is that the words "more complete" imply that the states are required to use these funds solely to supplement the endowment of schools receiving First Morrill Act funds. Agriculture reinforces this point by noting that the First Morrill Act requires states to "take and claim the benefit" for "at least one college." 12 Stat. 504. Under the terms of the First Morrill Act, a state failing to designate at least one beneficiary would forfeit its benefit entirely under that Act, *id.* at 504-05, without which no institution could be "more complete[ly] endowed" under the Second Morrill Act. In light of the considerations discussed above, we doubt that the very general language concerning the purpose of the Second Morrill Act can support the construction that Agriculture has placed upon it.

The text of the Second Morrill Act, however, lends support to Agriculture's view for another reason. The Second Morrill Act's (invalid) racial segregation proviso deemed the establishment of institutions for "colored students" to be compliance with the proviso that forbade discrimination in the admission of students based on race or color. It did so by authorizing states having a college "established in pursuance of [the First Morrill Act]" to establish (if they had not already done so) an institution "of like character" for black students, "whether or not it has received money heretofore under the [First Morrill Act]." 26 Stat. at 418. This limited exemption of schools for "colored students" from receipt of First Morrill Act funds would seem to imply a congressional understanding that schools receiving appropriations under the Second Morrill Act and not established under the proviso be otherwise subject to the requirement of receiving of First Morrill Act funds.

Some pertinent legislative history also substantiates Agriculture's view. Most relevant is a floor exchange between Senator Hoar and Senator Blair. During a discussion of the draft bill, Senator Hoar suggested that the bill ought to, but did not, allow states to allocate the appropriated benefits to an institution devoted to the agriculture and mechanic arts "which did not receive the benefit of the original

[29] Rhode Island's agricultural school was not a recipient of First Morrill Act funds (only Rhode Island's Brown University appears to have been specifically so designated) Thus, the court could have disqualified the agricultural school from Second Morrill Act appropriations on this ground alone, if it had read that Act in the manner that Agriculture proposes. That the court denied the agricultural school Second Morrill Act appropriations for an entirely different reason, which was the school's failure to teach the mechanic arts, supports the view that there is no requirement that a school receive First Morrill Act funds in order to eligible for designation as a Second Morrill Act beneficiary. *See* 21 A at 917

benefaction." 21 Cong. Rec. 6086 (1890). He suggested that the bill be amended to rectify this perceived deficiency. Senator Blair — who was answering questions and objections from the Senators concerning the bill — asserted initially that the bill did not require amendment because it "meets . . . the suggestion[] of [Senator Hoar] as it now is." *Id.* This initial response implied that the bill did not require colleges to receive First Morrill Act funds in order to be eligible for the new appropriation. When Senator Hoar expressed skepticism that the bill met his concerns, however, Senator Blair elaborated as follows:

> It was not the understanding of the committee that we were recommending an annual appropriation for an indefinite number of colleges which might hereafter come to be established. Meritorious colleges undoubtedly will be established including the same subject matter; but it was thought that the States where these colleges are should receive a certain specific amount, $15,000 a year, and let them appropriate that money, as they necessarily must now, to the single agricultural college that exists in each State.
>
> If there should be subsequently from those same funds — and I do not see how it can be done, for the whole amount that was realized from the lands under that act is already invested in every State — but if it is conceivable that they should be subdivided and those institutions multiplied with the funds already in the possession of the State, then let them divide this annual appropriation for the support of several if they see fit, but otherwise let it be concentrated upon a single one of the institutions. However, they must be institutions which derive their vitality from the original act of Congress making appropriations of the public lands. The nation itself certainly ought not to be dragged beyond what originates in that specific act of Congress in the way of support of the agricultural colleges and those of the mechanic arts which the States may see fit to multiply among themselves hereafter.

Id. at 6087. This statement suggests that Senator Blair viewed the Second Morrill Act as prohibiting states from allocating funds to colleges not endowed with First Morrill Act funds. Of course, the statement is at odds with Senator Blair's initial response to Senator Hoar's suggested amendment. Nonetheless, it is much more detailed than the initial response and therefore likely reflects Senator Blair's views more accurately.

Senator Blair's statement, however, belies the balance of political forces at the time of the Second Morrill Act. To be sure, the Second Morrill Act's enactment largely resulted from fierce lobbying by the land-grant college presidents, an effort

obviously intended to obtain funds for these particular colleges and no others.[30] Too, the college presidents were able to squelch Senator's Hoar proposal for explicit language permitting schools not receiving First Morrill Act funds to be given Second Morrill Act appropriations. *See* Williams, *supra* note 2, at 144. It is doubtful, however, that the college presidents had the political strength to obtain explicit language confining Second Morrill Act appropriations to schools receiving First Morrill Act funds. They faced powerful opposition from the Grange movement, which had long "condemn[ed] the colleges for their inability to attract agricultural students and vow[ed] to oppose the schools in every way," Williams, *supra* note 2, at 3; *see* Eddy, *supra* note 2, at 73; Ross, *supra* note 2, at 79-80. The strength of the Grange was reflected by the "Grange Amendment" to the Second Morrill Act, which restricted application of the appropriations more narrowly and explicitly than had the First Morrill Act. The college presidents were forced to include these restrictions if they were to obtain even the Grange's sullen acquiescence in the Second Morrill Act. It is doubtful that the bill would have passed had they not done so.[31] Even with such acquiescence, the Grange maintained their efforts to redirect federal funding away from the existing land-grant colleges.[32] There seems little doubt that the Grange would have opposed vociferously (and probably successfully) any language that expressly confined Second Morrill Act appropriations to schools receiving the benefits of the First Morrill Act.

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[30] As one representative in the House complained:

> I tell you, Mr Speaker, that the only lobby I have seen at this session of Congress was the educational lobby, composed of the presidents of the agricultural institutions They have haunted the corridors of this Capitol; they have stood sentinel at the door of the Committee on Education, they have even interrupted the solemn deliberations of that body by imprudent and impudent communications. . My God, if there is any eagerness in the world it is possessed by these gentlemen who are presidents of these agricultural colleges. . . . They have buzzed in your ears, sir, and in yours, and in the ears of every member of this House. It has been an organized, strong, combined lobby for the benefit of the agricultural colleges of the country.

21 Cong. Rec 8836 (1890) (remarks of Rep. Caruth)

[31] *See* Williams, *supra* note 2, at 143-49; Eddy, *supra* note 2, at 101, 103; Ross, *supra* note 2, at 178; 26 Stat at 418. The Grangers were chiefly concerned that the new appropriations not be diverted to classical languages and other studies that they did not consider appropriate for an agricultural college *See, e.g.*, Williams, *supra* note 2, at 147. The Grange had similarly limited the achievements of the land-grant college presidents only three years earlier concerning the bill that became the Hatch Act, when they successfully forced an amendment, also known as the "Grange Amendment," that preserved for the states the option of maintaining agricultural experiment stations independent from the land-grant colleges. The land-grant colleges had desired in the Hatch Act to bring such stations under their exclusive control *See id.* at 113-15, Ross, *supra* note 2, at 140.

[32] *See* Williams, *supra* note 2, at 152 ("At its annual meeting in 1891, the Grange declared the land-grant colleges to be 'practically worthless' and implored Congress to separate the agricultural departments from existing colleges, establishing new and purely agricultural institutions around them 'We further ask,' the Grange added, 'that all appropriations now paid to the combined institutions . . be transferred to such separate and distinct agricultural and mechanical colleges as may be established in the several states '") (footnote omitted); Edmond, *supra* note 2, at 33 (Yale College, Brown University, and Dartmouth received land-grant designation from their respective state legislatures during the 1860s but lost it to agricultural colleges during the 1890s as a result of opposition from the state Grange and agricultural societies who resented the former schools' perceived emphasis on instruction in classical as opposed to agricultural studies).

Significantly, the land-grant college presidents themselves were not so certain that the Second Morrill Act appropriations could be confined to their institutions under the language of that Act as it was enacted. They were even fearful that the Second Morrill Act could actually be interpreted to deny them such funds altogether. Thus, barely two months after the enactment of the Second Morrill Act:

> Atherton and Alvord [two influential land-grant college presidents who had each played a major role in lobbying for the Second Morrill Act] were extremely anxious about the potential for rogue initiatives—especially from the Grange—to exclude land-grant colleges from receiving the benefits of the act or to qualify non-land-grant colleges for the new funds. Thus, they prepared a "Brief of Points" for Assistant Interior Secretary Chandler and distributed it as appropriate to various land-grant colleges. In their document, Atherton and Alvord interpreted the second Morrill Act as a "supplement to the Act of 1862." They were careful to note that the latter act applied only to institutions designated by their state legislatures to receive funds from the original act. Anticipating arguments to the contrary, Atherton and Alvord emphasized that the broad nature of the original act, and the power it gave to the various states to develop their land-grant colleges according to the demands of local conditions, had given rise to a disparate class of institutions .... They further emphasized that questions of institutional purpose and organization ... had already been settled in the various states "and cannot now be raised to debar them from the benefits of the Act of 1890."

Williams, *supra* note 2, at 151-52 & n.75. It seems likely that the land-grant college presidents would have obtained explicit language in their favor two months earlier if they could have done so. Thus, the absence of such language from the Second Morrill Act does not appear to be mere oversight. Rather, it appears to reflect a stalemate between the college presidents and the Grange. In these circumstances, we do not find the single (somewhat contradictory) statement by Senator Blair to be controlling of our interpretation of the Second Morrill Act.

In sum, although the statute (including its legislative history) is not unambiguous, we conclude that the balance of the evidence supports the view that the Second Morrill Act's appropriations may be given to colleges regardless of whether they are endowed under the First Morrill Act. Accordingly, West Virginia could validly designate State College to receive appropriations under the Second Morrill Act.

V. CONCLUSIONS

We conclude that West Virginia could validly designate State College as a recipient of Second Morrill Act appropriations without designating it to receive First Morrill Act funds. We further conclude that, regardless of State College's eligibility for Second Morrill Act appropriations, it is not among those colleges eligible for benefits under the 1890 derivative statutes.[33]

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[33] Agriculture may wish to request that Congress refer specifically to the 1890 colleges in its future appropriations pursuant to the 1890 derivative statutes. This step would supersede any arguably broader language in the 1890 derivative statutes themselves, and would thereby remove all doubt about the intended beneficiaries of these statutes. *See supra* text accompanying note 12.